Highway Rights-of-Way in Alaska

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I. Introduction

It's been almost 20 years since this document was first prepared and presented. The purpose of this revision is for inclusion in the updated Alaska Society of Professional Land Surveyors Standards of Practice Manual and for fundraising seminars in support of the 2017 IRWA International Conference to be held in Anchorage.[1] This latest edition results in a reorganization, expansion and addition of new information.

When I began working with the DOT&PF Right-of-way section back in October of 1986, the presumption was that land professionals such as title examiners, professional land surveyors and attorneys were generally versed in the issues relating to access and right-of-way. Speaking for the land surveyors, the reality is that although we may have had some training or experience in subdivision street dedications or express rights-of-way that may have defined a parcel boundary, we generally had little knowledge of the various authorities and interests that make up the right-of-way for our Alaska Highway system. I suspect the same would hold true for many of the other land and title professionals. If it's a challenge for the professional, you can imagine the difficulty the average property owner would have with this subject. So I've gained a lot of empathy for the landowner who is attempting to determine whether their land is encumbered by a highway right-of-way and hope that both professionals and laypersons can benefit from the presentation.

The following is a compilation of notes relating to highway rights-of-way in Alaska that I have gathered over the years. It is not intended to be a statement of the law or a comprehensive analysis of every issue related to highway rights-of-way. I have learned over my career to leave the law to the lawyers. But once they provide me with their opinion of the law, it is my role to research the facts and implement the legal guidance in a practical manner.

The focus of this paper is primarily on those right-of-way authorities that make up the bulk of the DOT&PF highway system and for which some degree of research and analysis are required to determine their application. This edition also touches on a variety of other authorities that are also included in the DOT&PF system but to a lesser degree. The reason I have added them is to emphasize my analogy of the varying authorities that make up a highway right-of-way as being a "patchwork quilt" of title interests. To the extent you are fortunate to be working with a uniform width right-of-way corridor you may find that the title interests are anything but uniform.

Why do I consider this subject important? Not all right-of-way interests are defined by deed with an accurate description. Alaska still lacks good titles and plans for many of our major highways and so it becomes necessary to be able to research and analyze title to determine the nature and width of the right-of-way. The primary intent of this presentation is to provide the land professional with an understanding of the processes by which many of the highway rights-

[1] For further information, see the Alaska Society of Professional Land Surveyors website at http://www.alaskapls.org/ and the website for the International Right-of-way Association 2017 Conference at http://www.irwa49.org/anchorage2017.html.

of-way in Alaska were established as well as some guidelines and sources of information which can be used to determine whether a particular property is impacted by these rights-of-way. Whether we are working for a client who is hoping to prove that a right-of-way exists or that it doesn't, the practical application of these principles will be the same. The more I research this material, the more I realize that there is always more to learn. Should any readers find errors or identify issues that would benefit from more clarification, please let me know.

Daniel W. Beardsley, SR/WA an Attorney at Law is acknowledged for providing the case law summaries and analyses as well as for initially motivating me to put this collection of right-of-way information into print. I would also like to acknowledge the many Assistant Attorney Generals within the Transportation section of the Department of Law for providing advice and attempting to keep me out of trouble as well as former DOT&PF Right-of-way "Engineers" Karen F. Tilton, PLS, CFEDS, SR/WA and James H. Sharp, PLS, CFEDS who I believe are among the few who have enjoyed this area of practice as much as I.

II. History of the Department (DOT&PF)

The Department of Transportation and Public Facilities is the primary management authority for highways in Alaska.[2]

Prior to the establishment of the Alaska Road Commission, there were several pieces of Federal legislation dating back to 1900 relating to the appropriation of funds for the War Department to construct military roads in Alaska.

The Act of April 27, 1904[3] was of particular interest in that it provided for mandatory service of the male population in the construction and maintenance of public roads. Specifically, it required that "*all male persons between eighteen and fifty years of age who have resided thirty days in the district of Alaska, who are capable for performing labor on roads or trails...to perform two days' work of eight hours each in locating, constructing, or repairing public roads or trails...or furnish a substitute,...or pay the sum of four dollars per day for two days' labor*."

The roots of the Department began with the Act of January 27, 1905[4], Section 2 in which Congress authorized the Secretary of War to administer the roads and trails in Alaska as the Board of Road Commissioners. "*The said board (of road commissioners) shall have the power, and it shall be their duty, upon their own motion or upon petition, to locate, lay out, construct, and maintain wagon roads and pack trails from any point on the navigable waters of said district to any town, mining or other industrial camp or settlement, or between any such towns, camps, or settlements therein.*"

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[2] A.S. 19.05.010 "*The department is responsible for the planning, construction, maintenance, protection and control of the state highway system.*"

[3] P.L. 188 - 33 Stat. 391

[4] P.L. 26 – 33 Stat. 616 (48 U.S.C. 321) *"An act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of <u>insane</u> in Alaska, and for other purposes."*

As a testament to the War Department's involvement in exploration, construction and maintenance of roads in Alaska, several highways including the Richardson[5], Steese[6], Elliott[7] and Glenn[8] were named after Army officers.

In 1917 the Territorial legislature created a Territorial Board of Road Commissioners and appropriated funds for road construction.[9] The Board was empowered to act for the Territory in the receipt, allotment and disbursement of any federal funds that may be turned over to the Territory for the building and maintenance of roads.

The annual report of the Board of Road Commissioners for fiscal year 1925 is now labeled as the Annual Report of the Alaska Road Commission. This was one of the earliest official representations of the Board as the Alaska Road Commission.

Pursuant to the Act of June 30, 1932[10], Congress transferred administration over the roads and trails in Alaska to the Secretary of the Interior and authorized the construction of roads and highways over the vacant and un-appropriated public lands under the jurisdiction of the Department of the Interior. This statute did not specify the width of the rights-of-way which may be established.

The Secretary of the Interior's jurisdiction over the Alaskan road system ended on June 29, 1956 when Congress enacted section 107(b) of the Federal-Aid Highway Act of 1956[11], which transferred the administration of the Alaskan roads to the Secretary of Commerce. The Commerce department operated the system as the Bureau of Public Roads.[12]

On April 1, 1957 the Territory of Alaska enacted the Alaska Highway & Public Works Act of 1957 in order to create a Highway Division to carry out a planning, construction, and maintenance program.

The transfer of the Department of Interior's jurisdiction to the Department of Commerce was reiterated on August 27, 1958, when Congress revised, codified, and reenacted the laws relating to highways as Title 23 of the U. S. Code.[13]

Section 21(a) of the Alaska Omnibus Act, enacted on June 25, 1959[14] directed the

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5 General Wilds P. Richardson, Member of the Road Commission from June 16, 1905 to December 29, 1917.
6 Colonel James G. Steese, Member of the Road Commission from July 7, 1920 to October 15, 1927.
7 Major Malcolm Elliott, Member of the Road Commission from November 9, 1927 to July 20, 1932.
8 Named for Captain Edwin Glenn, leader of an 1898 expedition to find an Alaska route to the Klondike.
9 Ch. 36, SLA 1917 Section 13
10 P.L. 218 – 47 Stat. 446 (48 U.S.C. 321a)
11 P.L. 84-627, 70 Stat. 377
12 The Bureau of Public Roads had operated in Alaska since 1922 performing all road construction in the Tongass and Chugach National Forests. In 1956 the Alaska Road Commission and the Territorial Board of Road Commissioners were absorbed into the BPR.
13 P.L. 85-767, Sect. 119 – 72 Stat. 898
14 P.L. 86-70, 73 Stat. 141

Secretary of Commerce to convey to the State of Alaska all lands or interests in lands "*owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska.*" On June 30, 1959, pursuant to section 21(a) of the Alaska Omnibus Act, the Secretary of Commerce issued a quitclaim deed to the State of Alaska in which all rights, title and interest in the real properties owned and administered by the Department of Commerce in connection with the activities of the Bureau of Public Roads were conveyed to the State of Alaska. Although not all of the conveyed rights-of-way were considered "constructed", the system mileage of the rights-of-way included 2,200 miles classified as "primary" system routes, 2,208 miles of "secondary class A" routes, and 990 miles of "secondary class B" routes for a total of 5,399 miles of rights-of-way.

As the State of Alaska was not quite prepared to handle the operation of the road system, the Governor as authorized by the Omnibus Act, entered into a contract with the federal Bureau of Public Roads on July 1, 1959 to continue certain highway survey, design, construction and maintenance functions in connection with the Federal-aid highway program until the State Department of Public Works was suitably organized and equipped to perform these functions. The State assumed full highway functions in mid-1960.

Executive Order No. 39 effective July 1, 1977 merged the State Department of Highways, Public Works (which included the Division of Aviation) and the Alaska Marine Highways into the Department of Transportation and Public Facilities.[15]

III. Nature, Scope & Title Interest

a. Omnibus Act Quitclaim Deed

The June 30, 1959[16] "*Quitclaim Deed*" between the U.S. Department of Commerce and the State of Alaska is a key document in establishing the title to Alaska's highway rights-of-way. The 180 page deed was recorded in the relevant recording districts in the latter months of 1969 and the early months of 1970. Unlike our current expectations for adequate deed descriptions, the QCD did not specify the width of the right-of-way, the interest conveyed or much in the way of an accurate location. The initial QCD consisted of 3 categories of property: Schedule A – Highways (60 pages), Schedule B – Improved Real Property (54 pages), and Schedule C – Unimproved Real Property (62 pages).[17] The Improved and Unimproved property generally

[15] Alaska Statutes governing the activities of the Department can be found in Title 02 - Aeronautics, Title 19 - Highways and Ferries and Title 35 - Public Buildings, Works and Improvements. Department regulations can be found in Title 17 of the Alaska Administrative Code – Transportation and Public Facilities.

[16] Section 45(a) of the Alaska Omnibus Act allowed for transfers to the State up until July 1, 1966. A subsequent QCD was executed on June 30, 1960. This 22 page deed conveyed additional Improved and Unimproved Real Properties that had not been included in the initial conveyance. Other individual deeds for transfer of specific airport properties were also issued.

[17] The sum of the three Schedules = 176 pages. Add 2 pages for the conveyance pages and 2 for recording stamps =180.

consisted of maintenance camps, material sites, airfields and specific parcels for highway protection (erosion control).

For the purpose of this paper, the focus is on "Schedule A" which consisted of the approved Federal-Aid System. The Highways "Schedule A" was not a comprehensive list of all of the roads constructed or maintained by the Bureau of Public Roads or its predecessor, the Alaska Road Commission. It appears to have been based on an inventory of roads that was more likely a planning document rather than a summary of all title interests owned or claimed for highway purposes. As late as 1957, the Bureau of Public Roads continued use of the Alaska Road Commission system of classification and route numbering using a document referred to as ARC Order No. 40, "Highway System – Route Numbers and Mileages.[18] The Bureau of Public Roads then reclassified and renumbered the Alaskan roads under its jurisdiction. In the new summary, the roads were classified as Federal-Aid Primary, Federal-Aid Secondary Class "A" and Federal-Aid Secondary Class "B" routes.[19]

Over the course of time, roads were reclassified, added or deleted from the inventory depending upon the changing use or need for the road. This was the case with the flare-up or demise of mining areas whose operations were often served by the Alaska Road Commission. As this dynamic inventory was used as a basis for conveying the federal interest in highways to the State of Alaska, the result is that certain rights-of-way that were clearly established under Public Land Orders or other legal mechanisms were not named in the 1959 conveyance document.[20] An example would be the Rampart Road from the Elliott Highway to the village of Rampart. Although this road is referenced in the ARC documents back to 1908, only the 4.5 mile segment from Rampart to Little Minook Creek is referenced in the Quitclaim Deed.[21] The State has asserted an RS-2477 right-of-way for the full length of the Rampart road, however, the standing question is whether a PLO right-of-way still exists and who has management authority over it.

b. 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

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[18] The latest version I have found is dated January 31, 1957 and classifies roads in a manner similar to the PLOs or "*Through, Feeder and Local*" roads. The numbering system was consistent with those used in the Alaska Road Commission Annual Reports.

[19] PLO 601 initiated the classification system of roads as "*Through, Feeder and Local"* that continues through to PLO 1613. The Omnibus Quitclaim Deed classifies roads as "*Primary, Secondary Class 'A' and Secondary Class 'B'"*. While these two systems appear to be similar, they are not the same. The QCD does not speak to the width of any of the named rights-of-way. The PLOs and the road classifications named within them are the basis for the highway rights-of-way established under that authority.

[20] It doesn't seem logical that rights-of-way validly created through the Public Land Orders or other authorities were vacated just because they were not named in the Omnibus QCD. There was no statement of intent or positive act on behalf of the public to dispose of these rights-of-way so the better argument would be that once validly created, they continued to exist and while not specifically conveyed to the State by the QCD, they remain available for an appropriate authority to assume management.

[21] Federal Aid Secondary Highway System, Class "B" Route 6259, Rampart – Little Minook Creek

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[22] concluding that concluded that conveyed PLO rights-of-way were highway easements. This reversed a 1985 Attorney General opinion[23] 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 "*constructed*"). The State Highway System inventory as of 12/31/12 was 5,620 miles.[24] Simple

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[22] 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.

[23] 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.*"

[24] 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

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[25] and a road that is now re-emerging as one of our priority projects, the road to Tanana.[26] 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[27], 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[28]. 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.[29] 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 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.

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25 Federal Aid Secondary Class "A" Route 131 – 20 of 71 miles constructed.
26 Historically referenced as one of the first stops on the proposed "Road to Nome".
27 Federal Aid Secondary Class "A" Route 680 – 106 of 201 miles constructed.
28 Federal Aid Primary Route 52 – the extension of the Denali Highway west of the Parks Highway
29 Federal Aid Secondary Class "B" Route 6021 – Kantishna Road

c. 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*."[30] 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[31] 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[32] 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 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

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

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

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

easement by Alaska's courts. Alaska does have some statutory limitations[33] on hunting from a road but they are more related to weapons misconduct than scope of use of a highway easement.

d. 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.[34]

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.[35] 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[36] and federal[37] statutes and regulations to keep the right-of-way free and clear of unpermitted 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

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[33] 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;*"

[34] 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

[35] 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.

[36] 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.

[37] 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.[38] 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[39] 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.

e. 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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[38] A.S. 38.95.010 State's interest may not be obtained by adverse possession or prescription.

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

IV. Public Land Orders

a. Introduction

These rights-of-way for highway purposes were established across unreserved federal lands under the authority of the Department of the Interior between April 4, 1942[40] and April 7, 1958[41]. The PLO right-of-way constitutes the majority of varying interests in the DOT&PF inventory. At statehood, the federal government transferred 5,400 miles of highway rights-of-way to the State of Alaska[42], most of which were based on PLOs. Although most of these rights-of-way were established as withdrawals, subsequent PLOs converted them to easements. Typically, the PLO right-of-way was described as 50, 100, or 150-feet on each side of the physical road centerline according to the road's classification.

Although somewhat obscure in the chain of title, Alaska Supreme Court decisions have established that ignorance of the PLO rights-of-way is no defense against their effect. Professionals in the title, surveying, and real estate fields must be sufficiently knowledgeable of PLOs such that they can recognize their possible impacts on a given property. At a minimum the professional needs to be aware of the available resources that can aid in determining whether a PLO right-of-way exists. The following is a summary of the PLOs affecting highway rights-of-way in Alaska:

b. Public Land Order Chronology[43]

April 23, 1942 - E.O. 9145: This order reserved for the Alaska Road Commission in connection with construction, operation and maintenance of the Palmer-Richardson Highway (Now Glenn Highway), a right-of-way 200-feet in width from the terminal point of the highway to its point of connection with the Richardson Highway. The area described is generally that area between Chickaloon and Glennallen.

July 20, 1942 - PLO 12: This order withdrew a strip of land 40 miles wide generally along the Tanana River from Big Delta to the Canadian Border. It also withdrew a 40 mile wide strip along the proposed route of the Glenn Highway from its junction with the Richardson Highway, East to the Tanana River.

January 28, 1943 - PLO 84: This order withdrew all lands within 20 miles of Big Delta

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40 The first of a series of highway withdrawals, Executive Order No. 9145 reserved a 200-foot wide right-of-way for the "Palmer-Richardson" (Glenn) highway between Chickaloon and Glennallen.

41 The last Public Land Order for highway rights-of-way issued, PLO 1613 effectively eliminated the remaining withdrawals established by the prior Public Land Orders by converting the "Through" roads to easements.

42 On June 30, 1959, pursuant to section 21(a) of the Alaska Omnibus Act, the Secretary of Commerce issued a quitclaim deed to the State of Alaska in which all rights, title and interest in the real properties owned and administered by the Department of Commerce in connection with the activities of the Bureau of Public Roads were conveyed to the State of Alaska.

43 Throughout this document I refer to E.O. (Executive Order), S.O. (Secretarial Order) and P.L.O. (Public Land Order) collectively as PLOs.

which fell between the Delta and Tanana Rivers. The purpose of the withdrawal was for the protection of the Richardson Highway.

April 5, 1945 - PLO 270: This order modified PLO 12 by reducing the areas withdrawn by that order to a 10 mile wide strip of land along the now constructed highways. The highways affected by this order are as follows:

1. Alaska Highway - from Canadian Border to Big Delta
2. Glenn Highway - from Tok Junction to Gulkana

July 31, 1947 - PLO 386: Revoked PLO 84 and PLO 12, as amended by PLO 270. The order withdrew the following land under the jurisdiction of the Secretary of the Interior for highway purposes:

1. A strip of land 600-feet wide along the Alaska Highway as constructed from the Canadian Boundary to the junction with the Richardson Highway at Delta Junction.

2. A strip of land 600-feet wide along the Gulkana-Slana-Tok Road (Glenn Highway) as constructed from Tok Junction to its junction with the Richardson Highway near Gulkana. This order also withdrew strips of land 50-feet wide and 20-feet wide along the Alaska Highway for purposes of a telephone line and pipeline respectively. Pumping stations for the pipeline were also withdrawn by this order, as well as 22 sites which were reserved pending classification and survey.

August 10, 1949 - PLO 601: This order revoked E.O. 9145 as to the 200-foot withdrawal along the Glenn Highway from Chickaloon to Glennallen.

It also revoked PLO 386 as to the 600-foot wide withdrawal along the Alaska Highway from the Canadian Boundary to Big Delta and along the Glenn Highway from Tok Junction to Gulkana.

"Subject to valid existing rights and to existing surveys[44] *and withdrawals for other than highway purposes..."*, PLO 601 withdrew and reserved for highway purposes... a strip of land 300-feet on each side of the centerline of the Alaska Highway, 150-feet on each side of the centerline of all *Through* roads as named, 100-feet on each side of centerline of all *Feeder* roads as named, and 50-feet on each side of the centerline of all *Local* roads. Local roads were defined as "*All roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior*".

[44] I read this to mean "*existing surveys and withdrawals*" in the sense that an area could be withdrawn for classification and survey for a small tracts subdivision as opposed to all federal surveys once they are approved. To read it otherwise would prevent the application of the PLO to all surveyed and approved townships in the state. In the situation where land is withdrawn for survey and classification under the authority of the Small Tract Act, the application of a PLO for a highway right-of-way is not defeated. In Green, the Alaska Supreme Court found that "*…the Small Tract Act and Small Tract Classification No. 22 did not segregate all small tracts from the operation of general, discretionary right-of-way reservations."*

It is important to note that PLO 601 did not create highway easements. This Order was a withdrawal "*from all forms of appropriation under the public land laws, and reserved for highway purposes*."

This was essentially the first and one of the most important acts to comprehensively classify and define the width of the rights-of-way over public lands in Alaska.

10/16/51 - PLO 757: This order accomplished two things -

1. It revoked the highway withdrawal on all "*feeder*" and "*local*" roads established by PLO 601.

2. It retained the highway withdrawal on all the "*through*" roads mentioned in PLO 601 and added three highways to the list.

After issuance of this order the only highways still withdrawn included the Alaska Highway, Richardson Highway, Glenn Highway, Haines Highway, Seward-Anchorage Highway, Anchorage-Lake Spenard Highway, and the Fairbanks-College Highway.

The lands released by this order became open to appropriation, subject to the pertinent easement set by Secretarial Order No. 2665, discussed below.

10/16/51 - S.O. 2665: The purpose of this order, issued on the same date as PLO 757, was to *"(1) fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior and (2) prescribe a uniform procedure for the establishment of rights-of-way or easements over or across the public lands for such highways*." It restated that the lands embraced in "*through*" roads were withdrawn as shown under PLO 757. It also listed all the roads then classified as "*feeder"* roads and set the right-of-way or easement (as distinguished from a withdrawal) for them at 200-feet. The right-of-way or easement for local roads remained at 100-feet.

This Order provided what was termed a "*floating easement*" for new construction. Under this provision, "*rights-of-way or easements....will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at the appropriate points along the route of the new construction specifying the type and width of the roads*."

7/17/52 - Amendment No. 1 to S.0. 2665: This amendment reduced the 100-foot width of the Otis Lake Road, a local road not withdrawn in the Anchorage Land District, to 60-feet.

9/15/56 - Amendment No. 2 to S.O. 2665: This amendment added several roads to the "*through*" (300-foot width) road list including the Copper River Highway, the Sterling Highway, and the Denali Highway. Several highways were deleted from the "*feeder*" (200-foot width) road list including the Sterling Highway and the Paxson to McKinley Park Road. The Nome-Kougarok and Nome-Teller roads were added to the list of "*feeder*" roads.

8/1/56 - Public Law 892 - Act of August 1, 1956: The purpose of this Act (P.L. 892 - 70 Stat. 898) was to provide for the disposal of public lands within highway, telephone and pipeline withdrawals in Alaska, subject to appropriate easements. This Act paved the way for the issuance of a revocation order (PLO 1613) which would allow claimants and owners of land adjacent to the highway withdrawal a preference right to acquire the adjacent land.

4/7/58 - PLO 1613: This order accomplished the intent of the Act of August 1, 1956. Briefly, it did the following:

1. Revoked PLO 601, as modified by PLO 757, and provided a means whereby adjacent claimants and owners of land could acquire the restored lands, subject to certain specified highway easements. The various methods for disposal of the restored lands are outlined in the order.

2. Revoked PLO 386 as to the lands withdrawn for pipeline and telephone line purposes along the Alaska Highway. It provided easements in place of withdrawals.

Prior to PLO 1613 the road rights-of-way classified as "*feeder*" and "*local*" were defined as easements where the "*through*" roads were still withdrawals. PLO 1613 effectively eliminated the last of the withdrawals established by the previously mentioned Land Orders by converting the "*through*" roads to easements.

To more clearly relay the intent of the Federal Government in issuing PLO 1613, the following is quoted from a BLM informational memo titled:

INFORMATION REGARDING LANDS ADJOINING CERTAIN HIGHWAYS

"Between August 10, 1949, and April 7, 1958, the lands underlying the following highways in the Fairbanks Land District were withdrawn from entry for highway purposes:.....The acquisition of rights in homesteads, homesites, etc., along these highways during this period included property only up to the boundary line of the highway withdrawals. They did not include any part of the reserved area. On April 7, 1958, Public Land Order 1613 was issued revoking the withdrawals and opening the lands to application for private ownership under the public land laws. However, the Government retained an easement for highway and other purposes extending 150 feet from the centerline of each highway listed here. The effect on you, as owner of land or as an applicant for land adjoining these highways is as follows:

PRIVATE OWNERS OF PATENTED LAND: ....If you own land with frontage on any of the other highways listed above, there now exists 150 feet of public land between your boundary and the centerline of the highway. The same

Government easement applies to this 150 feet. It cannot be used for other than highway purposes without permission of the Bureau of Public Roads. However, should the highway be changed or abandoned, the owner would have full use of the land. Owners of private lands will have a preference right of purchase at the appraised value the released land adjoining their private property. This right will extend to land only up to the center line of the highway concerned. ....However, at the time of purchase he must furnish proof that he is the sole owner in fee simple of the adjoining land.

CLAIMANTS WITH VALID UNPERFECTED ENTRIES OR CLAIMS FILED BEFORE APRIL 7, 1958: ...In this instance, you may exercise a right to amend your entry or claim to include the property (Underlying the highway easement). This additional land will not be included in the area limitation for your type of filing.

TIME LIMITATIONS: The preference right applications mentioned above must be filed in the Land Office within 90 days of receipt of the appropriate Notice from the Land Office. If not filed within at that time, the preference right will be lost. The lands then will become subject to sale at public auction."

As might be expected from the previous sentence, the preference right sales offered a great potential for future problems. A 1984 Department of Natural Resources internal memo outlined the conflicts that arose.[45]

The memo described a situation along the Old Glenn Highway in which BLM had sold the original patentee, Mr. Setters, a PLO 1613 highway lot based upon his preference right. Prior to this preference right sale, Mr. Setters had conveyed away his original patent and it was now owned by a Mrs. Pavek. At this point there was not a conflict as Mr. Setter's PLO 1613 Lot was subject to a highway easement and Mrs. Pavek had direct access onto the easement. However, DOT&PF then vacated a portion of the right-of-way without realizing any ramifications. Mr. Setter now owned a strip of unencumbered land between Mrs. Pavek and the highway. Mr. Setter then approached Mrs. Pavek with an offer to sell access rights across his strip of land for $30,000. Mr. Setters had paid BLM $25 for the entire PLO 1613 highway lot.

In order to prevent additional occurrences of this problem, the Alaska Statutes were modified as follows:

A.S. Sec. 09.45.015. Presumption in certain cases.

(a) A conveyance of land after April 7, 1958, that, at the time of conveyance was made, adjoined a highway reservation listed in section 1 of Public Land Order 1613 of the Secretary of the Interior (April 7, 1958), is presumed to have conveyed land up to the center-line of the highway subject to any highway

[45] June 18, 1984, Decision Memo #75 – PLO 1613 and Omnibus Lands, James R. Anderson, Director, DTS to Esther C. Wunnicke, Commissioner.

reservation created by Public Land Order 601 and any highway easement created by Public Land Order 1613.

(b) The burden of proof in litigation involving land adjoining a highway reservation created by Public Land Order 601 or a highway easement created by Public Land Order 1613 is on the person who claims that the conveyance did not convey an interest in land up to the center-line of the highway. (2 ch 141 SLA 1986)

A.S. Sec 09.25.050. Adverse Possession.

(b) Except for an easement created by Public Land Order 1613, adverse possession will lie against property that is held by a person who holds equitable title from the United States under paragraphs 7 and 8 of Public Land Order 1613 of the Secretary of the Interior (April 7, 1958)

This problem also raised the issue as to whether the State had received a fee interest or an easement interest when the highway rights-of-way were conveyed from the Federal Government by virtue of the 1959 Omnibus Act Quitclaim Deed. If the State had in fact received a fee interest, then there could be no sales to third parties of these highway lots and therefore no conflict. DOT&PF has for many years and does now treat these PLO rights-of-way as easements.[46]

6/11/60 - Public Law 86-512 - Act of June 11, 1960: This Act amended the Act of August 1, 1956. This was a special act to allow the owners and claimants of land at Delta Junction and Tok Junction a preference right to purchase the land between their property and the centerlines of the highway. The Act was necessary since the land in both towns was still reserved for townsite purposes, even after the highway, telephone line, and pipeline withdrawals were revoked.

8/19/65 - Revocation of S.O. 2665 and amendments: This DOI Memorandum served as notification that several Secretarial Orders were to be revoked[47] on December 31, 1965 including S.O. 2665 and its amendments.

Note: The above noted DOI Memorandum was considered to be merely a housekeeping exercise as the Omnibus Act (Public Law 86-70) of June 25, 1959, by Section 21(d)(7), repealed the Act of 1932 and the Act of 1947. These Acts were the basis for the majority of pre-statehood highway rights-of-way.

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[46] See Section III (b) Nature of Interest Conveyed by the QCD.

[47] Nonetheless, a BLM memo dated April 3, 1975 from the District Manager to the Chief, Division of Land Office spoke to the filing of as-builts on February 15, 1975 for the Livengood to Yukon River Road. *"In accordance with the Secretary's Order No. 2665 dated October 16, 1951, the subject road should be noted to the official records."* The BLM abstract for FF 021630 notes *"5/1/75 Noted to records per SO 2665 DTD 10/16/51"*

c. Practical Applications

One of the many points that the 1983 Supreme Court case State of Alaska v. Alaska Land Title Association established was that the publication of a public land order in the Federal Register imparted constructive notice as to the land it affected. Title companies were liable to their policy holders for not disclosing the existence of PLO rights-of-way which encumbered their property.

Once a person has begins to research PLO rights-of-way, they will realize that much of the required information is obscure and of limited availability. This research can be considered challenging for DOT&PF staff that perform this work on a regular basis. It is easy to understand how difficult it can be for private sector professionals and that it may be virtually impossible for the layman.

I have found form letters[48] in the Northern Region Right-of-way office from 1980 that one of the major title companies intended to submit to DOT&PF for each title report that they were to prepare. The letters each stated the following:

> *"We are presently engaged in a title search of the following described real property. Since alleged highway rights-of-way created by Public Land Orders 601, 757, 1613, or Department Order 2665 are not recorded by property description, please advise us if the State of Alaska is claiming a right-of-way for a local, feeder, or through road on the following property and specify the width of the right-of-way you are claiming:"*

DOT's response to the form letters at the time was essentially the same as it is today. That is, our files are open to anyone who needs to research the necessary information, but unfortunately we do not have the personnel to review and respond to these requests for every title report generated in the State.

If you have a need to know the status of a highway PLO with respect to a particular piece of property, then you also have the need to know how to perform the proper research.

In order to evaluate the effect of a PLO, you must review three items:

- Land Status – Dates of Entry
- Effective Date of Public Land Order
- Date of Road Construction (or Posting)

i. Land Status

A common element of each PLO that served to establish a highway right-of-way was that they were "*subject to valid existing rights*". Our interpretation of that requirement is that if the

[48] Transamerica Title Insurance PLO Form Letter, Received February 20, 1980

land was withdrawn or reserved prior to the effective date of a PLO, then the PLO could not act to create a right-of-way. These reservations or withdrawals could include homestead entries, mineral entries, military withdrawals, and such.

The primary sources of information with respect to PLO validity are the Bureau of Land Management land status records. Generally, the process is to:

- Review the Master Title Plat in order to locate the property in question. [49]
- Review the Historical Index for action involving the property in question and the dates that they occurred.

Caveats: Not all land actions would serve to preclude the application of a highway PLO. For example, in one particular situation involving a federal grazing lease the lease document stated that "*Nothing herein shall restrict the acquisition, granting, or use of permits or rights-of-way under applicable law*."[50]

Actions that might serve to create a "*valid existing right*" may have preceded the earliest date noted on a BLM Historical Index. For example, some very early mining claim and homestead location notices were filed in the Federal Magistrate's office (now the Recorder's office) and are not noted on the Historical Index.

There may be gaps in the "*valid existing rights*" that would allow a PLO right-of-way to take effect. For example, a homestead entry that may have precluded the application of a PLO right-of-way at one point in time may be relinquished, returning the land to the public domain. Upon relinquishment, the PLO right-of-way may be created.

"Unreserved" vs. "Subject to": PLOs and RS-2477s differ in that the RS-2477 grant requires an unreserved land status to take effect while the PLO is only "*subject to valid existing rights*". If a highway PLO applied to a road crossing a pre-existing homestead entry, the entry did not defeat the application of the PLO, it was just subject to the prior existing right. If that prior existing right is terminated, or relinquished, the PLO would no longer be subject to the homestead entry and would move to the forefront. A similar situation was considered in State of Alaska v. Harrison.[51] In this case, the Chickaloon River road in crossed parcel of land that was first subject to a Railroad Townsite in 1917. Then PLO 601 came into effect in 1949 and would have provided a right of way withdrawal for the road, however, the PLO was subject to the Railroad Townsite. The Townsite was revoked in 1955 and Harrison filed for a homestead in 1956. He argued that as the Townsite prevented application of the PLO, no road right-of-way existed. The Court found that "*there is no inconsistency or conflict between the railroad townsite withdrawal and Public Land Order 601*." When the Railroad Townsite was revoked, it did so without purporting to affect the PLO right-of-way. As a result the road easement existed

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[49] See BLM and DNR online resources cited in Section VI (b) Section Line Easement Analysis

[50] Mercer v. Yutan Const. Co. 420 P.2d 323 Alaska 1966 (November 17, 1966)

[51] State of Alaska v. David B. Harrison, et al. – U.S. District Court, Alaska – Case No. A94-0464-CV – Order dated October 28, 1998.

before the homestead entry.

Date of Occupation vs. Application: Sometimes you will have to go the extra mile in gathering evidence to make the correct PLO evaluation, particularly when the date of a PLO is very close to the date of entry.

A question that might arise is whether the entryman had vested rights based on occupation prior to the reported date of entry or application noted in the BLM records. With regard to a federal homestead entry, Hamerly and Dillingham told us that only the application submitted by the entryman would vest rights, occupation would not. But other authorities that would serve to reserve the public domain may have provided a different conclusion.

An example of this would be land reserved for a federal Trade and Manufacturing[52] site which was the subject of a research project into the PLO right-of-way for the Richardson Highway in the vicinity of the Meier's Lake Roadhouse. Our assertion of the full 300-foot wide right-of-way across USS 3318 was based on the fact that the effective date of PLO 601 (8/10/49), which established the Richardson Highway right-of-way, preceded the application date leading to the patent of USS 3318 (9/22/49 according to the BLM ALIS Online abstract). Only 44 days separated the PLO from the application date. A site survey indicated several buildings and other improvements for the lodge were located within the 300-foot wide PLO 601 highway right-of-way. We ordered the T&M Site case file from the National Archives and along with other historical information located on-line and at the library, we found that the Meier's Lake Roadhouse dates back to its construction by Charles J. Meier in 1906. The roadhouse burned down in 1925 and was rebuilt between 1928 and 1929. Between 1943 and 1950, Adler and Maude Tatro (Patentees) managed the business until the main building was again destroyed by fire in 1950. The preceding statement identifying the patentees/entrymen as having occupied the site since 1943 was found in a manuscript titled Roadhouses of the Richardson Highway II. We then noted that the federal law[53] governing T&M sites was revised near the time that PLO 601 was implemented and now provided "*that anyone initiating a T&M site claim must file a notice of location in the appropriate land office within 90 days of initiating the claim, or else the claimant will receive no credit for occupancy maintained prior to the filing of the notice of location or application to purchase.*"[54] However, 43 CFR 81 (1949 Edition) governed the sale of public lands for T&M Sites at the time of the Tatro's application on 9/22/49. Part 81.6 states that "*The application to enter must show; (a) That the land is actually used and occupied for the purpose of trade, manufacture or other productive industry, when it was first so occupied,…*" As Tatro's occupancy and application occurred prior to 1950, their claim would not be subject to the location notice provision. In support of the proposition that the Tatro's rights commenced upon occupation of the public lands prior to the effective date of PLO 601 rather than their date of

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52 § 10, Act of May 14, 1898 (30 Stat., 413) "*Procedure under this statute will be regulated in accordance with the instructions that follow:…4…The register and receiver will fix a certain date, and notify the applicant that he must, within the time limited, furnish evidence of posting and publication of notice of his application, together with proof corroborated by two witnesses showing: First. The actual use and occupancy of the land for which application is made for the purpose of trade, manufacture, or other productive industry…Second. The date when the land was first so occupied."*

53 Act of April 29, 1950, 43 USC § 687(a)(1)

54 Eugene M. Witt IBLA 74-158, Decided May 7, 1974 (15 IBLA 378)

application, several IBLA decisions have cited Vernard E. Jones[55], "*The filing of a notice of location, however, does not establish any rights in land, the establishment of such rights being entirely dependent upon the acts performed in occupying, possessing and improving land and their relationship to the requirements of law under which the settler seeks to obtain title.*" Our determination in this situation was that the T&M site was not subject to the 300-foot wide PLO 601 right-of-way and was only subject to a "*ditch to ditch*" width easement by prescription or possibly by RS-2477.

Another evaluation of a federal Homesite[56] at the Boundary Lodge on the Top of the World Highway found occupation language in the regulations preceding the changes in the filing procedures brought about by the Act of April 29, 1950. The occupation of the homesite commenced with the construction of the roadhouse in 1938 and the application for patent filed on February 9, 1950. This was about 6 months after the effective date of PLO 601. As the application date preceded the Act of April 29, 1950 by slightly less than three months, we determined that the entryman's rights vested under the 1949 regulations (Part 64 – Homesites or Headquarters) by occupation rather than the 1950 regulations[57]. The entryman's claim then related back to the date of occupancy which preceded PLO 601. As with the Meier's lake property, we only claimed a "*ditch to ditch*" right-of-way for the road crossing the survey.

Note that while T&M sites, Homesites and Headquarters sites may offer an "*occupation*" exception to the "*application*" date rule, particularly where the application and PLO date are close, we still have rulings in Hamerly and Dillingham that with respect to Homesteads, the application date is the key.

Often there is little or no documentary evidence supporting an occupancy date prior to the reported entry/application date. In those cases our only option is to evaluate the PLO with those dates. However, if a site inspection indicates historical improvements that might suggest occupation prior to date of entry/application, you should carry your research to the next level.

School Lands Reservation: The Act of March 4, 1915, (38 Stat. 1214) provided that when public lands in the Territory of Alaska are surveyed, sections 16 and 36 in each township shall be reserved from sale or settlement for the support of the common schools in the Territory. Under the Alaska Statehood Act, 6(K), title to these reserved school lands passed to the State of Alaska as of the date of the State's admission into the Union on January 3, 1959, by Presidential Proclamation (73 Stat. 16).

In Schultz v. Department of the Army, U.S.[58], the court cited Hamerly and Dillingham in

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55 Vernard E. Jones 76 I.D. 133, 137 (1970) The citation continues: "*The actual appropriation and occupancy of land generally are accomplished facts at the time a notice of location is filed. Thus, the acceptance of a notice of location for recordation is not the allowance of an application for land but is, in reality, nothing more than the acknowledgement that the initiation of settlement rights as of a particular date has been claimed and noting of the land office records to reflect the existence of that claim, and the acceptance for recordation of a notice of location is not a bar to a subsequent finding that, in fact no rights were established in the attempted settlement.*"

56 Act of May 26, 1934 (48 Stat. 809)

57 1950 Cumulative Pocket Supplement to the 1949 Edition Code of Federal Regulations

58 9th Circuit Court of Appeals, 10 F.3d 649 (1993)

stating that "*Territory validly withdrawn for other purposes also falls within the Dillingham rule. Thus, when Congress set aside land for the support of territorial schools, the sections it named from each township no longer were available public lands.*" A prior informal Alaska Attorney General Opinion[59] noted that the school land reservation was a reservation only from "*…sale or settlement"* and that such a settlement did not prevent the United states from subsequently appropriating the reserved lands by public land order for other governmental purposes. Also, in 1978, State legislation[60] was passed making mental health lands and school lands part of the state's unrestricted grant public domain.

In a 2010 the Kenai Superior Court[61] agreed with DOT's argument that the 1978 legislation converting the school lands to unrestricted public domain eliminated *"any problems associated with the use of school lands for other purposes."* While the PLO that would have established a "*Local*" road right-of-way of 50-feet each side of centerline for Nikishka Beach road within Section 16 may have been subject to the prior existing rights of the School lands reservation, the legislative conversion to unrestricted public domain lands allowed the PLO right-of-way to rise to the top.

Native Allotments: When reviewing land status to determine the applicability of a PLO, it shouldn't be surprising that Native Allotments can represent some very complex issues. *"Prior to 1987, Alaska Native allotments were generally subject to rights-of-way existing when they were approved. However, in 1987, the IBLA began applying the relation back doctrine to declare certain existing rights-of-way null and void. Under the relation back doctrine, the IBLA gives priority to an allottee if the allottee's claimed initial use and occupancy of the land predated other uses and rights-of-way, even if the allotment application was submitted after the right-of-way was issued."*[62]

In 1979, an Alaska district court ruled that a Native's right to the land was deemed to have vested as of the date of first use and occupancy, rather than at the time the allotment was approved.[63] The Aguilar case required BLM to recover title from the state so it could be re-conveyed as Native Allotments. While the PLO rights-of-way conveyed to the state under the Omnibus QCD may only be easement interests, they would still constitute an interest conveyed prior to the adjudication of the Native Allotment and potentially subject to an Aguilar re-conveyance. To provide BLM adjudicator's guidance, the DOI Regional Solicitor issued a memo[64] stated that "*…allotment certificates are subject to rights-of-way conveyed pursuant to the Alaska Omnibus Act."* The memo continues saying "*The general procedure does not apply to patents or allotment certificates based on entries or use and occupancy predating conveyance*

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59 CIRI Selection Pool Nomination of Nike Site Jig, 1980 WL 27809, AGO File No. A66-021-78 dated August 4, 1980, Thomas E. Meacham, AAG.

60 Ch. 182 SLA 1978, July 1, 1978

61 State of Alaska v. Offshore Systems – Kenai, Case No. 3KN-08-453 CI, Order issued April 6, 2010

62 Alaska Native Allotments – Conflicts with Utility Rights-of-way Have Not Been Resolved through Existing Remedies, September 2004, Government Accountability Office Report GAO-04-923. - http://www.gao.gov/assets/250/243917.pdf

63 Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979)

64 Reservation of Omnibus Act Rights-of-Way in Patents and in Native Allotment Certificates, August 23, 1982, DOI Regional Solicitor to State Director, BLM Alaska

of the road." A handwritten note by the author adjoining the preceding sentence stated "*Modified – This proc. Applies across the board to native allotments prior rights to roads must be vindicated with Aguilar procedures. DJH"*

An excerpt from the BLM adjudication manual[65] states the following: *"Omnibus Act Roads….The Department's position is that the quitclaim deed transferred an easement interest and not the full fee. Therefore all allotments encompassing an Omnibus Act road must be made subject to an easement for the road. However, research is required to determine whether the applicant's use and occupancy predated the quitclaim deed, any withdrawal for the road, or public use of the road. If the applicants use did predate, title recovery is required to obtain the easement back, as in other Aguilar type situations."*

Our presumption is that the Omnibus QCD appropriately conveyed the federal easement interest to the State of Alaska for the highway system. When the allottee or the federal agency determines that the interest had been incorrectly conveyed, they may follow the Aguilar procedures for title recovery. The State is not obligated to voluntarily re-convey the easement based solely on BLM's determination which provides an opportunity for a settlement.

ii. Effective Date of Public Land Order

This may be the easiest part of a PLO right-of-way review. Copies of all of the pertinent Land Orders have been provided in the appendices.

Review the PLO's to see when the road in question is specifically named. (For example, the Taylor Highway and the Manley Hot Springs to Eureka roads were named as Feeder roads with a right-of-way of 100-feet each side of centerline in DO 2665, but were not specifically named at all in PLO 601.) This exercise is necessary in order to establish the earliest date that a PLO highway right-of-way may have been created.

Caveat: It may be the easiest part of the research but there are pitfalls. For example, the Edgerton Cutoff and New Edgerton highway have long been a point of confusion. The Edgerton Cutoff is the old road which has been noted in the ARC report since the 1920's as a cutoff from the Richardson to Chitina. It is the road that is specifically referenced in PLO 601 and SO 2665 as a "*feeder*" road (200-foot). The new Edgerton highway was also created under SO 2665 but was not specifically mentioned as it was created under the "*posting*"[66] requirements for new construction. An ARC public notice dated designated the new Edgerton as a "*feeder*" road under SO 2665 as staked.

If you do not have copies of the PLO's available, bound volumes of all Alaska Land Orders can be viewed or copied at the BLM public room. Another interesting resource within BLM is the index of Orders Affecting Public Lands in Alaska. This index lists the Order number,

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[65] H-2661-1 Native Allotments Chapter V, V-14 & V-15

[66] This notice dated September 15, 1956 is the only such SO 2665 posting I have found in Northern Region records.

reference number, date, description, approximate land area involved, and a cross reference to other relevant land orders.

iii. Date of Construction or Posting

This is likely to be the most difficult aspect of the research due to the relatively unorganized state of the documents that will establish such a date. The date of construction is particularly important when attempting to establish whether an unnamed local road right-of-way is subject to a conflicting land reservation or withdrawal.

1. Alaska Road Commission Annual Reports

These reports, dating from 1905 to 1956 name each road that was constructed and maintained under ARC jurisdiction along with the amount of public funds expended. Many of these reports can be viewed at the BLM Resource Library in Anchorage, DOT&PF Right-of-way offices in Anchorage and Fairbanks, the University of Alaska Rasmussen Library in Fairbanks and the Alaska Branch of the National Archives in Anchorage.

2. As-built plans, Field Books - ARC/BPR

Each DOT&PF Regional office has retained some records from the Alaska Road Commission and the Bureau of Public Roads. For example the Northern Region (Fairbanks) has ARC field books dating as early as 1906. We also have some road as-builts from the 1940's and 1950's.

3. USGS Mapping Base Photography and other Historical Aerial Photos

Private photogrammetry firms often have an extensive photo archive which can fix a date for certain improvements such as roads. Aerometric, Inc. of Anchorage maintains a photo archive dating back to the 1940's. Early 1950's and later photography which was the basis for the USGS quadrangle mapping is also a prime source for fixing dates on roads during those specific time periods. Note that just because a road is shown on a USGS quad does not mean it truly exists. There have been a few occasions where roads were placed on USGS quads based upon proposed plans but for some reason were never constructed.

4. Federal Records Center/National Archives Documents

After statehood, a large amount of the archived records of the ARC/BPR were retained by the Federal Highway Administration and transferred to their regional headquarters in Portland, Oregon. These records were eventually sent to the Federal Records Center in Seattle for storage and eventual transfer into the National Archives.[67] Many of these records have since been

[67] These records were the primary source making up the Naske RS-2477 Trails database referenced in Section V(b) RS-2477 Trails; Chronology of Select State Events.

transferred to the Alaska Branch of the National Archives in Anchorage (Old Federal Courthouse). In their possession are dozens of cases of correspondence, weekly/monthly/annual reports, field books and plans relating to the construction of roads in Alaska. Note that while the Alaska Road Commission Annual Reports provide a good resource for road names, route numbers, activities and expenses for the road system, they are but a distillation of the District monthly and weekly reports. Often the key information you need will be in these more detailed reports.

5. Miscellaneous Mapping, Surveys, and Reports

Other sources of information that can be used to date the existence of a particular road can be the plats and field notes of GLO/BLM surveys. Generally the plats and running field notes for U.S., Mineral, and Township surveys will note the intersection of survey lines with existing roads and trails. Also references of access can be found in the mineral reports of the U.S. Geological Survey. Descriptions of control monumentation established by the U.S. Coast and Geodetic Survey have also served to establish the dates of roads.

d. Evaluation of Information

At times it might be necessary to perform a cost/benefit analysis in order to establish what level of research is warranted. Research is labor intensive. Although each evaluation will necessarily include a comprehensive review of the "*land status*" and the "*effective date of PLO*" portions of the research, the "*date of construction*" portion can easily involve a seemingly endless number of man hours. Once you have invested an amount of research into these areas that balances with the risk you may incur, then the evaluation of whether a PLO right-of-way exists is fairly straight forward. For example:

A local (secondary) road crosses your property. The State of Alaska claims jurisdiction for the road, however the right-of-way was never specified in your homestead patent and you have never given a specific easement for the road. Is the road subject to a PLO right-of-way?

1. If your homestead date of entry was prior to August 10, 1949 (PLO 601) then there is no PLO easement.

2. If your homestead date of entry was after August 10, 1949 but prior to the date of construction (or posting when allowed by SO 2665), there is no PLO easement.

3. If your homestead date of entry was after August 10, 1949 and after the date of construction (or posting when allowed by SO 2665), there will be a PLO right-of-way easement.

Note: Note that the above example deals only with PLO 601. If you are considering a road covered under earlier PLO's such as the Alaska or Glenn highways, you will need to use the effective dates of the earlier PLO's.

Caveats: Some items to be aware of when evaluating your research data are as follows:

1. Road re-classifications and name changes - Note that PLO 601 classified the Nome-Solomon road as a "*feeder*" road. SO 2665 maintained the "*feeder*" classification but extended the route and changed the name to the Nome-Council road. Under PLO 601, the Taylor highway would have fallen under the classification of an unnamed "*local*" road. SO 2665 upgraded the classification to a "*feeder*" road. SO 2665 classifies the Paxson to McKinley Park road as a "*feeder*". Amendment No. 2 to SO 2665 changes the name of the road to Denali Highway and reclassifies it to a "*Through*" road.

2. Note that the preceding research and evaluation will only establish whether a PLO right-of-way exists or not. It generally does not take into account the location of the physical road with respect to a particular piece of property or the fact that they road may have shifted by maintenance or construction realignment over a period of time.

3. In some records, particularly BLM status maps and land adjudication documents, that a right-of-way may be noted as a "50' CL", "100' CL", or a "150'CL". Many people have erroneously interpreted these notations to mean total right-of-way widths when in fact they represent the half widths. (i.e. 50-feet on each side of centerline).

e. Case Law Summary

United States v. Anderson, 113 F.Supp., 1, 14 Alaska 349 (D. Alaska 1953) Land withdrawn by PLO 386 for the Alaska Highway was not subject to entry by individuals.

Matanuska Valley Bank v. Abernathy, 445 P.2d 235 (Alaska 1968) Purchasers were entitled to rescind sale agreement where there was a mutual mistake as to the status of title of land. (Land was subject to a PLO 1613 highway easement.)

Hahn v. Alaska Title Guaranty Co., 557 P.2d 143 (Alaska 1976) A Public Land Order published in the Federal Register constitutes a "*public record*" which imparts constructive notice with regard to a particular tract of real estate. The appellee, a title insurance company was determined to be liable to the extent that the right-of-way crossing the insured land exceeded that indicated on the policy. (PLO 601)

State, Dep't of Highways v. Green, 586 P.2d 595 (Alaska 1978) A 50-foot right-of-way reservation provided by SO 2665 for local roads applied to subject lot only if the effective date of the Small Tract Act lease was preceded by both construction of road and issuance of secretarial order.

The Greens argued that the PLO did not apply as their lot was subject to a specific reservation (33-feet) by virtue of the Small Tract Act. SO 2665 is a general order where the reservation created by the small tract act was specific. The Court ruled the two conflicting orders should be "*harmonized if possible*" unless there is a conflict. Since the 33-foot reservation was for access streets serving interior lots and the 50-foot reservation was for local roads there

was not a conflict. The court relied on the rule of construction that "*where language of a public land grant is subject to reasonable doubt such ambiguities are to be resolved strictly against the grantee and in favor of the government*".

823 Square Feet, More or Less v. State, 660 P.2d 443 (Alaska 1983) Surveying, staking, stripping, and clearing of entire 100-feet were sufficient act of appropriation to create a 100-foot wide right-of-way although the road with ditches was only 48-feet wide. Discusses application of SO 2665 and PLO 601 on lots created under the Small Tract Classification order No. 22 of March 23, 1950. Occasionally the question arises as to whether PLO 601 only applied to roads in existence at its effective date or whether it also applied to new construction of roads as is more clearly stated in SO 2665. According to this decision, the answer is yes. *"The next question is whether PLO 601 applied to subsequently built local roads such as Tudor. PLO 601 defines local roads as "[a]ll roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior." I believe that under a natural as well as practical construction of the order, PLO 601 applied to subsequently built local roads."*

State v. Alaska Land Title Ass'n, 667 P.2d 714 (Alaska 1983) This is one of the more significant cases for PLO rights-of-way. By virtue of PLOs 601, 757, and 1613 and DO 2665, the State of Alaska and the Municipality of Anchorage claimed easements for local, feeder and through roads greater than shown in the patents. Three properties, owned by Pease, Boysen and Hansen, were involved in the appeal.

PLO 601 was effective on August 10, 1949; PLO 757 and DO 2665 on October 19, 1951 and PLO 1613 on April 7, 1958.

The lease for the Pease small tract was dated May 1, 1953. The patent, issued on October 4, 1955, contained 33-foot easements along two boundaries, one of which was Rabbit Creek road, and a blanket reservation under 43 USC 321d (the '47 Act). Rabbit Creek Road was in existence at the time of the original leases.

Boysen had property bordering the Seward Highway. The date of entry was January 2, 1951 and the patent was issued on May 15, 1952 with a '47 Act reservation. The Seward highway was constructed prior to the effective date of any of the PLOs.

Hansen's property was entered on January 23, 1945 with a patent issued on June 1, 1950. Hansen's property was entered prior to 1947 therefore it was not subject to a '47 Act reservation.

As to the Hansen property, the Court ruled that the property was not subject to PLOs or DO since the entry in January, 1945 was prior to the effective date of any of them. The other two properties were found to be subject to PLO rights-of-way. A number of arguments against the validity of the PLO rights-of-way were dismissed by the Court.

Right-of-way Act of 1966: The Pease and Boysens patents were subject to a '47 Act

reservation.[68] They argued that the Right-of-way Act of 1966 precluded the State and Municipality's claims for feeder and local roads under the DO 2665. The Court ruled that the ROW Act applied only to the '47 Act reservation, 43 USC 321d. DO 2665 was promulgated under 43 USC 321a, which was not repealed by the ROW Act.

Constructive Notice: The PLOs and DO were not recorded. On April 4, 1959 the Federal government conveyed its interest in the Alaska highways to the State. That deed was not recorded until October 2, 1969. Pease and Boysen claimed the State's interest was invalid against them as subsequent innocent purchasers in accordance with AS 34.15.290 which protects subsequent innocent purchasers for value who are without notice of a prior interest. The Court distinguished PLOs and the DO from a wild deed outside the chain of title. Issue in this case was whether the publication of the PLOs and DO in the Federal Register was constructive notice. The Court reaffirmed its earlier decision in Hahn v. Alaska Title Guaranty Co. that publishing in the Federal Register was constructive notice; therefore subsequent purchasers were not innocent purchasers protected by the recording statutes.

Title Company Liability: The Court was asked to overturn Hahn v. ATG, since the PLOs and DO were not recorded in Alaska. The Court refused to do so. The title companies were subject to the claims of Pease and Boysen.

Estoppel: Pease and Boysen claimed the State and Municipality were estopped from claiming an interest due to the fact that for over 20 years they had been allowed the property to be developed in a manner inconsistent with the assertion of the claimed easements. Relying on its finding that the constructive notice was imparted by the Federal Register, the Court ruled that notice made reliance by the parties unreasonable therefore the estoppel claim lacked merit.

Patent Statute of Limitations: The patents did not contain any reservation for the PLO and DO rights-of-way. This six year statute of limitations to contest a patent had expired long before the State claimed its easement interest. In reaffirming State, Department of Highways v. Green, the Court found that a right-of-way not expressed in the patent was a valid existing right and the patentee takes subject to such right.

By operation of law, land conveyed by the United States is taken subject to previously established rights-of-way where the instrument of conveyance is silent as to the existence of such rights-of-way. No suit to vacate or annul a patent in order to establish a previously existing right-of-way is necessary because the patent contains an implied by law condition that it is subject to such a right-of-way.

Staking: The lower court held that the additional widths created by DO 2665 did not apply to the rights-of-way for adjacent to the Pease and Boysen properties because the road had not been "*staked*" in accordance with the terms of DO 2665. The Supreme Court rejected that conclusion on the basis that the staking was only required for new construction. Since the roads were in existence at the time of the DO, staking was not required.

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[68] Note that in the 1966 State v. Crosby case, the Alaska Supreme Court ruled that BLM Small Tract parcels created under the Act of June 1, 1938 are not subject to '47 Act reservations.

State, DOT&PF v. First National Bank of Anchorage, 689 P.2d 483 (Alaska 1984) The Bank's predecessor, Pippel, on June 10, 1946, entered onto land that was secretly withdrawn for the military by PLO 95 in 1943. BLM canceled the entry, then, subsequently reinstated it. A patent was issued to Pippel on October 11, 1950. PLO 95 was not revoked until April 15, 1953.

The state argued that the entry was not a valid existing right due to the invalid entry on withdrawn land; therefore the property was subject to a 300-foot wide right-of-way under PLO 601. However, the Court ruled that once a patent is issued, defects in the preliminary process are cured. Since the state did not contest the patent within the six year statute of limitations, the patent made the 1946 entry presumptively valid. Consequently the entry related back to 1946, prior to the PLO.

Resource Investments v. State, DOTPF, 687 P.2d 280 (Alaska 1984) Reaffirms the decision in the Alaska Land Title case that a homestead entry constitutes a "*valid existing right*" as defined by PLO 601.

Simon v. State, 996 P.2d 1211 (Alaska 2000) A PLO 1613 easement allows for realignment of road within right-of-way and right to move or use subsurface materials. To disallow this use would defeat the purpose of the easement.

f. Case Study

1. Mentasta Road: The following excerpts from IBLA case 88-589 provide a good discussion of the history of roads in Alaska and the application of laws relating to PLO rights-of-way.

April 29, 1991 (IBLA 88-589 Frank Sanford Et. Al.) Alaska: Native Allotments

A decision recognizing that a Native allotment is subject to an easement for highway purposes extending 50 feet on each side of the centerline of a road conveyed to the State of Alaska by a quitclaim deed issued pursuant to the Alaska Omnibus Act, P.L. 86-70, 73 Stat. 141, will be affirmed where an easement of that width had been established under the Act of June 30, 1932, 47 Stat. 446.

The quitclaim deed cited in BLM's decision refers to Schedule A which is a list of highways. FAS Route No. 8921 is listed as a secondary class "B" highway named the Mentasta Spur with 7.0 miles constructed and described as follows: "From a point on FAS Route 46 approximately 10 miles west of Little Tok River, west to Mentasta Lake." Although this describes the road crossing Sanford's parcel, the conveyance does not indicate its width. The State contends that a 100-foot right-of-way is proper; other parties contend either that the road was abandoned or, alternatively, that only a 60-foot right-of-way is appropriate.

In a recent decision, Lloyd Schade, 116 IBLA 203 (1990), we provided a brief outline of the history of the administration of roads in Alaska:

Pursuant to the Act of January 27, 1905, 33 Stat. 616, as amended by the Act of May 14, 1906, 34 Stat. 192, Congress authorized the Secretary of War to administer the roads and trails in Alaska. In 1932, Congress transferred administration over those roads and trails to the Secretary of the Interior pursuant to the Act of June 30, 1932, 47 Stat. 446.

The State's response to the Sanford appeal included an affidavit by John Bennett, a registered professional land surveyor employed as Engineering Supervisor in the right-of-way division of the State's Department of Transportation and Public Facilities. Bennett states that he has examined records in an attempt to learn when the Mentasta Spur Road was established. Excerpts from a 1960 document by the Division of Highways of the Alaska Department of Public Works entitled Fifty Years of Highways is attached to Bennett's affidavit as Exhibit A. The document refers to a "Tok Cutoff Glenn Highway" as "constructed during World War II." A copy of Alaska Road Commission Order No. 40, Supplement No. 1 (August 1, 1952) includes an attachment which refers to a "Mentasta Loop." Exhibit B consists of a quadrangle map and a list of monument descriptions indicating that the road through Sanford's allotment existed in the 1940's. The map bears a hand-written notation indicating that the present location of the Tok Cutoff of the Glenn Highway which does not cross Sanford's parcel was a "1951 Reroute."

Public Land Order No. 601 of August 10, 1949, 14 FR 5048 (August 16, 1949), revoked a prior PLO and divided all roads under the Secretary's jurisdiction in Alaska into three classes: through roads, feeder roads, or local roads. That order withdrew from all forms of appropriation under the public land laws public lands within 150 feet of each side of the center line of all through roads, 100 feet of each side of the centerline of all local roads and reserved the lands for highway purposes.

On October 19, 1951, PLO 757 amended PLO 601 by revoking the general withdrawal for local and feeder roads (16 FR 10749, 10750 (Oct. 19, 1951)). Simultaneously, the Secretary issued Secretarial Order (SO) 2665 establishing easement for, rather than withdrawals of, 50 feet on each side of the center of each local road and 100 feet on each side of the center line of each feeder road. 16 FR 10752 (Oct. 19, 1951). Because the Mentasta Spur was not listed as a through road or feeder road, the size of the easement established was 50 feet on each side of the center, or 100 feet in total width.

As authority for the establishment of these easements, the PLO cited the Act of June 30, 1932, identified earlier as the statute by which Congress transferred

administration over roads and trails from the Secretary of War to the Secretary of the Interior. Section 5 of that statute required the Secretary to reserve in patents a right-of-way for roads "constructed" or to be constructed by or under the authority of the United States." Act of June 30, 1932, ch. 320 as added, Act of July 24, 1947, ch 313, 61 Stat. 418. Reference to the more recent history of the administration of Alaskan roads discloses:

The Secretary of the Interior's jurisdiction over the Alaskan road system ended in 1956 when Congress enacted section 107(b) of the Federal-Aid Highway Act of 1956, 70 Stat. 37, which transferred the administration of the Alaskan roads to the Secretary of Commerce. This change in authority was reiterated on August 27, 1958, when Congress revised, codified, and reenacted the laws relating to highways as Title 23 of the United States Code. See 23 U.S.C. 119 (1958). The Commerce Department's Bureau of Public Roads reclassified and renumbered the Alaskan roads under its jurisdiction as primary, secondary "A", and secondary "B" routes, but did not specify the widths of those classes of roads.

Section 21(a) of the Alaska Omnibus Act, 73 Stat. 145 (1959), enacted on June 25, 1959 directed the Secretary of Commerce to convey to the State of Alaska all lands or interests in lands "owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska." Section 21(d)(3) an (7) of that Act repealed 23 U.S.C. 119 (1958), and the Act of June 30, 1932, 47 Stat. 446, effective July 1, 1959. 73 Stat. 145-46 (1959).

Lloyd Schade, supra at 204-205. On June 30 1959, pursuant to section 21(a) of the Alaska Omnibus Act, the Secretary of Commerce issued the quitclaim deed which included the road in question.

Accordingly, we conclude that BLM properly recognized that Sanford's Native allotment is subject to an easement for highway purposes extending 50 feet on each side of the centerline of a road transferred to the State of Alaska by a quitclaim deed issued pursuant to the Alaska Omnibus Act, P.L. 86070; 73 Stat. 141, when an easement of that width had been established under the Act of June 30, 1932, 47 Stat. 446. Any issue concerning the abandonment of such a right-of-way is properly within the jurisdiction of the state courts.~

g. Odds & Ends

From time to time DOT&PF is questioned as to the justification for the width of rights-of-way. The following letter indicates that even at the time PLO 601 was being proposed, the width of rights-of-way was a very controversial subject.

February 22, 1949 - Letter[69] from E. L. Bartlett to Secretary of the Interior regarding PLO 601 proposed right-of-way widths.

"My dear Mr. Secretary:

I appreciate the opportunity afforded by your invitation of February 10 to comment on the department's proposal that the width of right-of-way for roads in Alaska should be as follows:

Alaska Highway	*600 feet*
Other primary Roads	*300 feet*
Secondary Roads	*200 feet*
Feeder and Branch Roads	*100 feet*

The proposal is simply fantastic. If adopted it would push the would-be settler back as if he were not wanted in Alaska. It would in many cases push him up a mountain, over a cliff, or into a stream or lake. It would multiply the difficulties which for him are very considerable already. It would present problems in driveway construction, maintenance, snow clearance and in the obtaining of driveway permits through your right-of-way in the first place. (Don't try to tell any Alaskan who has had dealings with the department that there would not be red tape and delay in connection with that.) It would be an open invitation to trespass.

And for what? I confess I am unable to think of a single good reason for tying up all this territory right where we want people, accommodations for travelers, service facilities, etc. I drove to Alaska over the Alaska Highway last summer and am willing to testify that, even from the standpoint of appearance and interest to the traveler, developments along the road itself are exactly what is needed....."

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[69] One of my other favorite ARC letters is from Governor Parks to Colonel Steese dated October 10, 1925 in which the Governor responds to Steese's request to abandon the Richardson highway due to the costs of construction and maintenance over the prior 21 years. Parks noted that tourist travel had increased by 25% between 1924 and 1925. Fortunately, Steese's request to abandon was denied.

V. RS-2477 (Trails)

Revised Statute 2477[70] provided a federal offer for road easements over public lands. The intent of the grant was to protect the access rights of miners in the early 1800's where there was a virtually complete absence of a federal presence on the public domain lands. In Alaska, highways that were constructed prior to the Public Land Orders establishing rights-of-way may have been created across unreserved public lands by virtue of the RS-2477 grant[71]. The width of an RS-2477 trail right-of-way was generally considered to be "*ditch to ditch*".[72] However, an RS-2477 right-of-way may be 100-feet wide if the public lands which it crossed were unreserved as of 1963.[73] The Federal offer for road easements over public lands was concisely stated:

"*The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted*."

The interpretation and application of RS-2477 in Alaska is a highly debated and controversial subject. The opinions of the State and Federal agencies as well as those among the private sector vary considerably. The primary issues to be resolved include the matters of legal jurisdiction, allowable use, management authority, width of right-of-way, and determination of whether a particular trail meets the validity tests of an RS-2477 grant.

Rather than debate the entire issue in this paper, the reader is advised to review the current State and Federal policies for RS-2477 as well as the relevant Federal and State case law which is summarized at the end of this section.

a. Chronology of Select Federal Events

The Federal position is primarily relevant in regard to assertions of RS-2477 rights-of-way across lands subject to federal law.

November 19, 1963: BLM issues a 100-foot wide Right-of-Way Grant (F 027315) to

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[70] The Mining Law of 1866 - Lode and Water Law, July 26, 1866 (Section 8 - 14 Stat. 253) The above referenced Section 8 of the 1866 Mining Law was re-designated as Section 2477 of the Revised Statutes 1878. (43 U.S.C. 932) RS 2477 was repealed by Title VII of the Federal Land Policy and Management Act on October 21, 1976.

[71] A footnote to the Alaska Supreme Court case State v. Alaska Land Title Ass'n, cited a memo from the Chief Counsel of BLM dated 2/7/51 noted that "*Prior to the issuance of Public Land Order No. 601...,nearly all public roads in Alaska were protected only by easements. Right-of-way easements were acquired under section 2477 of the Revised Statutes (43 U.S.C. sec. 932) by the construction of roads*."

[72] In the 1963 Superior Court case State v. Fowler regarding Farmer's Loop road in Fairbanks, the Highway Department claimed that 43 U.S.C. 932 (RS-2477) provided for a 66 foot wide right-of-way where a claim of RS-2477 was appropriate. The Superior Court sustained defendant's position that the state "*only has a right-of-way for the width of the road utilized in the past and now by the Highway Department*".

[73] In order to establish a 100- foot width for an RS-2477 right of way, the State legislature enacted Sec. 1, Ch. 35, SLA 1963 (Effective April 7, 1963): Establishment of Highway Widths. (a) It is declared that all officially proposed and existing highways on public lands not reserved for public uses are 100 feet wide. This section does not apply to highways which are specifically designated to be wider than 100 feet. AS 19.10.015.

Department of Public Works for an access road into Fairbanks International Airport under the authority of R.S. 2477 (43 U.S.C. 932) [Example of BLM acknowledgement of RS-2477]

December 23, 1964: While few highway rights-of-way on the DOT&PF State Highway System inventory are based on RS-2477, BLM issued a letter stating that the Klutina Lake trail was protected under the RS-2477 regulations.[74] [BLM acknowledgement of RS-2477 trail]

December 14, 1968: DOI issues Public Land Order No. 4582, the "*Land Freeze*", in anticipation of Native Land claims reserves all federal lands in Alaska. While the RS-2477 grant is still effective, the public lands must be unreserved to be available for any new trail rights-of-way.

October 21, 1976: FLPMA[75] repeals the RS-2477 Grant.

December 7, 1988: "*Hodel Policy*"[76] The Department of the Interior issues a policy memorandum which defines key RS-2477 terms and determines that the federal government has no authority to adjudicate RS-2477 claims. However, in recognition of the importance of potential assertions, DOI establishes procedures to identify the existence of public highways. To constitute acceptance, all three of the following conditions must have been met:

1. *"The lands involved must have been public lands, not reserved for public uses, at the time of acceptance."*
2. *"Some form of construction of the highway must have occurred."*
3. *"The highway so constructed must be considered a public highway."*

Under the Hodel Policy the width of the right-of-way depends on whether at the time of acceptance, the RS-2477 trail was under the jurisdiction of a State or local government. If so, then statutory widths may apply. If not, then the width may be based upon the area in use including back slopes and drainage ditches otherwise known as the "*ditch to ditch*" width.

Non-highway uses such as placement of telephone, power and other utilities are generally not considered to be within the scope of the RS-2477 grant.

An accepted RS-2477 grant of right-of-way may be abandoned or relinquished by the proper authority in accordance with State, local or common law.

May 28, 1993: Hearings were held between 1992 and 1993 in Alaska and throughout western states with an interest in RS-2477. As a result, the Secretary of the Interior delivered to the Appropriations Committees of the Senate and the House of Representatives, the Report to

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[74] BLM to Mr. Leonard Brenwick (Dept. of Highways contractor) "*This office has no objection to your improving the Klutina Lake trail in cooperation with the State of Alaska for a public road. It appears that this would come under the regulations R.S. 2477, which provides for pioneer access roads."*

[75] Federal Land Policy and Management Act of 1976 § 706(a); RS-2477 Repealed

[76] Departmental Policy on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-way for Public Highways (RS 2477)

Congress on RS-2477[77]. The intent was to submit a final report to the U.S. Congress in anticipation of legislation which would resolve the long standing conflicts over this issue. In the letter which transmitted the report, the Secretary of the Interior stated:

"*Until final rules are effective, I have instructed the Bureau of Land Management (BLM) to defer any processing of RS 2477 assertions except in cases where there is a demonstrated, compelling and immediate need to make such determinations*."

August 1, 1994: Based on the June 1, 1993 report to Congress, DOI submits proposed RS-2477 regulations.[78] Congress responds in 1996 by prohibiting the use of DOI funds to carry out the proposed rulemaking[79] and ensures that no regulations relating to RS-2477 determinations and management will take effect unless expressly authorized by Congress[80].

January 22, 1997: With the "*Babbit Policy*"[81], DOI revokes its 1988 policy and provides for RS-2477 determinations by DOI in advance of final regulations where there exists a demonstrated, compelling and immediate need. Once an application was submitted, BLM would evaluate the following items:

- Lands subject to the RS-2477 claim had not been withdrawn or reserved at the time the highway was constructed.
- Construction must have occurred prior to October 21, 1976 repeal of RS-2477.
- The right-of-way must constitute a "*highway*". Prior to the FLMPA repeal of RS-2477 it was used by the public for the passage of vehicles carrying people or goods.
- State law in effect on October 21, 1976 will be applied to the extent it is consistent with federal law.

September 8, 2005: A10th Circuit Court[82] further modifies the DOI RS-2477 policy in determining that BLM does not have jurisdiction to make binding determinations regarding the validity of an RS-2477 right-of-way. But BLM is not forbidden to make validity determinations for its own internal land management purposes. The 10th Circuit decision requires that a claimant file suit in a federal court to receive a binding determination of RS-2477 validity.

March 22, 2006: The Secretary of the Interior issued what is known as the "*Norton*" memo[83] to outline DOI RS-2477 Policy after the 10th Circuit Court ruling in SUWA v. BLM. The memo noted that "*Title V of FLPMA or other right of way authorities, recordable disclaimers, and the Quiet Title Act each may offer more certainty to bureaus and to claimants.*" While BLM can issue a non-binding RS-2477 validity determination; such a reversible decision would rarely be acceptable to a claimant. BLM has authority under FLPMA to issue a

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77 The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands

78 59 Fed. Reg. 39216 (August 1, 1994)

79 P.L. 104-134 § 110, 110 Stat. 321, April 26, 1996

80 P.L. 104-208 § 108, 110 Stat. 3009, September 30, 1996

81 Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy

82 Southern Utah Wilderness Alliance v. Bureau of Land Management 425 F.3d 735 (10th Cir. 2005)

83 Departmental Implementation of Southern Utah Wilderness Alliance v. Bureau of Land Management

recordable "*disclaimer of interest*"[84] where the disclaimer would help to remove a cloud on the title. The state of Alaska currently uses the RDI process to confirm the State's ownership in navigable rivers and lakes. According to BLM's RDI website[85], there are no plans for BLM to apply the RDI process to resolution of RS-2477 claims crossing federal lands. Another alternative to what could be lengthy and costly litigation is to avoid the RS-2477 conflict and apply to BLM for a FLPMA Title V right-of-way.

February 20, 2009: The BLM Acting Director issued the following interim policy guidance[86]: *"Pending further review and direction from the Secretary, the Bureau of Land Management has been directed not to process or review any claims under RS 2477, including use of the disclaimer rule."*

Current BLM procedures relating to RS-2477 can be found in BLM Manual Section MS-2809.[87]

b. Chronology of Select State Events

November 4, 1960: The Department of Law issues an opinion[88] regarding the width of an RS-2477 right-of-way. Drawing upon Chapter 19, SLA 1923 that established a 66-foot width for section line easements, the opinion concluded that 66-feet would be a reasonable width for all Alaska Highways constructed under 43 U.S.C Sec. 932 (RS-2477).

September 26, 1962: In a Superior Court condemnation case[89], the width of Farmer's Loop Road, established under provisions of RS-2477 by a public user, was at issue. The court determined that only the 1962 width of the road would be considered a part of that right-of-way and deemed it "*a reasonable width necessary for the use of the public generally*." The State argued that the provisions of Sec. 1 Ch. 19, SLA 1923 (establishing public highways between each section of land in the territory) indicated the local law and reflected the local custom as to the width of the rights-of-way established pursuant to RS-2477 (33-feet on each side of centerline or 66-feet total). The court concluded that taking into consideration the character and extent of the user as disclosed by the evidence in Fowler, the "*reasonable width necessary for the use of the public*" constituted only the present width of Farmer's Loop Road, thirty feet.

April 6, 1963: As if in response to the court's decisions, the State legislature enacted Sec. 1, Ch. 35, SLA 1963:

Establishment of Highway Widths (a) It is declared that all officially

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84 Federal Land Policy and Management Act of 1976 (FLPMA) § 315 (P.L. 94-579) & 43 CFR § 1864

85 http://www.blm.gov/ak/st/en/prog/rdi/generalinfo.html

86 Cited in IBLA 2010-153 County of San Bernadino, March 30, 2011 at 181 IBLA 18.

87 MS-2809 Special Considerations to Manuals 2801 – 2807 ; See Section .21 R.S. 2477, Highway ROW. http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/blm_manual.html

88 1960 Opinions of the Attorney General, No. 29; Right of Way Width, Construction of 43, U.S.C. 932; November 4, 1960.

89 State of Alaska v. Fowler, Civil Action No. 61-320 Memorandum Opinion dated September 26,1962.

> *proposed and existing highways on public lands not reserved for public uses are 100 feet wide. This section does not apply to highways which are specifically designated to be wider than 100 feet.* AS 19.10.015.

In this law, the 1963 legislature accepted the RS-2477 grant as it might pertain to those portions of highways still traversing unreserved public lands.[90] A valid RS-2477 trail crossing unreserved federal lands as of April 7, 1963 would be subject to a 100-foot wide right-of-way once the land had been patented out of federal ownership.

April 8, 1974: Department of Highways Commissioner, B.A. Campbell, submits a copy of the Alaska Existing Trail System[91] to BLM asserting State ownership of these trails under RS-2477. This submittal consisted of a set of 153 USGS 1:250,000 Quadrangle maps that identified and numbered existing trails. The maps came with a computer database printout that provided references and limited historic basis for each individual trail assertion. BLM issued a policy[92] regarding this submittal more than 10 years later stating that the submittal is not adequate for notation onto BLM records and will only be considered for their information value.

May 27, 1983: A footnote in the State v. Alaska Land Title Ass'n[93] case referenced a February 7, 1951 memo from the BLM Chief Counsel that stated in part: "*Prior to the issuance of Public Land Order No. 601…, nearly all public roads in Alaska were protected only by easements. Right-of-way easements were acquired under section 2477 of the Revised Statutes (43 U.S.C. sec. 932) by the construction of roads.*"

September 28, 1984: Alaska DOT&PF and DNR enter into a Memorandum of Understanding with BLM to establish procedures for the assertion of an RS-2477. While BLM will review each assertion to establish that the land was unreserved prior to the RS-2477 repeal in 1976, BLM will not adjudicate the validity of the assertions. BLM was to plot the asserted trail onto the Master Title Plats if the following four criteria were met: Actual construction; open to the public; unreserved public land; and a state procedure to confirm the right-of-way. The MOU itself met the 4th criteria. The MOU established a coordinating committee and allowed DNR, DOT and the public to submit assertions.

As of 1985 the Coordinating Committee had reviewed 14 RS-2477 assertions of which 4 crossed BLM managed lands.[94] A 1990 BLM Instruction Memorandum notified BLM staff of an informal agreement to recognize the situation where a miner is using an old trail which

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90 See Informal Attorney General Opinion regarding Circle-Fairbanks Historic Trail dated February 1, 1983.

91 The database is labeled State of Alaska, Department of Highways, Existing Trail System; While there may be copies at various federal and state agencies and libraries, I am only aware of one set on file at the DOT&PF Northern Region Right of Way offices in Fairbanks.

92 Policy Regarding 1974 Trail Atlas (sic) Filed by the State of Alaska, From BLM State Director, Alaska August 12, 1985. The policy notes that the submittal did not cite any authority for construction of the trails.

93 State v. Alaska Land Title Ass'n; 667 P.2d 714, May 27, 1983; Footnote 8

94 Chronology of R. S. 2477 Actions Affecting Alaska, by Dwight J. Hempel, BLM, August 30, 1985

historically had been used for access. [95] In 1991 BLM accepted a portion of the Candle to Independence Creek Trail as an RS-2477 right-of-way with a 100-foot width and noted it as such on the federal master title plat.[96]

1988: Under contract with DOT&PF, Claus M-Naske prepares the Alaska Trails Database. The database cites almost 14,000 names, dates and references to historic trails as found in the Annual Reports for the Alaska Road Commission, the Federal Records Center and the University of Alaska Rasmussen Library.

1992-1993: In 1992 and 1993 the Legislature appropriated funds for a task force to create and RS-2477 trail inventory. DNR researched approximately 1,950 trails proposed as RS-2477 rights-of-way. The project determined that almost 600 trails may qualify as valid RS-2477 rights-of-way. DNR has posted RST case file summaries, a FAQ and a Fact Sheet relating to the project on-line.[97]

January 27, 1992: DNR proposes regulations (11 AAC 51) to nominate, identify and certify RS-2477 trail rights-of-way. DNR would create case files and notify land owners and appropriate agencies. These regulations were made effective on May 14, 1992.

August 3, 1998: Effective date of legislation[98] adding Article 5. Rights of way Acquired under Former 43 U.S.C. 932 to A.S. 19.30. This section identifies 585 documented RS-2477 rights-of-way accepted by public users.

July 10, 1999: Effective date of legislation[99] amending A.S. 19.30.410, A.S. 29.10.200 and A.S. 29.35.090 further restricting the ability of a municipality to unilaterally vacate an RS-2477 right-of-way.

November 21, 2000: The State and the United States settled a quiet title action with a consent decree over the Harrison Creek-Portage Creek[100] trail in the Steese National Conservation Area north of Fairbanks.[101] In the settlement, the State accepted a 60-foot wide right-of-way for the 12-mile long road. The final judgment stated that except for width, the scope of use would be as if it were an RS-2477 right-of-way.

May 3, 2001: DNR implements new regulations that repeal and amend in part those

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95 Access Across Public Lands to State Mining Claims, issued by BLM State Director, Alaska as Memorandum No. AK 90-154 on April 2, 1990. The memo states that the trail will be noted on the BLM status plats and if the trail has been formally accepted by the State, it would be noted with a width of 100-feet.

96 June 19, 1991 letter from BLM to DOT Right of Way stating that the RS-2477 assertion had been noted on the Master Title Plat for T. 3N., R.18W., KRM. The MTP identifies case FF087178 within Sections 8 & 9. The BLM Abstract cites Case Type ROW-Roads Under RS 2477.

97 RS 2477 Project website: http://dnr.alaska.gov/mlw/trails/rs2477/

98 SB180, An Act Relating to state rights-of-way, Ch 26 SLA 98

99 SB45, An Act relating to the vacation by the estate or a municipality of rights-of-way acquired by the statue under former 43 U.S.C. 932, Ch 94, SLA 1999

100 A.S. 19.30.400(d) Harrison Creek – Portage Creek RST 0008

101 State of Alaska v. United States, U.S. District Court No. F97-0009-CV

relating to RS-2477 that had been set into place on May 14, 1992. These revisions eliminate the costly "*Certification*" process and better define the realignment or vacation of an RS-2477. Comments from the public, agencies and other entities can be found at DNR's website.[102]

July 31, 2003: The State of Alaska drafts an MOU to establish an "*Acknowledgement Process*" with BLM that would result in the issuance of FLPMA Recordable Disclaimers of Interest on certain claimed RS-2477 trails. It is intended that for RS-2477 assertions in Alaska, the MOU will supplant the January 22, 1997 process referred to as the "*Babbit*" policy. The draft MOU was not reviewed or accepted by the Department of the Interior.

January 9, 2007: The State and the United States again resolve a quiet title action[103] regarding the Coldfoot to Caro Trail (RST 262) and Coldfoot to Chandalar Lake Trail (RST 9). In a manner similar to the Harrison-Portage case, the right-of-way will be treated as if it were an RS-2477, however, the width will be set at 60-feet.

April 2, 2008: Ahtna, Inc. files a trespass suit[104] against the Department of Transportation asserting that the Klutina Lake trail (Brenwick-Craig road)[105] is not a 100-foot wide RS-2477 right-of-way, but a 60-wide right-of-way based on ANCSA 17(b). This case covers approximately 26 miles of the 103 mile Valdez to Copper Center Trail (RST 633). Among some of the more interesting assertions, the State argues that the RS-2477 can be reasonably realigned after portions of the trail fell into the Klutina river during a 2005 landslide and Ahtna argues that aboriginal title constitutes reserved public lands that would defeat a claim of RS-2477. On July 17, 2002, the Attorney General's office issued an informal public opinion[106] regarding the Klutina Lake road right-of-way. The opinion concluded that State law will control the scope of use within an RS-2477. This case is still in progress.

c. DOT&PF Perspective

Although my opinion may come into conflict with others who believe DOT should be a stronger proponent of RS-2477, the reality is that RS-2477 trail and section line easements are often on the low end of our priorities. When you think about DOT&PF facilities, you generally think of the primary highways such as the Richardson, Glenn and Parks. However, if you think with a historical perspective, you should consider such roads and trails as the Eureka to Rampart road, Ft. Gibbon to Kaltag trail and other that were constructed or maintained by DOT's federal predecessor agency, the Alaska Road Commission.[107]

Many active roads during the early mining years that were maintained by ARC now see

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102 Public Easements: Update on New Regulations, http://dnr.alaska.gov/mlw/trails/11aac51/index.cfm

103 State of Alaska v. United States, U.S. District Court No. 3:05-cv-0073 (RRB)

104 Ahtna, Inc., v. Leo von Scheben, Case No. 3AN-08-6337 CI

105 See note under Chronology of Select Federal Events where on December 23, 1964**,** BLM acknowledged that this road was subject to an RS-2477 right-of-way.

106 Scope of Klutina Lake Road right-of-way, July 17, 2002, File No.: 665-01-0201, Paul R. Lyle, AAG

107 DOT&PF Northern Region field book examples include original notes for "Winter Trail , Fairbanks – Ft. Gibbon, 1908" and "1906, Rampart – Glen Wagon Road Survey".

limited use and virtually no public maintenance. In a practical sense, DOT has little interest in current RS-2477 issue with respect to highway improvement projects for the following reasons: Trails created by path of least resistance decades ago no longer represent the best route in which to invest large sums of money. Due to alignment, grades, geology and environmental issues, these old routes may no longer be practical as primary or even secondary transportation corridors. The same holds true for section line easements whose alignments conform to the rectangular system without regard to the parameters most often accepted for the construction of new roads. There are a few roads within the State Highway System where the existing right-of-way is primarily based on an RS-2477 trail right-of-way such as the Eureka to Rampart road and Brenwick-Craig (Klutina Lake) road. State roads along RS-2477section line easements where the topography and soils were suitable for road construction are more common.

One of the more significant highways that DOT&PF may (or may not have…) under RS-2477 is the Dalton Highway. During the early stages of preparation for the Trans-Alaska pipeline the Department of Highways strongly asserted the State's right to claim the Dalton Highway under RS-2477. This was done in consideration of the effect of PLO 5148 that reserved all Alaska lands on December 14, 1968 and that release of certain lands from the PLO would be required before an RS-2477 could take effect.[108]

Dalton Highway – BLM Grant (F-21145) issued under TAPS authority or RS-2477:

10/10/72: B.A. Campbell[109] to BLM: "*On January 8, 1970, the state applied for a right of way under RS 2477 between the Yukon River and Prudhoe Bay*." "*…we do not agree that another application is needed from us.*"

Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.)(enbanc), cert. denied 411 U.S. 917 1973). AS 19.40.010 (concerning the Trans-Alaska pipeline haul road) properly accepted the RS 2477 grant.

5/2/74: BLM to B.A. Campbell: Transmits Grant of Right of Way for Public Road pursuant to TAPs Authorization Act[110] and ANCSA subject to delivery of a map of definite location.

5/8/74: B.A. Campbell to BLM: "*Your unilateral grant in no way diminishes our prior right to construction of this road under RS2477*."

10/27/75 Woodrow Johansen[111] (Department of Highways) to BLM: "*As indicated in letters to you from then Commissioner Bruce A. Campbell dated October 10, 1972, and May 8, 1974, the Yukon River - Prudhoe Bay Highway is being constructed by the State of Alaska under*

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[108] See discussion of PLO 5148 in Section VI (b) of this paper regarding the Section Line Easement table. Note: PLO 4676, 34 Fed. Reg. 13415 (1969) specifically amended PLO 5148 to allow for the establishment of an R.S. 2477 right-of-way for the 53-mile section of the Dalton Highway from Livengood to the Yukon River.

[109] Bruce A. Campbell, P.E. began his involvement with Alaska road construction with the Alaska Road Commission in the early 1950's and became Commissioner of the Department of Highways from 1971 to 1974.

[110] Trans-Alaska Pipeline Authorization Act of November 16, 1973, P. L. 93-153 (87 Stat. 584)

[111] H. Woodrow "Woody" Johansen, P.E., worked for the Alaska Road Commission and its successor agencies as the head of the Fairbanks District from approximately 1955 to his retirement in 1979.

RS 2477."

It appears that neither Department of Highways nor BLM accepted or rejected the arguments of the other.

When BLM proposed it's RS2477 regulations in the 1990's, they argued that it was unreasonable for a state to develop new infrastructure based on an access law that was repealed more than 2 decades prior (1976) given that Congress had provided alternatives in the form of ANCSA 17(b) easements, ANILCA Title XI grants and FLPMA Title V grants. In my experience, DOT Northern Region has in fact utilized FLPMA Title V rights-of-way for several projects, particularly where only state funding was available. We have incorporated a 17(b) easement only once and have had little success in securing any rights-of-way under ANILCA Title XI. What the federal regulators left unstated was the fact that the 17(b)'s provide only limited widths, uses and management authority and incorporating them into a highway project can involve more complex negotiations than if we had set out to acquire a new right-of-way in the first place. Title XI grants can be very difficult to secure. We have found that no matter how much information we provide with our application and subsequent transmittals, it never seems to be enough. The acquisition of a FLPMA Title V grant is a relatively straightforward process. However, it is difficult to get BLM to issue more than a limited duration grant. Fortunately, we have the ability to appropriate certain federal lands for highways under the U.S.C. 23 Highways using the authority of the Federal Highway Administration. As most of our highway program is federally funded, Title 23 Grants are the most common.

RS-2477 Trail Management: The DOT/DNR joint jurisdictional authority for RS-2477 is defined by the following regulation and statute:

11 AAC 51.100 Management of public easements, including R.S. 2477 rights-of-way

"(a) The commissioner has management authority over the use of any RS 2477 right-of-way that is not on the Alaska highway system."

Sec. 19.30.400. Identification and acceptance of rights-of-way.

"The state claims, occupies, and possesses each right-of-way granted under former 43 U.S.C. 932 that was accepted either by the state or the territory of Alaska or by public users. A right-of-way acquired under former 43 U.S.C. 932 is available for use by the public under regulations adopted by the Department of Natural Resources unless the right-of-way has been transferred by the Department of Natural Resources to the Department of Transportation and Public Facilities in which case the right-of-way is available for use by the public under regulations adopted by the Department of Transportation and Public Facilities."

Essentially, if a road is listed on the "*State Highway System*"[112] and the right-of-way is

[112] Sometimes the terms "Alaska Highway System" and "State Highway System" get used interchangeably. See 11 AAC 51.990 Definitions "(14) "state highway system" or "Alaska Highway system" means all roads constructed,

based on an RS-2477 grant, DOT&PF has jurisdiction. All others are under the management of DNR. The management of certain roads based on an RS-2477 grant may also be assumed by a municipality with road powers.

RS-2477 vs. ANCSA 17(b) Easements: In order to avoid the controversy of acknowledging RS-2477 rights, BLM will generally superimpose an ANCSA 17(b) easement over what the State asserts as a valid RS-2477 right-of-way. This has occasionally led to conflict where the State and the public assert a greater width and scope of use than is provided by the relatively limited 17(b). A notable conflict is over the Klutina Lake Road off of the Richardson Highway near Copper Center which is referenced above in the Chronology of Select State Events. The dispute flared in 2002 when Ahtna, Inc. filed a trespass suit[113] against a fishing guide claiming that accessing the Klutina River for a commercial guide operation (even though the river could be entered from within the right-of-way) was beyond the scope of an RS-2477 ROW and a 17(b) easement. Ahtna argued at various times that the RS-2477 did not exist or that the 17(b) superseded any valid RS-2477 right-of-way. BLM responded[114] to an inquiry from the guide's counsel that the 17(b) easement was subject to any rights the State may have under RS-2477.[115] BLM also noted that the 17(b) easement was also intended for access to major waterways and public owned lands and considered the fishing guide's use to be appropriate.

Research and Evaluation: See 11 AAC 51.055 – Identification of R.S. 2477 rights-of-way (a) and (b). Essentially, the research and evaluation required to determine whether the RS-2477 grant has been accepted is similar to that required for section line easements (Section VI.) and public land orders (Section IV.). Many sources of information are available to aid in the establishment of the date that a trail was constructed or in public use. Primary sources include the previously mentioned Naske "Alaska Trails Database" and the 1973 "Alaska Existing Trail System" maps. While RS-2477 trail rights-of-way may no longer be a top priority of DOT&PF, the fact remains that a large number if not most were constructed or maintained under the jurisdiction of our predecessor agency, the Alaska Road Commission. DOT&PF still remains an important resource for historical trail research. To determine whether the land in question was unreserved at the time the grant was accepted, the BLM land status records must be reviewed.

Scope of Use: The State takes a fairly liberal view towards the scope of use of a highway easement. State courts have held that an RS-2477 may be used for "*any purpose consistent with public travel"* and that "*Alaska views the scope of an R.S. 2477 generously*".[116] Incidental uses such as a power line or communications line are also allowed under State law.[117] However, where an RS-2477 right-of-way crosses land subject to federal law, such as that owned by any federal agency or held in trust as a restricted native allotment, utility use will not be considered to be within the scope of a highway easement. In those cases the utility will have to obtain a

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managed, operated, or maintained by the Department of Transportation and Public Facilities." Some of these roads may be under a maintenance agreement with the local governing authority. The DOT regulations define the "Alaska Highway System" in 17 AAC 05.010 as a sub-set of the "State Highway System" defined in A.S. 19.10.020.

113 Ahtna, Inc. v. Josh Hughes and Randy Hughes d/b/a/King Fishers Perch, Case No. 3AN-02-05375

114 November 21, 2002 letter to Greg A. Miller from Henri R. Bisson, State Director, BLM

115 Alaska Department of Transportation, 88 IBLA 106 (1985)

116 See Dillingham and Puddicombe cases in following Case Law Summary.

117 See Fisher v. Golden Valley in Section Line Easement Case Law Summary.

permit from the underlying federal agency.

Vacation and Disposal of RS-2477 Rights-of-Way: See A.S. 19.30.410. Vacation of rights-of-way and 11 AAC 51.065. Vacation of easements (g) – (k) for statutory provisions regulations governing the vacation of an RS-2477 right-of-way. The legislature seemed to be concerned about a concerted effort towards a mass release of the public's RS-2477 rights and so ensured that the vacation process was rigorous. While a vacation plat may begin at a local platting authority, the joint jurisdiction of DNR and DOT&PF require the written approvals of both agencies on the final plat. As DNR essentially manages the regulatory process for these vacations, you might say that DOT&PF has more of a veto authority. To ensure that public access is not degraded or eliminated, the vacation statute and regulations establish a requirement that equal or better alternative means of access is available or will be provided through realignment.

d. Case Law Summary

Hamerly v. Denton, 359 P.2d 121 (Alaska 1961). Before a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be a public user for such a period of time and under such conditions as to prove that the grant has been accepted. The court defined public lands as: "*lands which are open to settlement or other disposition under the land laws of the United States. It does not encompass lands in which the rights of the public have passed and which have become subject to individual rights of a settler*." Once there is a valid entry the land is segregated from the public domain.

Mercer v. Yutan Construction Co., 420 P.2d 323 (Alaska 1966). Trial court was correct in finding that a grazing lease, expressly subject to later rights-of-way, did not reserve the leased land such that the government could not accept the RS-2477 grant and build a right-of-way.

Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 4110 (Alaska 1985). The public use establishing the RS-2477 grant must have a specific termini and a definite location. Occupation prior to application for formal homestead entry was insufficient to segregate land from the public domain. The scope of use includes any purpose consistent with public travel. An RS-2477 grants only a right-of-way which is synonymous with and easement.

U.S. v. Vogler, 850 F.2d 638 (9th Cir. September 28, 1988) The federal government had authority to regulate travel on a trail, even assuming it was an established right-of-way.

Shultz v. Dept. of Army, USA (Shultz I) 10 F.3d 649 (9th Cir. 1993) As long as the termini of the right-of-way are fixed the route in between need not be absolutely fixed. Right of access is the issue, not the route. An RS-2477 right-of-way comes into existence automatically when the public highway is established across public lands in accordance with the law of the state. Whether a right-of-way has been established is a question of state law. An RS-2477 right-of-way can be established by a positive act on the part of the appropriate public authorities or by public user for such a period of time and under such conditions to prove that the grant has been

accepted.

Shultz v. Dept. of Army, USA (Shultz II) 96 F.3d 1222 (9th Cir. 1996) Vacating Shultz I the court ruled that Shultz did not sustain his burden to factually establish a continuous RS-2477 route.

Fitzgerald v. Puddicombe 918 P.2d 1017 (Alaska, August 26, 1996) The extent of public use necessary to establish acceptance of the RS-2477 grant depends upon the character of the land and the nature of the use. It is not necessary that the precise path of the trail be proven. It is enough for one claiming an RS-2477 right-of-way to show that there was a generally followed route across the land in question.

Puddicombe v. Fitzgerald - Memorandum Decision (Alaska, Not Reported, August 25, 1999). These cases involved the claim of an RS-2477 trail across a US Survey on the Knik River. The Superior Court ruled against Fitzgerald and rejected their claims to the RS-2477 right-of-way. Citing Alaska RS-2477 cases Hamerly v. Denton, Dillingham Commercial Co. v. City of Dillingham and the 1993 9th Circuit decision Shultz v. Dep't of Army, the 1996 Supreme Court reversed the Superior Court and held that an RS-2477 right-of-way did exist across the Puddicombe property. The Supreme Court then remanded the case to the Superior Court for a "*determination of the precise location and extent of the right-of-way*". On November 22, 1996, the Superior Court of Judge Brian Shortell issued an order addressing the location of the right-of-way (following the existing driveway) and the width of the right-of-way (100-feet in width as per A.S. 19.10.015). Shortell determined the remand order was limited to a review of the location and width of the right-of-way and not scope of use. Also, in a foot note, it appears that not all Superior Court judges take reversal well…. "*Although I strongly disagree with the Supreme Court's factual and legal analysis in this case, the doctrine of civil disobedience is not available to me to remedy the injustice that results. I must apply the appellate court's orders and I will do so to the best of my ability.*" On February 12, of 1998, Judge Shortell issued an Order Supplementing November 22, 1996 Decision and Order on Remand. Judge Shortell decided that the Supreme Court really did intend for him to consider the scope (allowable uses) of the RS-2477 right-of-way. Shortell stated that "*Alaska views the scope of an R.S. 2477 generously*" and are not necessarily limited to the historical uses as they existing in 1976 when the RS-2477 grant was repealed. This Order was appealed by Puddicombe and the Supreme Court issued the Puddicombe decision in 1999 with the following notes:

"*The Ninth Circuit's 1996 decision vacating Schultz v. Department of the Army does not affect the analysis or result reached in Fitzgerald v. Puddicombe.*" ["*An RS2477 right-of-way is governed by state law. In rendering the Fitzgerald decision, the Supreme Court found an RS2477 right-of-way existed and defined Alaska common law on this issue. This is the common law of the state and it is this law which this court must apply, regardless of the outcome of Schultz.*"]

"*The scope of an RS 2477 grant is subject to state law. The superior court's reliance on AS 19.10.015 to determine the scope was not erroneous.*" [100-width of right-of-way]
"*The superior court did not err in holding that the right-of-way could be used for 'any purpose consistent with public travel.' This conclusion is directly supported by our decision in Dillingham."*

VI. Section Line Easements

A section line easement is an easement for highway purposes that generally runs along a surveyed section line established as a part of the rectangular survey system. The SLE may be based on a federal grant or a state statute which results in varying rules for establishment and varying widths. The combined effect could result in an SLE total width as follows:

- 0 feet – no valid SLE on either side of the section line
- 33 feet – a half chain or 2 rods – half of a federal SLE
- 50 feet – half of a state SLE
- 66 feet – a full federal SLE – 4 rods or 1 chain
- 83 feet – half federal/half state SLE
- 100 feet – full state SLE

Federal SLEs are based the same federal RS-2477 grant across unreserved public land that applied to trails. The difference is the acceptance of the trail grant was generally by user and followed the meandering path of the trail. A federal SLE applies the RS-2477 grant to surveyed section lines. State section line easements are applied to lands owned or acquired from the Territory of Alaska or now State of Alaska.

In 1969, the Department of Law issued formal guidance regarding the legal basis for Section Line Easements in Alaska.[118] This opinion is still the current official statement on SLEs. The 1969 opinion also overruled a previous 1962 Attorney General's Opinion[119] that had concluded that the 1923 Legislature's establishment of SLEs did not constitute acceptance of the RS-2477 grant. Essentially the 1962 opinion voided federal SLEs. As a result of the 1962 opinion, it appears that the Commissioners of Highways and Public Works jointly issued and recorded a document[120] that intended to explicitly accept the RS-2477 grant across unreserved federal lands and establish federal SLEs. However, this document went a step too far by asserting easements not only along section lines, but "*half-section*" lines or those lines that run through the center of a section from quarter corner to quarter corner and applying the 100-foot width to all section line easements. [121] This error was recognized in the summer of 1979 in which the Attorney General's Office recommended that the Commissioners of DOT&PF and DNR would jointly execute and record a document in all recording districts that intended to extinguish all purported "*half-section*" line easements and remove any cloud on title that the

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118 1969 Opinions of the Attorney General No. 7 dated December 18, 1969 entitled Section Line Dedications for Construction of Highways

119 1962 Opinions of the Attorney General No. 11, dated July 26, 1962 entitled Section Line Dedications; An interpretation of Ch.19, SLA 1923, Ch. 123, SLA 1951 and CH. 34, SLA 1953.

120 Acceptance of Unreserved Federal Lands for Highway Purposes, Dated October 2, 1962. For an example of this document see Book 14/ Page 37, Recorded 10/19/62, Bethel Recording District.

121 "*It is declared that all section and half-section lines in the State of Alaska are public highways. The width of these highways is 50 feet on each side of the section lines and half-section lines.*"

initial assertion may have created.[122] It is not clear if these recordings occurred.

a. Section Line Easement Elements

In order to determine the existence and width of a section line easement, it is necessary to evaluate up to four elements that authorize the right-of-way:

- Is the offer of a grant or statutory authority present?
- Is the acceptance of the offer present? (federal)
- Is the land unreserved? (federal)
- Have the public lands been surveyed?

The federal SLE is like an easement dedication on a plat. It is a two-part contract that requires both an "*offer*" of a grant as well as an "*acceptance*" on behalf of the public. So let's start with a chronology of authorities:

July 26, 1866: The 1866 Mining Law granted the "*right-of-way for construction of highways over unreserved public lands*." This is the "*offer"* of the federal RS-2477 grant.

April 6, 1923: The Alaska Territorial Legislature accepts the RS-2477 grant[123] completing the dedication. Before this date, federal section line easements could not exist in Alaska.

January 18, 1949: The territorial laws are re-codified and the acceptance of the RS-2477 grant gets misplaced. Laws that are not re-incorporated are considered repealed. You still have an offer on the table, but no acceptance of the federal RS-2477 grant. No new federal SLEs can be established. Established SLEs were not terminated by the repeal. Pre-existing section line highway easements remained valid even when the law was temporarily repealed between 1949 and 1953.[124]

March 26, 1951: The Territory enacts legislation[125] providing for 100-foot wide (territorial/state) SLEs, however, this law did not fix the accidental repeal of the RS-2477 grant that occurred on January 18, 1949. New federal SLEs still could not be established.

March 21, 1953: The Territorial legislature once again accepts the RS-2477 offer.[126] New federal SLEs can now be created.

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122 Declaration of Extinguishment of "Half-Section Line Easements", See memo from Thomas E. Meacham, AAG to Claude M. Hoffman, Chief Cadastral Engineer dated May 31, 1979

123 The 4-rod (66 foot) wide federal section line easement is based upon the offer of the RS-2477 grant and the initial acceptance of that grant on April 6, 1923 by the Territorial legislature (Ch 19 SLA 1923) for highway purposes.

124 Brice v. State, 669 P.2d 1311 (Alaska 1983).

125 On March 26, 1951, the legislature enacted § 1 Ch. 123 SLA 1951 which stated that "*A tract 100 feet wide between each section of land owned by the Territory of Alaska or acquired from the Territory, is hereby dedicated for use as public highways...*" Also see A.S. 19.10.010 Dedication of land for public highways.

126 The 1951 law was amended on March 21, 1953 by § 1 Ch. 35 SLA 1953, to include "*a tract 4 rods wide between all other sections in the Territory...*"

October 21, 1976: The offer of the RS-2477 grant was repealed by Title VII of the Federal Land Policy and Management Act.

Unreserved Land Status: The preceding covers the first 2 of the 4 elements – the offer and the acceptance of the federal grant or statutory authority. Once that is resolved we need to ensure that the federal public lands were unreserved during the period of "*offer and acceptance"* in order to meet the terms of the RS-2477 grant.

Acceptance of the RS-2477 offer can only operate upon "*public lands, not reserved for public uses*". If prior to the date of acceptance there has been a withdrawal or reservation by the federal government, or a valid homestead or mineral entry that leads to patent, then the particular tract is not subject to the section line easement.

Prior to the FLPMA repeal of RS-2477, the federal government reserved all lands in Alaska in anticipation of the Alaska Native Claims Settlement Act by issuing PLO 4582. The order withdrew all unreserved public lands in Alaska from all forms of appropriation and disposition under the public land laws. Commonly called the "*Land Freeze*", PLO 4582 was published on December 14, 1968 and went into effect upon publication. [127] While modified by several subsequent PLOs, PLO 4582 continued to be in effect until passage of the Alaska Native Claims Settlement Act on December 18, 1971. While repealing PLO 4582, ANCSA also withdrew vast amounts of land for native selections, parks, forests and refuges. A series of PLOs withdrew additional acreage between 1971 and 1972. PLO 5418 dated March 25, 1974 withdrew all remaining unreserved Federal lands in Alaska.

Lands must be surveyed: The 1969 AG Opinion regarding SLE's stated that *"The public lands must be surveyed and section lines ascertained before there can be a complete dedication and acceptance of the federal offer."* For a section line easement to become effective, the section line must be surveyed under the normal rectangular system. We look to the date of the official approval of the township survey to establish this fourth element. The 1969 AG opinion also stated that an easement can attach to a protracted survey, if the survey has been approved and the effective date has been published in the Federal Register. The location of the easement is however subject to subsequent conformation with the official public land survey and therefore cannot be used until such a survey is completed.

United States Surveys and Mineral Surveys are not a part of the rectangular net of survey. If the rectangular net is later extended, it is established around these surveys. There are no section lines through a U.S. Survey or Mineral Survey, unless the section line easement predates the special survey.

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[127] PLO 4582 (24 FR 1025) withdrawing unreserved lands in Alaska was subsequently modified by PLO Nos. 4589, 4668, 4669, 4676, 4682, 4695, 4760, 4837, 4865, 4884, 4885, 4940, 4962, 4988, 5081, 5108, 5145 and 5146. The first modification on April 4, 1969, PLO 4589 modified PLO 4582 to allow appropriations of lands for 23 U.S.C. 317 highway rights of way and material sites.

On large tracts such as State or Native selections, it is likely that only the exterior township boundaries were surveyed and monumented at 2-mile intervals, therefore, no section line easements could attach to interior section lines unless further subdivision surveys were carried out.

As most ANCSA lands were surveyed in this manner, it has been suggested that as a general rule, ANCSA lands are not subject to federal SLEs. In reality, the ANCSA corporations were also able to select and receive title to previously surveyed and unreserved federal lands that would be subject to federal SLEs if they have also met the "*offer*" and "*acceptance*" criteria of the RS-2477 grant.

b. SLE Table & Analysis

I have included a table that provides guidance regarding the application of SLE's and the relevant dates they were effective. This table was based on a similar one handed out in the BLM public rooms years ago to people interested in researching SLE status. I recently discovered a similar table prepared in 1958 that managed to confuse matters more than they already were by merging SLE dates of authorities with highway PLO dates of authorities.[128] As a part of DNR's 2001 11 AAC 51 Regulations project, they also included a text version of the research guide under 11 AAC 51.025. Section-line easements.

I have eliminated one inconsistency between my table and the DNR regulations by adopting December 14, 1968[129] as the effective end of the establishment of new federal 66-foot wide SLEs. Previously I had used March 25, 1974, the date of PLO 5418. Arguably, the many modifications to PLO 4582 between its effective date and the effective date of PLO 5418 may have left a small window of opportunity for an SLE to attach to a surveyed and unreserved section of federal land, but the odds were slim.

The other inconsistency that has been resolved was where the DNR regulations distinguish between SLEs that apply to surveyed Territorial or State lands from March 26, 1951 until June 30, 1960 and surveyed and un-surveyed lands owned by the State on or after July 1, 1960. Both categories would apply 50-foot SLEs but the latter also applies to un-surveyed lands. DNR's position is that from July 1, 1960 their regulations expressed intent to reserve 50-foot SLEs in all state land conveyances.[130] Whenever questions arise regarding the status or use of State SLEs, or where the outlined rules don't appear to fit, it is good advice to consult with DNR before taking action.

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128 Right of Way Easements in Alaska Lands, by Robert M. Redding, Right of Way Agent, September 30, 1958

129 PLO 4582, The Alaska "*Land Freeze*"

130 See Detailed Comments from other than General Public, DNR 2001 Regulations for 11 AAC 51 "*DNR's intent from July 1, 1960 onward was to reserve 50-foot section-line easements in all state land conveyances. DNR's regulations expressed this intent. It was reflected in DNR's "best interest findings" on proposed land sales, and DNR's land sale brochures told purchasers that section-line easements would be available for their access (although purchasers were typically warned that the easement would have to be surveyed before it could be developed)."*

Section Line Easement Determinations

In order for SLEs to exist, the survey establishing the section lines must have been approved or filed prior to entry on Federal lands or disposal of State or Territorial lands. The Federal lands must have been unreserved at some time subsequent to survey and prior to entry.

Surveyed Federal lands that were unreserved at any time during the indicated time period.	Effective Dates	Surveyed lands that were under State or Territorial ownership at any time during the indicated time period. (*Note: includes un-surveyed lands after July 1, 1960)*
none	April 5, 1923	None
66'	April 6, 1923 To January 17, 1949	66'
none	January 18, 1949 To March 25, 1951	none
none	March 26, 1951 to March 20, 1953	100'
66'	March 21, 1953 to December 14, 1968	
none	December 14, 1968 to Present	

Note: This table assumes the same land status on both sides of the section line. A review of the land status can result in total easement widths of 0', 33', 50', 66', 83', and 100'. A section line easement, once created by survey and accepted by the State, will remain in existence unless vacated by the proper authority.

SLE Analysis

1. Review the Federal Status Plat[131] and note the patent number or serial number of any action which affects the section line in question.

2. Using either BLM's land status database[132] or Historical Index determine the date of reserved status or the date of entry leading to patent.

3. From BLM's township survey plats[133] extract the date of plat approval.

4. Review the dates and track the status of the lands involved to determine if they were unreserved public lands at any time subsequent to survey approval. Particular attention should be directed towards any applicable Public Land Orders as well as homestead entries and mineral claim locations leading to patent. In order for federal section line easements to have been created, the lands must have been unreserved public lands at some time between April 6, 1923 and January 17, 1949, or between March 21, 1953 and December 14, 1968.

5. Using the date of entry or reservation and the date of survey plat approval, prepare an analysis of the data as follows[134]:

The provisions of ch. 19, SLA 1923, ch. 123, SLA 1951, ch. 35, SLA 1953, and AS 19.10.010 apply to the existence and width of any section-line easements on federal or state lands. The existence and width of any section-line easement that arose, varies in accordance with the statute in effect on the date of the creation of the easement. The following calculations of widths, as measured from the section line and derived from the relevant statutes, are provided below as guidance, but do not alter the legal existence, extent, or terms of any section-line easement:

a. "*for public lands in the Territory of Alaska before April 6, 1923, section-line easements did not arise by operation of statute;*" [No acceptance of grant]

b. *"for **surveyed** land owned by the Territory of Alaska at any time on or after April 6, 1923 through Jan. 17, 1949, or for surveyed federal land that was unappropriated and **unreserved** at any time during that period, the width identified in **ch. 19, SLA 1923** for any section-line easement is 33 feet;"* [All requirements met during period of initial grant acceptance]

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131 See BLM's Master Title Plat Online System http://sdms.ak.blm.gov/scanned_images/mtpindex.html

132 See BLM's Alaska Case Retrieval Enterprise System (ACRES) http://sdms.ak.blm.gov/acres/acres_menu

133 See BLM's Surveys – Online System http://sdms.ak.blm.gov/scanned_images/surveyindex.html. Federal MTPs and Survey plats can also be obtained from DNR's Alaska Land Records site at http://dnr.alaska.gov/Landrecords/

134 For consistency, the text of the 11 AAC 51.025 Section-line easements "Editor's Note" has been transcribed in italics. The bracketed comments and bold text formatting is added for clarification.

c. *"for any land owned by the Territory of Alaska at any time on or after January 18, 1949 through March 25, 1951, section-line easements did not arise by operation of statute;"* [Acceptance of grant repealed]

d. "*for federal land at any time on or after January 18, 1949 through March 20, 1953, section-line easements did not arise by operation of statute;"* [No acceptance of grant]

e. *"for any **surveyed** land owned by the Territory of Alaska or the state on or after March 26, 1951 through June 30, 1960, the width identified in **ch. 123, SLA 1951** for any section-line easement is 50 feet;"*[All SLE requirements met]

f. *"for **surveyed** federal land that was unappropriated and **unreserved** at any time on or after March 21, 1953 through December 14, 1968, the width identified in **ch. 35, SLA 1953** for any section-line easement is 33 feet;"* [All requirements met on date of second grant acceptance]

g. *"for **surveyed** or **unsurveyed** land owned by the state on or after July 1, 1960, the width, as identified in AS 19.10.010 , is 50 feet."*

There may be many other situations which will require evaluation and decision on a case by case basis. Any section line easement, once created by survey and acceptance by the State or Territory remains in existence, until vacated by the proper authority.

c. Odds & Ends

Date of Entry (Reserved Land Status): Of the required elements in evaluating a federal SLE, the most difficult is generally the determination of reserved land status. One of the most common reservations of public land in Alaska that must be considered when evaluating whether the SLE is valid is the homestead entry.

Often a review of the homestead abstract or historical index will provide a date of entry or application that is sufficiently distant from the other criteria (acceptance of grant and survey approval) that there is not much debate as to whether or not the RS-2477 right-of-way applies. But what happens when the dates are very close together? An example of this was a case off the Parks Highway between Nancy Lake and Willow. While this case involves an RS-2477 trail, the date of entry question seems to get asked more often during SLE evaluations.

Although the Blanchard v. Heimbuch[135] case never went to the Supreme Court, it provides a good review regarding homestead entry dates. The Heimbuchs filed an application for homestead entry of their property on May 26, 1961. The property had previously been entered by Dorius Carlson, who filed his application on June 11, 1959. On August 30, 1960, Carlson

[135] Blanchard v. Heimbuch, Case No. 3PA-94-814 CI, Memorandum and Order, September 1, 1995.

relinquished the homestead and Roy McFall filed his application on the same date. McFall relinquished his rights on May 26, 1961, the same date that the Heimbuchs filed their application. The Heimbuchs received a patent to their land on November 8, 1963.

So, does this mean there were no windows of unreserved status since June 11, 1959? The court noted that under Hamerly[136], homesteaded land reverts to public land status during gaps between homestead entries and can be evaluated by the court for character of use. The Blanchards, who argued for a valid RS-2477, testified that their predecessors used the road between 1959 and 1960 and that several "*gaps*" existed between entries where the lands reverted to public land status. The Blanchards assert that the lands are only withdrawn from public land status when BLM issues a "*notice of allowance*" authorizing the entry. The Heimbuchs, however, assert that the "*notice of allowance*" is irrelevant to public land status and that the key date is the filing of the application. Using the filing date there are no gaps between entries and therefore, no RS-2477 ROW. The Court noted that Hamerly considered the date of filing the application as the relevant date on which lands were withdrawn from the public domain. This is consistent with federal law, which states that patent, once issued, relates back to the date of filing the application for entry. The Court also stated that the issuance of the "*Notice of Allowance*" is but a ministerial duty which merely confirms the existence of a valid entry. The Court also considered whether a footnote in Shultz[137] which suggested that a claimant can acquire a right in federal land by physical entry without even so much as submitting an application would control over the application date. The Court ruled that the Shultz proposition directly conflicted with the Dillingham[138] decision and as the date of application was the operative date and there were no gaps in possession in which an RS-2477 ROW could attach, no right of way was created. Now if the application for the subsequent entry was filed prior to the relinquishment of the prior entry, I would agree that there would be no gap to evaluate whether an RS-2477 ROW could attach by public user. A homestead application may be considered the equivalent of an entry so far as the applicant is concerned based upon the application of the doctrine of "*relation back"*. When a patent is issued, and also when an entry is allowed, the rights of the applicant are deemed to go back to the date of the original application. The rule is applied to protect the applicant from intervening claimants.

We have taken the position that a federal SLE will immediately attach when the three conditions were met. For example, if a township survey was approved in 1915, and the land was unreserved up until 1930, we would say the SLE automatically attached on April 6, 1923 when the Territorial Legislature accepted the RS-2477 grant. To make the example more like the Blanchard's case, let's say the township survey was approved in 1915, a homestead entry occurred in 1922, the RS-2477 grant was accepted in 1923, and then in 1924, the homestead entry was relinquished and another homesteader filed for entry on the same date. We would argue that the land had to be in unreserved status for the second homesteader to enter, and at that moment, the SLE attached, even if the relinquishment and new entry happened in the same day. In the Girves[139] case, the Alaska Supreme Court found that only a "*positive act*" was needed by

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136 Hamerly v. Denton, - Alaska 1961
137 Shultz v. Department of the Army, U.S., - 9th Cir. 1993
138 Dillingham Comm. Co. v. City of Dillingham - Alaska 1985
139 Girves v. Kenai Peninsula Borough – Alaska 1975

the state or territory to establish an RS-2477 easement and the legislative acceptance of the RS2477 grant constituted that act. Actual construction is not required. There may have only been a few moments between relinquishment and the next entry, but that was a sufficient "*window*" to allow the SLE to come into effect.

So, getting back to Blanchard and Heimbuch, the question is why didn't the Superior Court consider whether a window opened between relinquishment and new application even if it happened on the same day? Perhaps the new applications were time stamped before the relinquishments leaving no window whereby the lands could be considered unreserved. Perhaps, as this was a case regarding an RS-2477 trail, the evidence of a public user would be necessary while that window is open and the prior public use cannot be considered. The answer is in Hamerly. Hamerly said that "*there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted*." Hamerly identified four windows of opportunity between relinquishments and entries. "*It was only during those periods of time that public use of the road could constitute acceptance of the grant made by 43 U.S.C.A. § 932. Use made of the road at other times when the land was the subject of existing homestead or homesite entries may not be considered."* The Hamerly court found that there was no evidence of public use during the times the land was not subject to an entry and therefore no RS-2477 right of way.

Section Line Easements Over Federal Lands: Previously I suggested consulting with DNR regarding SLE status or use where land may be subject to a State SLE. The same advice regarding federal agencies and land still under federal ownership would not be as beneficial. Whether the RS-2477 right-of-way is for a trail or SLE, the federal interpretation would be the same. The RS-2477 grant called for "*…construction of highways…*".[140] In the federal view, legislative acceptance without construction or use would be insufficient to complete the dedication. So for a practical purpose, there are no SLEs on federally owned lands available for use.

The State outlined its position in the previously mentioned 1969 AGO Opinion. The opinion cites the 1961 Alaska Supreme Court case Hamerly v. Denton: *"…before a highway may be created there must be either some positive act on the part of the state, clearly manifesting an intention to accept a grant, or a public user…."* The positive act was the legislative acceptance. On lands conveyed out of federal ownership and now subject to state law, an SLE can attach where no road has been constructed.

The same would hold true for federal trust lands such as native allotments. While they remain in restricted trust status, they would be subject to the federal interpretation of an RS-2477 that no SLE could be created by mere legislative acceptance of the grant. But what if the trust restrictions were released and the allotment sold to another private party? The parcel would become just another tract of land subject to state law and the SLE interpretations set out by our

[140] On October 23, 1986, the United States filed an Amicus brief in the case Alaska Greenhouses, Inc. v. Municipality of Anchorage, (Case No. A85-630 Civil). The brief stated that the United States has a strong interest in the property interpretation of a federal statute (R.S. 2477). *"To the extent the Alaska statute purports to accept rights-of-way without any actual or even planned construction, the purported acceptance exceeds the scope of the offer and is invalid."*

State Supreme Court. In a recent conversation with another surveyor, we considered an allotment that was bounded on the east and south by section lines and where use and occupancy was claimed in 1955. The approved survey of the section lines did not occur until 1960 and the official application for a native allotment was not filed until 1972. The restrictions on the allotment were released in 2006 when it was sold to a non-native. If the use and occupancy date did not precede the date of survey, we might find that once the trust restrictions were released and the SLE analysis could be reviewed according to state law, an SLE would exist. But what date will vest the rights for the initial allotment? Would it be the claimed date of occupancy and use or the date of application?[141] The current federal interpretation is clearly the date of occupancy and use which would result in a finding of no SLE. With the property now subject to state law, we might find a different result.

Partial Township Plats - In the basic federal SLE evaluation case, we determine whether the RS-2477 grant offer and acceptance was in place; whether the land was unreserved; and the date of the township survey approval. This may present a problem where the section in question is surveyed as a result of multiple partial township surveys. In a perfect world, all sections within a township would be surveyed and approved simultaneously. In the real world, it could conceivably take four separate partial township approvals to enclose a particular section. So the question arises: Assuming the offer and unreserved status are in favor of an SLE, does an SLE attach when an individual section line is surveyed and the township plat for that survey is approved? Or will no SLE attach until the entire section is enclosed by lines monumented and approved by a township plat? Logically, the focus and purpose of an SLE is on the specific section line as opposed to the completed exterior section boundary. The value of a highway easement along an individual section line is no greater by having the section fully enclosed by surveyed section lines. This suggests that an SLE would attach to a surveyed, monumented and approved section line even if it formed the boundary of a section that was not fully enclosed.

A question is raised in the DNR regulations at 11 AAC 51.025, which could be read to suggest that the critical element is the section of land rather than the section line. The DNR regulations state that "*For the purposes of calculating the widths for section-line easements, 'each section of land,' as used in ch.19, SLA 1923, is read to mean each section of surveyed land owned by the Territory of Alaska…"* In Ch 19 SLA 1923, the Territorial Legislature accepted the RS-2477 grant saying "*A tract of 4 rods wide between each section of land in the Territory of Alaska is hereby dedicated for use as public highways…"*

While this issue is not clearly addressed by the 1969 Opinions of the Attorney General No. 7 regarding SLEs, there is nothing in the Opinion that would suggest that SLEs could not attach to section lines within partially surveyed townships. In paragraph 7 of the Opinion it states that "O*ur conclusion that a right-of-way for use as public highways attaches to every section line in the State, is subject to certain qualifications: (b) The public lands must be surveyed and section lines ascertained before there can be a complete dedication and acceptance of the federal offer."*

[141] See discussion on Native Allotments in section IV.c.i. Public Land Orders/Practical Applications/Land Status regarding date of occupation and use vs. date of application for Native Allotments.

In discussions with other professionals, I have heard that opinions on the partial township survey issue are split down the middle. While I feel strongly that a partial survey does not prevent an SLE from attaching, we may have to wait until the issue is taken before the Court to know for certain.

Letters of Non-Objection for SLE Use – In 1970, on advice of the AGO and with DNR concurrence, the Department of Highways asserted jurisdiction over SLEs and issued Letters of Non-objection to persons wishing to use SLEs. On May 8, 1975 the department issued an LNO to Wrangell Mountain Enterprises, the appellant in Anderson v. Edwards and advised them that the SLE was 100-feet in width. (See following case law summary) It was suggested that the LNO resulted in the excessive clearing of the SLE by the appellant. A review of this policy concluded that the department had no specific statutory authority to regulate the use of SLEs (other than those occupied with roads that were a part of the State Highway System). From this point onward the Department of Law recommended that no LNOs be issued without their approval. In later years I found that letters regarding SLEs were again issued, but they were advisory as opposed to LNO's suggesting that DOT&PF asserted management authority over them. The letters advised that the SLEs were non-exclusive public easements for highway purposes, that public highway use would supersede any private individual use, and provided a warning regarding trespass onto adjoining properties and destruction of survey monuments.[142]

Merger of Title – If DOT&PF acquires a property in fee that is subject to an SLE, does "*Merger of Title*" principle terminate the SLE? Merger generally occurs when an easement interest and an underlying fee interest in the same property come into the hands of the same party. If the land was acquired in fee for a highway and the SLE is a highway easement, why wouldn't it merge? The answer is due to how the two interests are held. When DOT&PF acquires a property in fee, it is not generally "*dedicated*" to the public; it is just another parcel of real estate owned by the department. On the other hand, the SLE is considered to be a dedication that is held in trust for the public and so the two property interests are not actually "*owned*" by the same party. The SLE remains in effect until a positive act, the vacation process, terminates the easement. Generally there is no immediate need to vacate an underlying SLE within a DOT&PF highway corridor due to the department's authority to manage and control the highway system.

Unintended Dedication of an SLE – This goes to what could happen if you rely entirely on someone else to do your SLE evaluation. This sounds anecdotal but I have verbally confirmed it with one of the parties. A surveyor submits a subdivision plat to DOT&PF for review comments. The plat is returned with a red line comment along a section line that says "*section line easement?"* The surveyor interprets this comment to mean that there is an SLE along this line, and why didn't he show it? The plat is approved and recorded. There was no SLE along the line due as the criteria for the offer; acceptance and survey dates had not been met. But now it was shown on a subdivision plat as an SLE along with the typical Certificate of Ownership & Dedication that purported to "*…dedicate all streets, alleys, walks, parks, and other*

[142] Memo from Svobodny, AAG to Bodine, DOH dated October 21, 1976, Section Line Rights-of-Way and Letters of Nonobjection and letter regarding Ombudsman Complaint 76-0842 dated November 19, 1976 from Flavin, Ombudsman to Scougal, Commissioner, DOH.

open spaces to public or private use as noted." I don't know whether the SLE has ever been developed but the argument is that the subdivision dedicated a right-of-way referred to as a "*section line easement*", it just wasn't an existing SLE based on RS-2477.

Disposal of Excess DOT&PF Land – DOT&PF acquired a full parcel for a highway project. The west boundary of the lot was a section line and the lot was bounded on the west and south by DOT&PF roads. As the homestead entry that resulted in this parcel preceded the 1923 Territorial acceptance of the RS-2477 offer, there was no existing SLE. Once we set aside the area required for our right-of-way we determined that the remainder was independently developable and it was sold to an adjoining owner. Surprise: The parcel was not subject to an SLE when we bought it but it was when we sold it. We would have thought this had come up before but the fact is we don't own much excess land in fee much less enough that the parcel would be independently developable. But the fact remains that A.S. 19.10.010 applies to DOT&PF (…it is a DOT statute!) and other state agencies and not just DNR. So once DOT&PF purchased the property, a 50-foot wide SLE attached and remained intact as the parcel was conveyed to the private party. In fact, we didn't need another 50 feet of right-of-way as we had all the width we needed in the existing road rights-of-way. Should the owner desire to vacate the SLE, we would not object.

Scope of Use: In Fisher v. Golden Valley, the Alaska Supreme Court decided that a utility may construct a power line on an unused section line easement reserved for highway purposes under AS 19.25.010 Use of rights-of-way for utilities. Alaska Administrative Code 17 AAC 15.031 Application for Utility Permit on Section Line Rights-of-way provides for permitting by the Department of Transportation. While there is not a lot of guidance from the courts regarding scope of use within a highway easement, the statutory definition of "highway"[143] is broad and the historical use references in Fisher suggest that customary and traditional uses of the highway traveler (i.e. overnight camping, fishing, etc.) would be considered acceptable.

Vacation & Disposal: See Vacation and Disposal of RS-2477 Rights-of-Way in Section V. c. RS-2477 (Trails).

d. Case Law Summary

Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975). Held that Ch. 35, SLA 1953 was a positive act manifesting the territorial legislature's intent to accept the federal RS-2477 grant.

Anderson v. Edwards, 625 P.2d 282 (Alaska 1981). Where the state has not stepped in to regulate a section line right-of-way created via AS 19.10.010, a private citizen may use it, but only up to a width that is reasonable under the circumstances. Consequently, a citizen using a right-of-way who had cut too many trees to widen it must compensate the servient owner.

[143] A.S. 19.59.001 Definitions (8) "*'highway' includes a highway (whether included in primary or secondary systems), road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof…*"

Fisher v. Golden Valley Electric Association, 658 P.2d 127 (Alaska 1983). Utility use of an otherwise unused RS-2477 section line easement is allowed as an incidental and subordinate use of a highway easement. The case leaves room to argue for additional uses that are the progression and modern development of the same uses and purposes in the sense that a telecommunications line would be considered the technological advancement of the pony express rider who used the highways to convey messages.

Brice v. State, 669 P.2d 1311 (Alaska 1983). Pre-existing section line highway easements created under Ch. 19 SLA 1923, Section 1 remained valid even when the Territorial acceptance of the RS-2477 grant was temporarily repealed by Ch. 1 SLA 1949 between 1949 and 1953.

0.958 Acres, More or Less (Parrish) v. State, 762 P.2d 96 (1988), modified 769 P.2d 990 (1989). The taking of a section line easement for a controlled access facility did not result in a compensable loss of direct access. The difference in value between the existing section line easement interest and the fee estate that was taken was determined to be nominal.

VII. 1917 Territorial Dedication of Right-of-Way

The same Territorial legislation that established the Territorial Board of Road Commissioners also established a minimum width for a right-of-way. Section 13[144] provided that "*The Divisional Commission shall classify all public Territorial roads and trails in the divisions as wagon roads, sled road, or trails...The lawful width of right-of-way of all roads or trails shall be sixty feet (60).*"

The 1938 District Court case Clark v. Taylor[145] clarified that Ch. 36 SLA 1917 applied only to territorial roads built or maintained by the Territorial Board of Road Commissioners, either by itself or in cooperation with the federal Board of Road Commissioners for Alaska but it had no application to the roads constructed by the federal Alaska Road Commission.

While Annual Alaska Road Commission reports from 1917 to 1921 did indicate amounts of funds that the Territory was contributing toward projects, it appears that it is not until the 1922 that the ARC Annual report clearly segregated federal Alaska Road Commission projects from Territorial Alaska Road Commission projects.

144 Ch. 36, SLA 1917 Section 13

145 Clark v. Taylor, 9 Alaska 928 (4th Div. Fairbanks 1938)

VIII. Federal Patent Reservation ('47 Act)

Beginning in 1947, federal patents in Alaska included a reservation for highway rights-of-way which were non-specific as to their location and width. These rights-of-way were implemented through the filing of a document called a "*Notice of Utilization*".[146] The parcel acquired was generally described by metes and bounds.

a. Background

The Act of 1947 was one of three similar right-of-way reservations that are commonly noted in federal patents in Alaska. When researching title of lands along the highway system, you may find a document called a "*Notice of Utilization*". This notice declares the use of the right-of-way reservation provided by the Act of 1947. Of the three patent reservations, only the Act of 1947 specifically reserves rights-of-way for roads, however, the others are briefly mentioned due to the similarity of their intent.

The first patent reservation provided a right-of-way for "*Ditches and Canals*"[147] to be noted in all patents. At the time of enactment, the United States had no canals or ditches either constructed or in the process of construction. Congress was, however, concerned that disposal of land without such a reservation might render it difficult and costly to obtain the necessary rights-of-way when the work was undertaken. This act was eventually amended to require payment for land even if it was patented subject to the reservation.

The second patent reservation provided a right-of-way for the future construction of "*railroads, telegraph, and telephone lines*".[148] The Alaska Railroad Transfer Act of 1982[149] revoked 43 U.S.C. 975 in its entirety. The United States consequently has no remaining authority to utilize the 975d reservations. Section 609 of ARTA specifically states the requirement that future rights-of-way be obtained from current land owners under applicable law.

b. The '47 Act

The Act of July 24, 1947 applied only to lands which were entered or located after this date. This act reserved rights-of-way for roads, roadways, highways, tramways, trails, bridges, etc. Also commonly known as the "'47 Act".

> *"In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska, and in all deeds hereafter conveying any lands to which it may have reacquired title in said Territory not included within the limits of any organized municipality, there shall be expressed that there is reserved, from the*

146 The Act of July 24, 1947 (P.L. 229 - 61 Stat. 418) (48 U.S C. 321d)
147 Act of August 30, 1890. (26 Stat. 391 - 43 U.S.C. 945)
148 Act of March 12, 1914. (38 Stat. 30 - 43 U.S.C. 975d) "Alaska Railroad Act"
149 P.L. 97-468, Section 615(a)(i) (ARTA), January 14, 1983, 96 Stat. 2556

lands described in said patent or deed, a right-of-way thereon for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under the authority of the United States or any State created out of the Territory of Alaska. When a right-of-way reserved under the provisions of Sections 321a-321d of this title is utilized by the United States or under its authority, the head of the agency in charge of such utilization is authorized to determine and make payment for the value of the crops thereon if not harvested by the owner, and for the value of any improvements, or for the cost of removing them to another side, if less than their value."

The U.S. Senate Committee on Public Lands submitted a report leading to the passage of the "*'47 Act*" stating the following: "*The bill is designed to facilitate the work of the Alaska Road Commission. As the population of Alaska increases and the Territory develops, the Road Commission will find it increasingly difficult to obtain desirable highway lands unless legislative provision is made for rights-of-way. The committee believes that passage of this legislation will help to eliminate unnecessary negotiations and litigations in obtaining proper rights-of-way throughout Alaska.*"

This act provided for a taking of rights-of-way across land subject to the reservation without compensation except for the value of crops and improvements. The act only authorized the first take. Subsequent acquisitions required compensation for the land taken.

The Act did not specify right-of-way widths. However, a right-of-way of any width could be acquired over such lands by merely setting it by some sort of notice, either constructive or actual insofar as new roads are concerned, and since it did not limit the reservation to new roads only, it would also affect subsequent settlements on existing roads.

The Act of 1947 was repealed by Section 21 of the Alaska Omnibus Act.[150] The repeal became effective on July 1, 1959. This repeal only eliminated the insertion of the reservation into the patents of lands as of the July 1 date and lands patented or entered upon after this date are not subject to the act. Lands patented before the repeal were still subject to the reservation.

c. Right-of-Way Act of 1966

This act repealed the use of '47 Act reservations by the State of Alaska.[151]

"Section 1. PURPOSE. This Act is intended to alleviate the economic hardship and physical and mental distress occasioned by the taking of land by the State of Alaska, for which no compensation is paid to the persons holding title to the land. This practice has resulted in financial difficulties and the deprivation of peace of mind regarding the security of one's possessions to many citizens of the

150 P.L. 86-70, June 25, 1959 (73 Stat. 146).

151 HB 415 Ch. 92, 1966 - April 14, 1966

State of Alaska, and which, if not curtailed by law, will continue to adversely affect citizens of this state. Those persons who hold title to land under a deed or patent which contains a reservation to the state by virtue of the Act of June 30, 1932, ch. 321, sec.5, as added July 24, 1947, ch. 313, 61 Stat. 418, are subject to the hazard of having the State of Alaska take their property without compensation because all patents or deeds containing the reservation required by that federal Act reserve to the United States, or the state created out of the Territory of Alaska, a right-of-way for roads, roadways, tramways, trails, bridges, and appurtenant structures either constructed or to be constructed. Except for this reservation the State of Alaska, under the Alaska constitution and the constitution of the United States, would be required to pay just compensation for any land taken for a right-of-way. It is declared to be the purpose of this Act to place persons with land so encumbered on a basis of equality with all other property holders in the State of Alaska, thereby preventing the taking of property without payment of just compensation as provided by law, in the manner provided by law."

The Alaska Statutes also reflect the elimination of the '47 Act in AS 09.55.265 and AS 09.55.266. AS 09.55.265 Taking of property under reservation void states that "*After April 14, 1966, no agency of the state may take privately owned property by the election or exercise of a reservation to the state acquired under the Act of June 30, 1932, ch 320, sec. 5, as added July 24, 1947, ch.313, 61 Stat. 418, and taking of property after April 14, 1966 by the election or exercise of a reservation to the state under that federal Act is void. (2 ch 92 SLA 1966)*" AS 09.55.266 Existing rights not affected states that "*AS 09.55.265 shall not be construed to divest the state of, or to require compensation by the state for, any right-of-way or other interest in real property which was taken by the state, before April 14, 1966, by the election or exercise of its right to take property through a reservation acquired under the Act of June 30, 1932, ch 320, sec. 5, as added July 24, 1947, ch.313, 61 Stat. 418."*

d. Case Law Summary

Hillstrand v. State, 181 F. Supp 219 (1960) Once right-of-way has been selected and defined, later improvements, necessitating utilization of land upon which road is not already located, can only be accomplished pursuant to condemnation and compensation provisions.

Myers v. U.S., 210 F. Supp, 695 (1962) Where the United States issued patent which stated that lands conveyed were subject to a reservation for right-of-way for roads, and grantees accepted patents with full knowledge of reservation, grantees received and held titles subject to such reservation.

SOA v. Crosby, 410 P.2d 724 (1966) All lands disposed by BLM under the Small Tract Act (Act of June 1, 1938, 52 Stat. 609) which was made applicable to the State of Alaska in 1945 (Act of July 14, 1945, 59 Stat. 467) are not subject to the Act of 1947. This exception applies even if the small tract patent contains a '47 Act reservation.

IX. 44 LD 513

A 44 LD 513 notation is not a "*public*" right-of-way in the sense of an RS-2477 or a PLO right-of-way. However, as they are noted on the BLM master title plats and historical indices, the question often arises as to whether they are available for general use. A short discussion of their intended purpose is presented with the following excerpts from a June 15, 1979 letter from the Department of the Interior to the General Services Administration regarding the Haines-Fairbanks pipeline.

> *"Prior to the enactment of the Federal Land Policy and Management Act, there was no general statutory provision for the setting aside of rights-of-way for Federal agencies, and the Bureau of Land Management customarily employed the procedures set out in the 44 LD 513 (Page 513, Volume 44 of Land Decisions of the Department) Instructions to accomplish that purpose. The 44 LD 513 Instructions, issued in 1916 pursuant to the Secretary of the Interior's general management authority over the public lands, advised the General Land Office (now BLM) regarding procedures to: put the public on notice of the existence and location of Federal improvements on the public lands; and to protect those improvements when the public lands upon which they were constructed were conveyed out of Federal ownership. The Instructions directed the Bureau to make appropriate notations in the tract books to accomplish the first purpose and to insert exception clauses in the land patents to accomplish the second.*
>
> *The principle underlying the Instructions is that the construction of a Federal facility on public lands appropriates the lands to the extent of the ground actually used and occupied by that facility and for so long as the facility is used and occupied by the United States. When a federal agency no longer needed the facility, the agency would send a "Notice of Intention to Relinquish" to the BLM. BLM would then determine whether the lands would be turned over to the General Services Administration for disposal or returned to the public domain.*
>
> *Unlike withdrawals and reservations, 44 LD 513 notations do not continue in effect once the Federal Government's use and occupancy terminates. The notations draw the efficacy from the Federal use and occupation. They have no existence separate and apart from that Federal use and occupancy. Once the Federal use and occupancy terminates in fact, the notations have no segregative effect even though they still remain on the land records. Therefore, it is not possible for any Federal agency to transfer 44 LD 513 notations to third parties."*

Note: 44 LD 513 is very similar to an ILMA (DNR Interagency Land Management Assignment) at the federal level. It was intended to be between federal agencies and would be shown on the status plat. Although we have few of these interests in the Northern Region, I understand that many roads established by the Forest Service under 44 LD 513 in our Southeast Region were named in the 1959 Omnibus Act Quitclaim Deed.

A question arises as it appears several Forest Service roads in the Tongass Forest were protected by 44 LD 513 notations and ultimately named in the Omnibus Quitclaim Deed to the State of Alaska. If the 44 LD 513 did not create a property interest and could not be conveyed to a third party, what would be the effect of the Quitclaim Deed conveyance? Also, if the Quitclaim Deed only conveyed the interest held by the Department of Commerce, did it have the effect of conveying the interest established by the Forest Service? Both the Forest Service and the Bureau of Public Roads were branches of the Department of Agriculture. As a result, it appears that rights-of-way were not formalized for the forest roads. The Bureau of Public Roads established a presence in the Tongass Forest around 1920-21 and implemented the Forest Highway Program. Eventually, in the 1950's the BPR was transferred to the Department of Commerce. About the time of the transfer, Forest highways were being noted with BLM under 44 LD 513. While the authorities and conveyance of highway rights-of-way is less than crystal clear, DOT&PF has taken the position that the forest highways named in the Omnibus Quitclaim Deed were transferred and are now under the jurisdiction of the State of Alaska.[152]

X. Federal ROW Grants (BLM)

The combined holdings of the Bureau of Land Management and the U.S. Forest Service constitute approximately 25% of Alaska's lands. As a result, rural highway projects often require a right-of-way authorization to cross these federal lands. These authorizations represent easements for highway purposes. Once again, the issue of scope is important. Easements crossing lands where the servient owner is the federal government are subject to federal law. One difference in the scope of an easement crossing lands subject to federal law as opposed to lands subject to state law is the permitting of utilities within the highway right-of-way. Alaska law states that use of a highway easement by a utility is permissible subordinate use.[153] The federal interpretation would be that permitting of a utility does not fall within the scope of a highway easement and must be authorized under a separate permit issued by the federal land manager.

a. Title 23 Highway Easement Deed

FHWA is authorized to appropriate and transfer certain public lands owned by the United States and managed by the Bureau of Land Management (BLM) or the U.S. Forest Service (USFS) to DOT&PF under the 1958 Highway Act.[154] Through these authorizations, FHWA could appropriate federal lands and transfer them to the state highway department as a Federal Land Transfer.[155] Typically, in Alaska, deeds are prepared by DOT&PF and accompanied by a metes and bounds description and plats of the proposed right-of-way which are then to be

[152] January 19, 2007 email discussion with Rob Murphy, PLS, Chief, Right of Way, DOT&PF Southeast Region

[153] Fisher v. Golden Valley Elec. Ass'n, Inc., 658 P.2d 127 (Alaska, 1983)

[154] The Act of August 27, 1958, as amended, 23 U.S.C., Sections 107(d) and 317. Implementation through 23 CFR Sections 712.501-503.

[155] 23 CFR 710.601 Federal Land Transfer

forwarded to FHWA for execution by their Division Administrator. HEDs may be used for highway rights-of-way, material sites as well as maintenance stations and stockpile sites. The HED process between FHWA and BLM/FS is governed by a 1982 Interagency Agreement with BLM and a 1998 Memorandum of Understanding with the Forest Service. The intent of the Agreements was to reduce the BLM/FS involvement with State highway departments and to focus on FHWA as the administering agency. Both agreements provide that if BLM/FS have not responded to the FHWA request within a period of 4 months the requested right-of-way will be deemed appropriated by FHWA. Once construction has taken place, HED[156] grants are perpetual until vacated.

Lands administered by the Army, Air Force, Navy, Veterans Administration and other federal agencies must be applied for directly to those entities. Prior to the availability of FHWA issued Highway Easement Deeds, right-of-way grants were issued directly by BLM using the 1958 Highway Act authority.

b. FLPMA Title V Right-of-Way Grant

After the enactment of the Federal Land Policy and Management Act of 1976[157], Title V of the Act provided a process to acquire a grant of right-of-way across BLM lands for projects that are not federally funded or eligible for previously mentioned Title 23 process. Typically the proposed right-of-way is defined with a written description and plat, although in certain circumstances, the application may be for a general corridor to be followed with an as-built survey upon completion of construction.

As most of our projects in recent years have been federally funded, we have not often used the Title V process. In projects where we have applied for and received Title V grants[158], the term has been limited to a period of between 20 and 30 years. The initial term for these grants had been established dependent upon a "*reasonable*" period needed to accomplish the purpose of the authorization with a term generally not to exceed 30 years. If the servient estate owner continues to be BLM, there generally would be no problem in extending the grant. But if BLM has issued a patent for the lands to a private party, once the term of the grant ends, the road is without benefit of an authorized right-of-way. This loss of a right-of-way has occurred more than once on our projects.

In June of 2007, BLM issued a policy[159] that provides for the conversion of existing term right-of-way grants into perpetual easements under FLPMA when 1) the public land is being conveyed out of federal ownership 2) the holder is willing to provide reciprocal access to the U.S.; and 3) the grant is for State and Local Government highways and roads.

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156 Highway Easement Deed

157 Title V of the Federal Land Policy and Management Act of October 21, 1976 (P.L. 94-579) (90 Stat. 2776; 43 U.S.C. 1761)

158 AA-16679 – Glennallen Community Access Road; FF-80460 – Pilgrim Hot Springs Road; F-43687 – Wiseman Access Road

159 Final BLM Policy and Procedures for Issuance of "Long Term" Right –of-Way Grants and Easements Over Public Lands To be Transferred Out of Federal Ownership - June 28, 2007

XI. Alaska Department of Natural Resources Right-of-Way

Upon completion of the land conveyances from the federal government, the State of Alaska will own approximately 28 percent of the land in Alaska. As with federal lands, rural highway projects rely heavily upon right-of-way authorizations across land managed by DNR. All land interests issued by DNR to DOT must be returned to DNR when DOT's use has ended.

Generally, DNR receives no compensation for land value from DOT for issuing a land authorization. However, if the land to be crossed by the proposed right-of-way is subject to the ongoing litigation filed against the State regarding the management of School Trust lands, payment of the fair market value at the highest and best use of the parcel must be made to DNR and placed in escrow.[160]

a. Right-of-Way Permit

This process[161] is used when the required highway right-of-way crosses lands under the management of the Alaska Department of Natural Resources. DNR typically issues an "*Early Entry Authorization*" prior to construction and requires either an accurate right-of-way plan set defining the proposed parcel or an as-built Record of Survey of the facility before the final "*Right-of-way Permit*" is issued.

In 1994, as a result of concerns over management authority for third party uses, DNR and DOT executed a "*Cooperative Management Agreement*".[162] The Agreement established that DOT&PF has sole authority for management of highway rights of way and would be responsible for the issuance of third party uses except for those located within Legislatively Designated Areas and pipeline rights-of-way managed by DNR. In those cases, joint or concurrent authority would be used. Also, DOT could use all materials within a highway right-of-way but could not sell them to third parties.

b. Tidelands Permit

11 AAC 62.710 Tidelands Permits - Repealed 8/19/77

c. ILMA/ILMT

State property needed for transportation purposes is most commonly transferred from DNR to DOT by public easement (Right-of-Way Permit) and for highway construction and maintenance materials, by material sales contracts. An ILMA[163] will generally include total management authority except for those authorities specifically retained by DNR within the

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160 DNR Department Order 143, School Lands Litigation – Sections 16 & 36 in each surveyed township.
161 See A.S. 38.05.850. Permits
162 Cooperative Management Agreement between DNR and DOT dated April 18, 1994.
163 A. S. 38.05.027(a)

ILMA document. The ILMA represents a stronger management authority than that issued under a right-of-way or tidelands permit. Prior to the availability of ILMAs, DNR issued ILMTs or Interagency Land Management Transfers. ILMA/ILMTs have been used in the past for material sites, maintenance stations and airports.

d. Merger of Title

One question that comes up occasionally is whether easements granted for transportation purposes across federal lands based on a Public Land Order, BLM Grants or other federal authorization merge with the fee estate when BLM issues a Tentative Approval or Patent to the State of Alaska. Typically, upon conveyance of federal lands to the State of Alaska that contained previously established highway easements, BLM would issue a "*Merger of Title*" decision. In a 1983 memo[164] between DNR and DOT it was suggested that in such situations, the state would make a determination whether the purpose of the federal easement is still valid and in the best interest of the State, and if so an ILMA would be issued or some other action taken.

It has been held that merger does not occur when the common owner holds one interest as a trustee or in another representative capacity.[165] DOT&PF maintains a separate authority from DNR to acquire, manage, use and dispose of land interests.[166] This exception to the Alaska Land Act should protect against merger due to their separate representative capacities. DOT has successfully argued against merger[167] (at least in Superior Court) based on an assertion that the patent did not result in the burdens and benefits of the easement coming into a single ownership. The court ruled that beneficial rights in publically held easements are split into use and control rights. The right to control and manage the easement for the benefit of the public is located within the State, while the right to use the easement rests with the public. While the State's control includes the right to transfer, terminate, or dispose of the easement, legal title does not trigger the doctrine of merger for the purposes of a public easement.

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[164] November 10, 1983, Interagency Land Management Assignments, Tom Hawkins, Director, DNR to John Simpson, Acting Director, Standards and Technical Services, DOT&PF

[165] The Law Of Easements And Licenses In Land, Bruce & Ely 2001, § 10:27

[166] A. S. 38.05.030 (b)

[167] Order on Summary Judgment dated July 9, 2009, State of Alaska v. Offshore Systems – Kenai, Case No. 3KN-08-453 CI.

XII. Negotiated Acquisition (Interest & Platting)

The 1977 merging of the Department of Highways, the Department of Public Works and Division of Aviation transferred the powers to acquire and dispose of land previously held by the separate entities into DOT&PF.[168] I have referenced the Aviation branch of DOT&PF in this paper on highways because each airport is associated with an airport access road that may have been acquired as a part of an airport project.

As road rights-of-way acquired by DOT&PF are generally "*express*", that is, clearly stated and described in a deed[169], I won't go into detail as to how they are to be interpreted. Current parcel descriptions are typically metes and bounds with an attached plat or a description which refers to a portion of a recorded subdivision lot lying within the proposed right-of-way. The subdivision description also has an attached plat which provides the dimensions of the parcel. Older projects with uniform rights-of-way also made common use of strip descriptions.

In Section III, I stated that the bulk of our highway rights-of-way were easements as opposed to fee. This was based on the fact that most were based on Public Land Orders, '47 Act reservations, BLM grants and section line easements among other authorities. DOT&PF policy is to acquire rights-of-way in fee whenever possible. Rights-of-way acquired for an access-controlled facility must be acquired in fee simple.[170] As a general rule, rights-of-way acquired for urban and sub-urban projects where the operation of the facility severely limits the opportunity for permitted use by the servient estate will also be acquired in fee. Limited use facilities such as bike or pedestrian paths may be acquired as an easement interest. New rights-of-way for rural projects where the existing interest is an easement will often be acquired as an easement.

While it would seem prudent to acquire a fee interest for all acquisitions in order to avoid "*scope of use*" issues that arise with easements, there are a variety of reasons why acquisition of an easement may the best choice. First, as most of the existing rights-of-way are already easements, some level of uniformity can be made by acquiring highway easements for road for widening or re-alignment of the right-of-way. Secondly, platting authorities generally won't consider the public taking of an easement to constitute a "*subdivision*" which would trigger the requirement for a replat along with the associated increases in time and costs.

Under A.S. 40.15.900. Definitions (5), a "*subdivision (A) means the division of a tract or parcel of land into two or more lots by the landowner or by the creation of public access, excluding common carrier and public utility access;*"

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168 See A.S. 35.05.040 and A.S.19.05.040 both titled Powers of the Department and A.S. 2.15.070 Acquisition and disposal of property.

169 Not all rights-of-way acquired by the department were clearly stated or described. In the early 1960's the Department of Public Works acquired several blanket easements in the Goldstream valley across the claims of federal homestead entrymen. The description typically called for a 200' wide right-of-way for a road whose alignment was yet to be defined. In some cases these roads were never constructed leaving a cloud on the title.

170 A.S. 19.20.040 Acquisition of property and property rights.

When the Department of Natural Resources became the platting authority in the Unorganized Borough,[171] it was recognized that it did not make sense to apply the platting rules designed for private subdivisions to governmental bodies preparing right-of-way acquisition plats.[172] If acquisitions were in fee and met the definition of a "*subdivision*", then they were unique in that they were involuntary, having been acquired under threat of eminent domain, and did not serve to increase the density of land use. Also the sizes and shapes of the parcels acquired would generally not meet the criteria for conventional residential subdivision lots. The exception allowed under A.S. 40.15.380 allowed a condemning authority to acquire parcels by deed and subsequently submit a plat to DNR for approval. As the land owners are not required to sign the plat (the subdivision effectively having be accomplished by deed), the plat submitted to DNR is effectively a "*Record of Survey*". Note that when a fee acquisition requires compliance with the platting authority, there are no certificates of dedication or acceptance included. The plat represents the definition of real property interests acquired by the condemning authority and not the "*creation of public access*" by plat dedication.

Furthermore, DNR regulations to implement A.S. 40.15.380 state that "*The acquisition of a right-of-way or easement that does not divide a tract or parcel of land into two or more lots is exempt from 11 AAC 53.600 - 11 AAC 53.730.*"[173] We have found that the Fairbanks North Star Borough, the primary platting authority in the DOT Northern Region, uses a definition of "subdivision"[174] that is worded in a manner similar to A.S. 40.15.900 (5)(A). As a result, they do not consider the acquisition of easement interests to trigger platting approval as a subdivision.

To ensure that a condemning authority complies with the local platting authority when it is appropriate, A.S. 09.55.275, Replat Authority, required that the condemning authority obtain replat approval from the municipal platting authority for any property acquisition that resulted in a boundary change. The statute also required that "*The platting authority shall treat applications for replat made by state or local governmental agencies in the same manner as replat petitions originated by private landowners.*" This language did not recognize that replats for acquisition of rights-of-way are not similar to replats or subdivisions by private parties. We concluded that as the acquisition of an easement interest did not result in a boundary change, a replat approval under this statute would only be required if right-of-way was acquired in fee. This interpretation was determined to be unacceptable by the Alaska Supreme Court in 2002[175] when they ruled that "*the taking of an easement that is not coextensive with the landowner's property line and that functionally interferes with an owner's exclusive use creates a boundary change under A.S. 09.55.275.*"

In response to the Suzuki case and other condemnation actions involving replat compliance, the Legislature passed a bill in 2004[176] amending A.S. 09.55.275 such that it would

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171 Article 04 Platting in Areas Outside Certain Municipalities, A.S. 40.15.300 – 40.15.380

172 A.S. 40.15.380 Applicability to governmental bodies; right-of-way acquisition plats

173 11 AAC 53.650 Acquisition plats, Note: 11 AAC 53.600 – 730 are the regulations governing platting in the Unorganized Borough.

174 FNSB Title 17 Subdivisions - Chapter 17.20 Definitions: "Subdivision"

175 Municipality of Anchorage v. Suzuki, 41, P.3d 147 (Alaska, 2002)

176 CS For Senate Bill No. 382(CRA) am – 23rd Legislature – Second Session.

only apply to right-of-way acquisitions made in fee and eliminating the requirement that these subdivisions be treated in the same manner as those made by private parties. The Legislative intent language stated that "*The purpose of this Act is to confirm….the right of municipalities to regulate remnant parcels, while at the same time clarifying that the role is not intended to require the same substantive review or procedures for review of replats for the acquisition of property by the state or a municipality as required in replats for private landowner subdivisions or zoning reviews."*

For any individual parcel of right-of-way acquired by the Department, it is necessary to review the recorded document to determine the nature of the interest acquired.

XIII. Dedication (Statutory and Common Law)

Dedicated street rights-of-way are among the many types of existing interests that DOT might incorporate into a project, particularly in the urban areas. A dedication is an offer of land for public use by the owner and an acceptance of that offer by the public.

A statutory dedication is one made under and in conformity with the provision of a statute regulating the subject[177]. Generally, these rights-of-way are created by a formal platting action in which the offer to dedicate is evidenced by a "*certificate of dedication*" executed by the land owner and acceptance by the public is evidenced by a "*certificate of acceptance*" executed by an authorized official. "W*hen an area is subdivided and a plat of the subdivision is approved, filed, and recorded, all streets, alleys, thoroughfares, parks and other public area shown on the plat are considered to be dedicated to public use."*[178]

A common law or implied dedication occurs when the offer and acceptance arise by operation of law and the conduct of the parties. Dedication is a mechanism for transfer of real property which need not comply with the Statute of Frauds. There are, however, well-defined requirements for a valid dedication. *"Dedication is the intentional appropriation of land by the owner to some public use*."[179] In Alaska, there are two basic elements of common law dedication: an intent to dedicate on the part of the landowner, and an acceptance by the public[180]. In Alaska, the intent to offer to dedicate must be clear and unequivocal, and must be proven by the party attempting to assert the dedication.

Acceptance may occur through a formal official action or by public use consistent with the

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177 A.S. 29.40.070 Platting Regulation "....platting requirements that may include, but are not limited to, the control of ...(4) dedication of streets, rights-of-way, public utility easements and areas considered necessary by the platting authority for other public uses." also A.S. 40.15.030. Dedication of streets, alleys and thoroughfares. "When an area is subdivided and a plat of the subdivision is approved, filed, and recorded, all streets, alleys, thoroughfares, parks and other public areas shown on the plat are considered to be dedicated to public use."

178 A.S. 40.15.030 Dedication of streets, alleys, and thoroughfares.

179 Seltenreich v. Town of Fairbanks, 102 F.Supp. 319, 323 (D. Ak. 1952)

180 Swift v. Kniffen, 706 P.2d 296, 300-01 (Alaska); State v. Fairbanks Lodge No. 1392, Loyal Order of the Moose, 633 P.2d 1378, 1380 (Alaska 1981).

offer of dedication or by substantial reliance on the offer of dedication that would create an estoppel. Acceptance may also be implied from acts of maintenance by public authorities.[181] No acceptance is necessary when a public body having capacity to do so makes a formal dedication.[182] Federal townsite plats generally offer no words of dedication, however, the roads and alleys depicted upon them are considered to have left the jurisdiction of the federal government and are dedicated to public use.

Common law dedications often occurred in the Unorganized Borough prior to the establishment of the Department of Natural Resources as the Platting Authority.[183] While statutory dedications could be made in the Unorganized Borough by 1st and 2nd class cities that elected to exercise platting authority and by DNR with respect to state owned lands, formal acceptance of offers to dedicate for private lands were generally not available. Two scenarios were likely to exist. A private property was surveyed, platted and recorded. The plat would include a certificate of dedication executed by the owner. The acceptance of the dedication would be by public use of the rights-of-way as indicated by construction and maintenance. In the second scenario, the land owner might issue deeds without benefit of a plat or certificate of dedication. If the owner constructed access roads for the benefit of his grantees, this could represent an implied offer to dedicate.

In the early 1970's, DOT acquired right-of-way for the new Steese 4-lane project in Fairbanks. DOT incorporated what it considered to be public street rights-of-way created by the recording of a subdivision plat. The plat contained no offer to dedicate (except for sewer line easement) and there was no certificate of acceptance by the platting authority. The land owner filed an inverse condemnation case when DOT did not provide compensation for the street rights-of-way that were later incorporated into the project.[184] The court ruled against the State in stating that without a formal offer and acceptance there was no statutory dedication and there also was no construction or public use of the streets that could result in an implied common law dedication.

Once the State incorporates a street right-of-way validly created by dedication, the question is what ownership interest accrues to the State by constructing a road and assuming management of the facility? There are several types of rights-of-way for which DOT assumes management authority once they are included in our projects, but come without a formal conveyance by deed. These include RS-2477 trail and section line easements, federal patent reservations (Small Tracts), federal townsite streets and subdivision street dedications. In the early 1980's, a property owner adjoining the New Seward Highway right-of-way petitioned to vacation of a portion of a dedicated street right-of-way that lay within the DOT right-of-way vacated. DOT objected to the proposal due to a potential need for future projects. The Municipality of Anchorage Assembly approved the vacation over DOT's objections. The Court found that by showing the street dedication as part of the New Seward Highway right-of-way on the department's right-of-way maps, "*the State engaged in a 'formal official action' showing that it*

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181 Bruce & Ely, Law of Easements and Licenses in Land 4.06(3)

182 State of California v. U.S. , 169 F.2d 914, 921 (9th Cir. 1948)

183 A.S. 40.15, Article 4 – 11 AAC 53, Article 5. Platting Authority in the Unorganized Borough.

184 State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633, P.2d 1378, (Alaska, 1981)

was assuming control over the land for highway purposes."[185] As land or rights in land acquired for State highway purposes can only be vacated by DOT&PF, the Municipality's vacation could only release the Municipality's interest. Note: In order to protect its interest, it is important for DOT to record its right-of-way plans within a reasonable period.

XIV. Federal Patent Reservation (General)

Federal Patent Reservation (General) - Rights-of-way for roadways may be provided and specifically described as to location and width in the patents of certain types of federal conveyances. An example of such conveyances would be BLM Small Tracts parcels.[186] The Small Tracts surveys were essentially small parcel (2.5 acres) subdivisions based on the rectangular system as opposed to federal townsite subdivision surveys. The Small Tract survey did not provide for platted street rights-of-way similar to townsite plats but instead provided specific reservations for roadway and public utility purposes. These rights-of-way were typically 33-feet wide and located on one or more of the 4 sides of the tract allowing for up to a 66-foot wide right-of-way between tracts.

Identifying and locating an express right-of-way as reserved in a federal Small Tract patent is fairly straightforward. What gets more complicated in analyzing rights-of-way adjoining Small Tract parcels is that they may also be subject to a Public Land Order easement. Note that while a Small Tract patent might include a "'47 Act" reservation, the Alaska Supreme Court has found that they cannot be applied to a Small Tract parcel.[187] In a later case, the Supreme Court ruled that the specific Small Tract rights-of-way were intended for access streets serving interior lots while the PLO road right-of-way was for "local" roads. As these two authorities were not in conflict, a PLO could be applied to a Small Tract if the appropriate criteria were met.[188]

XV. Public Prescriptive Easements

The subject of Public Prescriptive Easements is well covered in a paper by Dan Beardsley[189] and so I will limit my comments to a view of how I have seen these interests handled in the past by DOT&PF.

The law of prescriptive easements is nearly identical to the laws of adverse possession,

185 Safeway, Inc. v. State, Dept. of Transportation and Public Facilities, 34 P.3d 336 (Alaska, 2001)
186 Small Tracts - Act of June 1, 1938 (52 Stat. 609)
187 See State of Alaska Dept. of Highways v. Crosby, 410 P.2d 724 (1966)
188 See State Dept. of Highways v. Green, 586 P.2d 595 (1978)
189 See Public Prescriptive Rights across Public Lands by Daniel W. Beardsley. An earlier version of this paper was included in the 1994 edition of the Alaska Society of Professional Land Surveyors *Standards of Practice* Manual and has been updated for several subsequent presentations.

except that prescriptive easements are based on use rather than full possession.[190] Alaska case law has established that a prescriptive easement can be acquired by the public across private lands. However, the ability of the State to acquire a right-of-way by this method requires a greater burden of proof due to a conflict with the constitutional provision that property not be taken without just compensation.[191] The Alaska statutes dealing with adverse possession[192] are also the statutory basis for prescriptive easements.

Occasionally when developing a titles & plans project for an existing right-of-way, we will find that portions of the public highway are without benefit of an interest established by one of the many other authorities listed in this paper. There are a variety of reasons why and how this may have occurred. If our research can support non-permissive public use of the private property in excess of 10 years, we will outline the physical footprint of the road ("*ditch to ditch*") on the plans and note that the existing right-of-way is based on an easement by prescription. We recognize that this assertion is just a "*claim*" of a prescriptive easement and can be contested by the owner of the servient estate. Generally, we find that the "*claim*" provides a sufficient interest to move ahead with project construction and that the risk that our claim may be contested is low. If we had reason to believe that a high value project could be at risk due to our assertion of an easement by prescription we would also have the opportunity to quiet title through a condemnation action.

DOT has a risk management process referred to as right-of-way "*Certification*" that is performed for each project advertised for construction. Before any project can move to advertising, the Regional ROW Chief must certify that all of the right-of-way required for construction of the project as designed either exists or has been acquired as a part of the project. Federally funded projects also require compliance with federal regulations that a sufficient interest in ROW has been acquired[193] and that the necessary ROW has been acquired prior to advertising.[194]

Generally, I have found that many claims of prescriptive easements are related to village roads or those classified "*local*". We identified many such roads as a result of an early1999 DOT&PF modified design procedure referred to as the "*Gravel to Pavement*" projects. The purpose of these projects was to limit the design effort on certain roads to grading and hard surfacing in order to extend the maintenance life for the minimum cost. This class of roads generally consisted of local roads maintained by DOT&PF but for which there was little if any mapping or title evidence to support our claim of a right-of-way. The level of research we were

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190 No Room For Squatters: Alaska's Adverse Possession Law – Jennie Morawetz – Alaska Law Review, Volume 28, Number 2, December 2011 (Duke Law School)

191 Ault v. State, 688 P.2d 951, 956, (1984) "Because of the obvious tension between state's ability to acquire land by adverse possession and constitutional prohibition against state's taking private property without just compensation, it is appropriate to narrowly view circumstances under which state may acquire property by adverse possession and, for such purposes, good faith should be defined as honest and reasonable belief in validity of the title."

192 A.S. 09.45.052 Adverse Possession and A.S. 09.10.030 Actions to recover real property in 10 years.

193 23 CFR §1.23(a) in that a right-of-way acquired by the state shall be "*of such a nature and extent as are adequate for the construction, operation and maintenance of a project.*"

194 23 CFR §635.309(c)(1), (2) & (3)

able to perform was also limited to a review of in-house and other public records. Rarely was a survey performed for these projects. Our risk assessment for advancing the "*certification*" of right-of-way for advertising was based on documented public maintenance & operation in excess of 10 years, no history of complaints and a clear note on the plans that no construction activity would take place beyond the existing footprint of the road.

Another category of projects that may have inadvertently led to the establishment of easements by prescription are those constructed under the 1960's "*Pioneer Access Road*"[195] program or the 1970's "*Local Service Roads & Trails*"[196] program. Both programs were state funded. While the program allowed the state to acquire right-of-way for projects, it was generally intended that the local government obtain any land interest required for construction of local service roads and trails. The lower level of scrutiny in determining whether a public right existed and a lack of oversight to ensure that one was acquired may have resulted in portions of roads being constructed without benefit of a public right-of-way.

Note that while the public may obtain an easement by prescription against a private owner, the reverse is not true. State land may not be acquired by adverse possession or prescription, or by any other manner except by conveyance from the State.[197] This prohibition also applies to other of instrumentalities of the State.[198] Similarly, a public prescriptive easement cannot be obtained across lands owned by the federal government, held in trust by the federal government for Alaska natives (allotments) or protected by specific federal legislation such as the Alaska Native Claims Settlement Act.[199]

In 2002 and 2003 the Alaska Legislature considered Senate Bills 309 and 93 respectively, which intended to repeal the concept of adverse possession referring to it as "*legal thievery*" of property or at least significantly reduce its effects on private property. Testimony from the Department of Law, utilities and title companies successfully persuaded the legislature that the impacts to roads, utilities and the loss of a mechanism to clear title between owners could be significant. The resulting bill maintained the ability of utilities and public transportation agencies to assert public prescriptive easements.[200]

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195 Article 01 Roads to Areas Rich in Mineral Resources - A.S. 19.30.020-051 - § 1 Ch 47 SLA 1959 and Ch 154 SLA 1960

196 Article 03 Local Service Roads & Trails - A.S. 19.30.111-251 - § 2 Ch 84 SLA 1971

197 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.*"

198 A.S. 9.45.052(a) - Alaska Mental Health Trust; A.S. 42.40.450 - The Alaska Railroad; A.S. 14.40.291(b)) - The University of Alaska; A.S. 44.33.755 - Municipal Trust property held by the Department of Commerce, Community and Economic Development.

199 Land conveyed by the federal government to a native individual or corporation pursuant to ANCSA is exempt from adverse possession claims so long as it is undeveloped, not leased and not sold. 43 U.S.C. § 1636(d)(1)(A)(i) (2006).

200 A.S. 9.45.050 (c) and (d)

XVI. Alaska Native Claims Settlement Act

The Alaska Native Claims Settlement Act[201] has provided two authorities for public access that have been occasionally incorporated into DOT&PF projects.

a. ANCSA 17(b) Easement

17(b) easements were reserved for public access across lands conveyed to Native corporations pursuant to Section 17(b) of the Alaska Native Claims Settlement Act. The easement reservations are cited in the Interim Conveyances and Patents to ANCSA Corporations[202] and graphically depicted on BLM 17(b) maps[203]. The intent was to provide linear easements for access across ANCSA lands to other public lands and site easements for changes in transportation mode such as 1 acre site easements at bodies of water and near air strips. These easements are specific as to width and use but may be ambiguous as to location unless they were established for an existing trail. Where no trail exists or the location is ambiguous, the location can be established by a mutual agreement between the easement manager (federal agency) and the land owner (ANCSA Corporation). Unless there has been a transfer of administration, BLM is the manager of the easement. Due to the limitations of use, management and width, these easements are rarely considered for use by DOT&PF projects. The only example of a 17(b) easement incorporated into a DOT project in the Northern Region was to allow for improvement of a 1 acre site easement as parking area for boat launching into the Tanana River at Manley Landing. (End of the Elliott Highway) Before a 17(b) easement could be transferred from BLM to DOT a Memorandum of Understanding was executed outlining the purpose, authorities and responsibilities for a 17(b) easement transfer of administration. Subsequently, a Transfer of Administration letter was issued for the specific easement to be transferred in reference to the MOU.

BLM's practice of imposing 17(b) easements rather than recognizing RS-2477 trail easements asserted by the State of Alaska has led to conflicting right-of-way claims. In a published Department of Law opinion[204] regarding Klutina Lake (Brenwick-Craig) Road right-of way near Copper Center on the Richardson Highway concluded that RS-2477 rights-of-way are not supplanted by overlapping ANCSA 17(b) easements. On April 1, 2008, Ahtna, Inc. filed a complaint in Superior Court claiming trespass by DOT&PF[205]. The Klutina Lake Road is included within the State Highway System Inventory[206] and DOT responded that it does not recognize the Brenwick-Craig Road right of way as restricted to a 17(b) easement and that any 17(b) easement is subject to a superior R. S. 2477 easement. This case is on-going.

Additional information regarding ANCSA 17(b) easements can be found at the BLM

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201 ANCSA - P.L. 92-203 (85 Stat. 688), 43 U.S.C. 1601. - Regulations 43 CFR 2650.4-7.

202 See BLM's Conveyance Document System at http://sdms.ak.blm.gov/scanned_images/patentindex.html

203 See BLM's 17(b) Easements Online at http://sdms.ak.blm.gov/scanned_images/esmtindex.html

204 http://www.law.alaska.gov/pdf/opinions/opinions_2002/02-015_665010201.pdf Scope of Klutina Lake Road Right-of-Way , Paul R. Lyle, AAG, July 17, 2002, File 665-01-0201

205 Ahtna, Inc. vs. Leo Von Scheben, Commissioner, DOT&PF, State of Alaska, Case No. 3AN-08-6337 Civil

206 Brenwick-Craig Road – CDS Route No. 195200 – 26.0 miles from Copper Center to Klutina Lake

Alaska website for 17(b) easements[207], BLM Departmental Manuals[208] and the BLM ANCSA 17(b) Easement Management Handbook dated June 2007.[209]

b. ANCSA 14(c)(3) Reconveyance

Section 14(c) of ANCSA says that a village corporation which gets title to its ANCSA land must then re-convey title to individuals and organizations who occupied land on December 18, 1971 when ANCSA was signed[210]. A village competing for a state or federally funded road project could increase the chances of having their project selected by providing a public right-of-way through the 14(c)(3) re-conveyance process.

While federal highway funds for other states are limited to those roads on the Federal-Aid Highway System, Alaska and Puerto Rico are in the unique position of being allowed to use federal highway funds for "*all*" public road construction. This resulted in a variety of small projects in the villages for landfill, water and sewage lagoon access. If the city where the project was incorporated and the village ANCSA corporation 14(c)(3) re-conveyance obligation had not yet been exhausted, DOT would facilitate the preparation and execution of a deed defining and conveying the lands necessary for the project right-of-way. This transaction would then later be identified in the federally mandated 14(c) survey and platting process.

For situations where there is not an incorporated municipality, the tracts of land that are defined in the 14(c) survey as intended for public use are conveyed from the ANCSA village corporation to the Municipal Land Trustee.[211] An important note is that the apparent street and road rights-of-way indicated on a 14(c) plat are generally not considered to be "dedicated" as you would expect to find on a subdivision plat in most other platting jurisdictions. These parcels of land are defined as tracts and conveyed in fee to the Municipal Land Trustee[212]. In order to use these tracts of land for a public project it will be necessary to either obtain a permit from the Trustee or to have the Trustee dedicate the right-of-way "*tracts*" to the public by platting action. It appears that one benefit of the "*tracting*" the apparent street rights-of-way as opposed to dedication is to allow the trustee to maintain greater control over the lands until such a time that they can be conveyed to an incorporated municipality.

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207 http://www.blm.gov/ak/st/en/prog/lands_realty/17b_easements.html

208 Department of the Interior Departmental Manual 601 DM 4 Administration of ANCSA 17(b) Easements

209 http://www.blm.gov/pgdata/etc/medialib/blm/ak/aktest/ims.Par.26550.File.dat/im_ak_2007_037_17bhandbook.pdf

210 14(c)(1) – Residences & Businesses; 14(c)(2) – Non-profits; 14(c)(3) – Present & Future public land uses; 14(c)(4) - Airports

211 See http://commerce.alaska.gov/dcra/planning/mltp/mltp.htm for a variety of resources regarding ANCSA 14(c)(3) and the Municipal Land Trustee Program.

212 State of Alaska, Department of Commerce, Community and Economic Development (DCCED)

XVII. Other Federal Agencies

DOT&PF may have reason to acquire a right-of-way interest from a variety of federal entities such as U.S. Fish & Wildlife, National Park Service, Military (Air Force, Army, Corps of Engineers & Coast Guard), General Services Administration, Federal Aviation Administration and others. These acquisitions make up a relatively small portion of the State's right-of-way inventory, use a variety of authorities and the procedures and issues change over time. As a result, there will be no additional discussion except for the following:

a. BLM Townsite Trustee

There are about 185 federal townsites in Alaska that are classified as either Presidential, Railroad or Trustee townsites. A Presidential townsite could be established in an area of anticipated development. An example of a Presidential Townsite would be the Tok Townsite. The Act of March 12, 1914 provided for railroad rights-of-way within the Territory of Alaska as well as the withdrawal of certain lands along the Alaska Railroad to be subdivided into lots as a Railroad Townsite. Nenana and Anchorage are examples of an Alaska Railroad Townsite. The most common is the Trustee Townsite[213] in which federal lands were surveyed and subdivided where people had already established a town. While most townsites files have been closed, the position of Townsite Trustee still resides within the BLM Alaska office.

While DOT and its predecessors have applied for and been issued townsite trustee deeds for new or re-aligned roads through a townsite, this discussion focuses on the status of the apparent dedicated street rights-of-way as shown upon the townsite plats. These plats did not include certificates of dedication or acceptance that is expected on plats of private subdivisions to create street rights-of-way. But for all intents and purposes and except in rare circumstances they are considered to be public street dedications.

Federal land decisions have held that adoption of a townsite plat and the sale of lots with reference to the plat will constitute an actual dedication to public use of the tracts or strips designated as streets or alleys.[214] An exception to this rule was the conveyance in fee of all streets and alleys within the Fairbanks Townsite to the City of Fairbanks.[215] In 1953, in response to a request from the City of Anchorage for a Trustee's Deed for townsite streets and public spaces, the BLM Chief Counsel issued an opinion that a patent or deed should not be issued as these areas should be considered dedicated to the public.[216]

While the trusteeship is active within a townsite and title is still vested in the U.S. Government, the predecessors of DOT could obtain a temporary permit from the Trustee for

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213 Section 11 of the Act of March 3, 1891 extended the townsite laws to the Territory of Alaska. The Act of May 25, 1926, allowed the trustee to issue restricted deeds for townsite lots to Alaskan Natives. Both authorities were repealed by FLPMA in October 21, 1976.

214 Gamble v. Sault Ste. Marie, 10 L.D. 375 (1890); O.P. Pesman, 52.L.D. 558 (1929)

215 Trustee's Deed dated March 21, 1951; Book 963, Page 55, FRD

216 Title to streets and alleys in the City of Anchorage, Alaska; patents for the streets and alleys should not be issued – March 16, 1953, Chief Counsel to Regional Administrator, Region VII

construction and upgrading of the townsite streets. Once the townsite is closed, the "*dedicated*" streets could be incorporated into a highway project without authorization from the Townsite Trustee.

b. Bureau of Indian Affairs

BIA grants or approves all actions that affect restricted lands held in trust for the benefit of the individual native land owner such as native allotments or restricted townsite lots.[217] BIA typically grants easements for highway rights-of-way. Some of these grants have been issued across un-surveyed allotments which can cause confusion when the final surveyed boundaries of the allotment do not conform to the original location. For airports where a more secure title is generally required, DOT has contracted to advance the survey and certification of certain allotments necessary for the project. DOT now works with BIA or BIA Realty Contractors[218] to secure an appropriate interest for our projects.

As with other federal lands crossed by an easement for highway purposes, permitting of utilities is not considered to be within the scope of a highway easement under federal law. DOT and its predecessors have issued permits to utilities within a highway easement that crossed an allotment. It did so by taking the position that the permit authorizes use with respect to DOTs interest and it is incumbent upon the permittee to secure other authorizations as required. It may also have issued the permit under the mistaken belief that unilateral permitting by DOT of a utility in a highway easement crossing federal lands was allowable. Separate from federal opinions on this issue, the Federal Highway Administration regulations clearly require that the utility obtain and comply with the terms of a permit issued by the federal agency having jurisdiction over the underlying land.[219]

A comprehensive discussion of the issue of utility trespass across Native Allotments related to utility permits within highway easements can be found in the 2004 report by the U.S. Government Accountability Office to Senator Ted Stevens.[220] The report reviewed 14 cases of utility trespass over Allotments by Copper Valley Electric Association.

c. US Forest Service - USFWS Special Use Permit:

These right-of-way permits are required for lands under the authority of the National Wildlife Refuge System Administration Act of 1966.[221]

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[217] See Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328). Regulations under 25 CFR Part 169.
[218] Public Law 93-638 Indian Self-Determination Act of 1975
[219] 23 CFR § 645.205(d)
[220] Alaska Native Allotments – Conflicts with Utility Rights-of-way Have Not Been Resolved through Existing Remedies; September, 2004; GAO-04-923
[221] Public Law 89-699 (80 Stat. 928, 16 U.S.C. 668dd. Regulations under 50 CFR Part 29.

XVIII. Right-of-Way Disposal & Vacations

a. Land Disposal Authorities

The procedure for a land interest disposal depends upon the authority by which it was created. In terms of Federal Highway rights-of-way, a "*Disposal means the sale of real property or rights therein, including access or air rights, when no longer needed for highway right-of-way or other uses eligible for funding under Title 23 of the United States Code.*"[222] Federal and state authorities governing disposals of land interests are set out in:

- Interests acquired under Alaska Statutes Title 2 – Aeronautics: *Sec. 02.15.070. Acquisition and disposal of property.* (Including access roads if acquired with FAA funding.)
- Interests acquired under Alaska Statutes Title 19 - Highways and Ferries authority: *Sec. 19.05.070. Vacating and disposing of land and rights in land; 17 AAC 10.100 – 130. Land Disposal.*
- Highway rights-of-way established under Public Land Orders, '47 Act patent reservation and easements by prescription: *A.S.19.05.070. Vacating and disposing of land and rights in land; 17 AAC 10.100 – 130. Land Disposal.*[223]
- Disposal of erroneously acquired real property – " *Whenever any real property, or interest therein, shall have been acquired by or transferred to the state through inadvertence or mistake in connection with highway purposes, the department shall prepare and submit a deed signed by the commissioner…" 17 AAC 05.020 Commissioner's deed.*
- Interests acquired under Alaska Statutes Title 35 - Public Works authority: *Sec. 35.20.070. Vacating of land or rights in land.*
- Interests acquired under Title 35 for Schools: *Sec. 14.08.151(b) – "…a regional school board may, by resolution, request, and the commissioner of the department having responsibility shall convey, title to land and buildings used in relation to regional educational attendance area schools.*"
- Interests acquired from DNR under Title 38: *Sec. 38.05.030(b) "…shall be returned to the management of the division of lands…"*
- Interests acquired with Title 23 U.S.C. funds: *23 CFR § 710.409 Disposals*
- Rights-of-way dedicated under 43 U.S.C. 932 (RS-2477 Trails) - *Sec. 19.30.410. Vacation of rights-of-way; 11 AAC 51.065 Vacation of Easements.*[224]
- Section Line Easements dedicated under 43 U.S.C. 932 or Sec. 19.10.010: *Sec. 19.30.010 ("If the highway is vacated…); 11 AAC 51.065 Vacation of Easements.*

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222 23 CFR § 710.105 Definitions (b)

223 See 17 AAC 10 Article 4 for Disposal by negotiated sale to an adjoining property owner; Disposal by competitive sale; Disposal through brokers; Land exchanges; and Land outside of right-of-way limits.

224 See additional discussion regarding disposal of RS-2477 Trail & Section Line easements in Section V. RS-2477 (Trails), c. DOT&PF Perspective of this paper.

- Rights-of-way dedicated under Alaska Statutes Title 29 – Municipal Government: *Sec. 29.40.160. Title to vacated area. & see municipal government platting ordinances in area of disposal.*
- Rights-of-way dedicated under Alaska Statutes Title 38 - Public Land: *11 AAC 51.065 Vacation of Easements.*
- Rights-of-way dedicated under Alaska Statutes Title 40 - Subdivisions and Dedications (DNR platting authority in unorganized borough): *11 AAC 51.065 Vacation of Easements.*[225]
- Other state owned public access easements managed by DNR: *11 AAC 51.065 Vacation of Easements.*
- Changes or disposal (break or relocation) of an access control line requires FHWA approval[226] and payment of fair market value[227].
- Alaska DOT&PF Right-of-Way Manual, Chapter 9 Property Management, Section 9.9 Excess Land (Resulting from a Highway Project) Management and Disposal.[228]
- DOT&PF Policy & Procedure No. 05.01.010 dated March 1, 2002 and titled ROW Acquisition, Management and Relocation provides additional guidance "…*when evaluating a request to use, to encroach upon, to lease, to vacate or dispose of an interest in land that is, owned or managed by the Department.*"
- Transfer of operating rights-of-way (Relinquishment): A *relinquishment means the conveyance of a portion of a highway right-of-way or facility by a State highway department to another government agency for continued transportation use.*"[229] While a relinquishment transfers ownership and management of a highway right-of-way to another agency or government entity, the land interest remains a highway right-of-way. A *relinquishment* is subject to the terms of *23 CFR § 620.202-203* and FHWA approval/concurrence according to the previously mentioned Stewardship Agreement.

b. Notes Related to Excess Land Disposals

No Appeal: A disposal of highway right-of-way under 17 AAC 10 is the only property management transaction for which there is no appeal. To ensure the integrity of the highway system, the decision to dispose or not dispose of right-of-way is considered to be entirely discretionary.

Payment of Fair Market Value: As highway right-of-way is considered to be a valuable asset of the State, and as the cost to acquire new right-of-way is so great, a disposal of highway right-of-way under 17 AAC 10 requires an appraisal and payment of fair market value if the disposal is in fee and 90% fair market value if the disposal is for an easement. This does not apply to disposals of dedications, RS-2477, and other rights-of-way not subject to A.S. 19.05.070

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225 See additional discussion regarding disposal of subdivision dedications incorporated into a DOT project in section XIII. Dedications of this paper.

226 September 22, 2009 FHWA/ADOT&PF Stewardship and Oversight Agreement

227 23 CFR § 710.403 Management (d)

228 The current version of the Right-of-Way manual effective August 30, 2011 can be found on-line at: http://www.dot.state.ak.us/stwddes/dcsrow/pop_rowmanual.shtml

229 23 CFR § 710.105Definitions (b)

or A.S. 35.20.070.

Agency Preference: Before land acquired in fee with federal funds can be disposed to a private party, 23 CFR § 710.409(b) requires that federal, state and local agencies be afforded the opportunity to acquire the excess land if it has the potential to be used for parks, conservation or recreation. The disposal can be made at less than fair market value if a reversionary clause is included to return the land should it no longer be used for public purposes. This provision is also stated in 17 AAC 10.100(b).

Default disposal to DNR: Land interests acquired by DOT&PF from DNR must be returned DNR when they are excess to the Department's needs. Generally, other excess land interests held in fee by the Department may be conveyed to DNR if they are willing to accept them. DOT's authority to dispose of State land interests is an exception to the Alaska Land Act under A.S. 38.05.030(d).

17 AAC 10 Disposal Regulations: These land disposal regulations at were established to deal with the disposal of "*highway*" rights-of-way and do not apply to land interests acquired under Title 2, Title 35, RS-2477 trail easements, section line easements, statutory or common law dedications by plat and others.

Disposal of Layered Interests: In certain circumstances where rights-of-way are layered (i.e. right-of-way by Public Land Order and plat dedication) the disposal process may require more than one procedure. (i.e. Commissioner's Deed of Vacation and a platting action).

Commissioner's Deed of Vacation or QCD: If the land interest is in fee, it must be conveyed to another party using a Commissioner's Quitclaim Deed. If the land interest is an easement, the Commissioner's Deed of Vacation simply releases the interest. Commissioner's QCDs have also been used to remove a cloud on title even when we did not believe a property was subject to a DOT&PF right-of-way interest. In order to assure the title company and land owners, we issued a QCD to clear title.

Vacations – To Whom It May Concern: Prior to 1988 the department released highway easements using a Commissioner's Deed of Vacation. No Grantee was named as no real property interest was being conveyed. The release returns the unencumbered use of the land to the owner of the fee estate by operation of law. Unfortunately, this was not good for the recording process given the difficulty in finding a property under the property description index or by the grantor index where the grantor is the "State of Alaska". Revisions to A.S. 40.17.030 and 11 AAC 06 in 1988 required the names and addresses of the Grantor and Grantee. This had the perceived effect of potentially creating a cloud on the title if the named Grantee was not in fact the owner of the fee estate. To satisfy the intent of the recording rules and not adversely disrupt the easement release process we started to add a disclaimer to the Deed of Vacation. The disclaimer states that *"The Grantee named is the ostensible owner and is named for recording indexing only. The unencumbered use of the land underlying the vacated easement reverts by operation of law to the owner of the fee estate, whomever that may be."*

Public Notice: Article VIII *§* of the Alaska Constitution requires public notice before the disposal of state land or an interest in state land. Lands returned to DNR do not require public notice as the lands are not leaving state ownership however, public notice in these cases might be warranted if the disposal may be controversial.

Reversion, Abandonment & Non-use: The Department takes the position that a public easement or less than fee right-of-way cannot be terminated by apparent abandonment or non-use. An affirmative act, in the form of a Commissioner's Deed of Vacation or Commissioner's Quitclaim Deed is required to release the interest. *"…the weight of authority indicates that mere non-use of a servitude, even for long periods of time, is not alone sufficient to result in an abandonment of the servitude."*[230] The state right-of-way interest cannot revert through adverse possession. "*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.*"[231]

No Disposal by Merger of Title: See Section XI. d. Alaska DNR Right-of-Way – Merger of Title in this paper.

XIX. Law on the Internet

With the advent of the internet there are a variety of legal resources available for the lay person. As with any material that may be outside your area of expertise: "*use at your own risk!*"

- All Alaska Supreme Court cases are now available from Westlaw's Alaska Case Law Service at http://government.westlaw.com/akcases/ .
- Department of Interior Web Search for IBLA, IBIA & Land Decisions as well as Solicitor's Opinions and others: http://www.oha.doi.gov:8080/isysquery/c7eb1d9c-67c3-475a-bd11-120fea2de274/21-24/list/
- DOI Office of Hearings and Appeals IBLA resources: http://www.oha.doi.gov/IBLA/findingIBLA.html
- Certain Alaska State Attorney General Opinions can be found at: http://www.law.state.ak.us/doclibrary/opinions-index/opinions_chron.html
- Alaska Statutes, Administrative Code, Legislation and Committee minutes can be found at the Alaska State Legislature website: http://www.legis.state.ak.us/basis/folio.asp
- The Federal Code of Regulations from 1996 to current year can be found at: http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR
- The U.S. Code (Statutes) from 1994 to current are at: http://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE
- A short term (1-day) subscription for Hein Online is available to access older versions of CFRs and federal law that may otherwise be difficult to find. http://home.heinonline.org

230 Kelley v. Matanuska Elec. Ass'n, Inc., Not Reported in P.3d, 2008 WL 4367550, September 24, 2008

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

XX. Appendix A - Public Land Orders

EXECUTIVE ORDER 9145

RESERVING PUBLIC LANDS FOR THE USE OF THE ALASKA ROAD COMMISSION IN CONNECTION WITH THE CONSTRUCTION, OPERATION AND MAINTENANCE OF THE PALMER-RICHARDSON HIGHWAY

ALASKA

By virtue of the authority vested in me as President of the United States, it is ordered as follows:

SECTION 1. Executive Orders No. 2319 of February 16, 1916, No. 5582 of March 18, 1931, No. 9035 of January 21, 1942,[1] No. 9085 of March 4, 1942,[2] withdrawing certain lands for townsite purpose, examination and classification, supply base and repair shop site, administrative and fire patrol station site, and other purposes, are hereby modified to the extent necessary to permit the reservation described in Section 2 of this order.

SECTION 2. Subject to all valid existing rights, there is hereby reserved for the use of the Alaska Road Commission, in connection with the construction, operation and maintenance of the Palmer-Richardson Highway, a right-of-way 200 feet wide, 100 feet on each side of the center line, beginning from terminal point Station 1369-42.8, in the NE¼ Section 36, T. 20 N., R. 5 E., Seward Meridian, and extending easterly and northeasterly over surveyed and unsurveyed lands to its point of connection with the Richardson Highway in the SE¼ Section 19, T. 4 N., R. 1 W., Copper River Meridian, Alaska, a distance of approximately 145 miles, as shown on the map, dated March 14, 1942, No. 1377260, on file in the General Land Office.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
April 23, 1942.

[F. R. Doc. 42-3667; Filed April 24, 1942; 2:59 p. m.]

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[1] 7 F.R. 457.
[2] 7 F.R. 1746.

Reference No. 653

Federal Register Data

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[Public Land Order 12]

ALASKA

WITHDRAWING PUBLIC LANDS PENDING DEFINITE LOCATION AND CONSTRUCTION OF CANADIAN-ALASKAN MILITARY HIGHWAY

By virtue of the authority vested in the President and pursuant to Executive Order 9146 of April 24, 1942, the public lands within the following described areas are hereby withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining laws, pending definite location and construction of the Canadian-Alaskan Military Highway:

TANANA RIVER AREA, ALASKA

BIG DELTA TO ALASKA-YUKON BOUNDARY

A strip of land 40 miles wide, 20 miles on each side of the following described center line, lying east of the Richardson Highway:

Beginning at Big Delta, on the Tanana River, at the mouth of Delta River;

Thence southeasterly up the center of Tanana River to the mouth of Chisana River;

Southeasterly up Mirror Creek to the Alaska-Yukon Boundary.

COPPER RIVER-MENTASTA-TOK RIVER AREA, ALASKA

GULKANA TO TANANA RIVER

A strip of land 40 miles wide, 20 miles on each side of the line of general route of the proposed highway, from and east of the Richardson Highway to the Tanana River, as shown on the map dated May 26, 1942 No. 1917065, on file in the General Land Office.

The areas described, including both public and nonpublic lands, aggregate approximately 8,320,000 acres.

[SEAL] HAROLD L. ICKES,
Secretary of the Interior.

JULY 20, 1942.

[F. R. Doc. 42-7356; Filed, July 30, 1942; 10:16 a. m.]

[Public Land Order 84]

ALASKA

WITHDRAWING PUBLIC LANDS FOR PROTECTION OF THE RICHARDSON HIGHWAY

By virtue of the authority vested in the President and pursuant to Executive Order No. 9146 of April 24, 1942, *It is ordered as follows:*

Subject to valid existing rights, the public lands in the following-described area are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, for protection of the Richardson Highway.

TANANA RIVER AREA, ALASKA

The area lying between the Delta and Tanana Rivers and the Richardson Highway within 20 miles of the town of Big Delta.

The area described, including both public and non-public lands, aggregates approximately 27,000 acres.

So far as the above-described area is affected, this order shall be subject to (1) the withdrawal for military purposes by Executive Order of May 24, 1905, (2) the withdrawal for military purposes by Executive Order No. 1557 of July 3, 1912, (3) the withdrawal for military purposes by Executive Order No. 2422 of July 14, 1916, (4) Air Navigation Site Withdrawal No. 105 of February 19, 1941, (5) Air Navigation Site Withdrawal No. 162 of June 25, 1941, and (6) the withdrawal for the Trans-Canadian Alaskan Railway by Public Land Order No. 32 of August 18, 1942.

ABE FORTAS,
Acting Secretary of the Interior.

JANUARY 28, 1943.

[F. R. Doc. 43-2028; Filed, February 8, 1943; 9:47 a. m.]

1943 FR. p. 1764

P.L.O. 270 – April 5, 1945

P.L.O.270
ALASKA

Reducing the Withdrawal made
by P.L.O.12 of July 20,1942

Whereas,PLO.No.12 of 7/20/42, #653
withdrew,pending the definite
location and construction of
the Canadian-Alaska Military
Hwy.,a strip of land in Alaska
40 miles wide,20 miles on
either side of a center line
extending from Big Delta to
the Alaska-Yukon Boundary,
and 20 miles on either

side of a center line extending from a point near Gulkana to the Tanana River; and

Whereas, the highway has been definitely located, and constructed in approximately its permanent location:

Now, therefore, by virtue of the authority vested in the President, and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

The withdrawal made by the above-mentioned public land order is hereby reduced to a strip of land ten miles wide, five miles on either side of the right of way of the Canadian-Alaskan Military Highway as constructed from Big Delta to the Alaska-Yukon Boundary, and from its junction with the Richardson Highway, near Gulkana, to the Tanana River.

This order shall not otherwise become effective to change the status of the surveyed lands hereby released from the withdrawal until 10:00 a. m. on the sixty-third day from the date on which it is signed. At that time such lands shall, subject to valid existing rights, become subject to application, petition, location, or selection as follows:

(a) For a period of 90 days, commencing on the day and at the hour named above, the vacant, unreserved, and surveyed public lands affected by this order shall be subject to (1) application under the homestead laws, by qualified veterans of World War II, for whose service-recognition is granted by the act of September 27, 1944 (Public Law 434—78th Congress), subject to the requirements of applicable law, and (2) application under any applicable public land law, based on prior existing valid settlement rights and preference rights conferred by existing laws or equitable claims subject to allowance and confirmation. Applications by such veterans shall be subject to claims of the classes described in subdivision (2).

(b) For a period of 20 days immediately prior to the beginning of such 90-day period, such veterans and persons claiming preference rights superior to those of such veterans, may present their applications, and all such applications, together with those presented at 10:00 a. m. on the first day of the 90-day period, shall be treated as simultaneously filed.

(c) Commencing at 10:00 a. m. on the 91st day after the lands become subject to application, as hereinabove provided, any of the lands remaining unreserved and unappropriated shall become subject to such application, petition, location, or selection by the public generally as may be authorized by the public land laws.

(d) Applications by the general public may be presented during the 30-day period immediately preceding such 91st day, and all such applications, together with those presented at 10:00 a. m. on that day, shall be treated as simultaneously filed.

Veterans shall accompany their applications with certified copies of their certificates of discharge, or other satisfactory evidence of their military or naval service. Persons asserting preference rights, through settlement or otherwise, and those having equitable claims, shall accompany their applications by duly corroborated affidavits in support thereof, setting forth in detail all facts relevant to their claims.

Applications for these lands shall be acted upon in accordance with the regulations contained in § 295.8 of Title 43 of the Code of Federal Regulations (Circ. 324, May 23, 1914, 43 L. D. 254), to the extent that such regulations are applicable. Applications under the homestead laws shall be governed by the regulations contained in Parts 65 and 66 of Title 43 of the Code of Federal Regulations.

These lands are situated in the Anchorage and the Fairbanks, Alaska, land districts. Applications should be filed in the district land office having jurisdiction over the lands.

ABE FORTAS,
Acting Secretary of the Interior.

APRIL 5, 1945.

(F. R. Doc. 45-6903; Filed, Apr. 13, 1945; 9:42 a. m.)

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Page 1 of 4

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[Public Land Order 386]

ALASKA

REDUCING WITHDRAWAL OF PUBLIC LANDS ALONG ALASKA HIGHWAY AND OPENING RELEASED LANDS TO SETTLEMENT AND OTHER FORMS OF APPROPRIATION

By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

Public Land Order No. 84 of January 28, 1943, and Public Land Order No. 12 of July 20, 1942, as amended by Public Land Order No. 270 of April 5, 1945, are hereby revoked.

Subject to valid existing rights, including the rights of natives based on occupancy, and the provisions of existing withdrawals, the following-described lands are hereby withdrawn under the jurisdiction of the Secretary of the Interior from all forms of appropriation under the public-land laws, including the mining and mineral leasing laws, for highway purposes:

(a) A strip of land 600 feet wide, 300 feet on each side of the center line of the Alaska Highway (formerly the Canadian Alaskan Military Highway) as constructed from the Alaska-Yukon Territory boundary to its junction with the Richardson Highway near Big Delta, Alaska.

(b) A strip of land 600 feet wide, 300 feet on each side of the center line of the Gulkana-Slana-Tok Road as constructed from Tok Junction at about Mile 1319 on the Alaska Highway to the junction with the Richardson Highway near Gulkana, Alaska.

Subject to valid existing rights (including the rights of natives based on occupancy and the provisions of existing withdrawals), the following-described lands are hereby withdrawn under the jurisdiction of the Secretary of War from all forms of appropriation under the public-land laws, including the mining and mineral leasing laws, for right-of-way purposes for a telephone line and an oil pipe line with appurtenances:

(a) A strip of land 50 feet wide, 25 feet on each side of a telephone line as located and constructed generally parallel to the Alaska Highway from the Alaska-Yukon Territory boundary to the junction of the Alaska Highway with the Richardson Highway near Big Delta, Alaska.

(b) A strip of land 20 feet wide, 10 feet on each side of a pipe line as located and constructed generally parallel to the Alaska Highway from the Alaska-Yukon Territory boundary to the junction of the Alaska Highway with the Richardson Highway near Big Delta, Alaska.

(c) A tract of land containing 65 acres, situated on the north side of the Alaska Highway, to include the pumping plant and accessories at Pumping Station "I" Canol Project, more particularly described as follows:

Beginning at a point on the center line of the Alaska Highway opposite the pump house at Mile Station 1249.7, thence by metes and bounds:

Southeasterly along center line of Alaska Highway approximately 15 chains:
N. 48° E., 24 chains;
N. 42° W., 30 chains;
S. 48° W., 22 chains to center line of Highway;
Southeasterly along center line of Alaska Highway approximately 15 chains to point of beginning.

(d) A tract of land containing 60 acres, situated on the north side of the Alaska Highway, to include the pumping plant and accessories at Pumping Station "J", Canol Project, more particularly described as follows:

Beginning at a point on the center line of the Alaska Highway opposite the pump house at Mile Station 1288.6, thence by metes and bounds:

S. 40 32' E., 15 chains;
N. 49 28' E., 20.00 chains;
N. 40°32' W., 30.00 chains;
S. 49 28' W., 20.00 chains to center line of Highway;
S. 40 32' E., along center line of Alaska Highway approximately 15 chains to point of beginning.

(e) A tract of land containing 60 acres, situated on the north side of the Alaska Highway, to include the pumping plant and accessories at Pumping Station "K", Canol Project, more particularly described as follows:

Beginning at a point on the center line of the Alaska Highway opposite the pump house at Mile Station 1330.1, thence by metes and bounds:

S. 80°56' E., 15 chains;
N. 9 04' E., 20 chains;
N. 80 56' W., 30 chains;
S. 9°04' W., 20 chains;
S. 80 56' E., along center line of Alaska Highway approximately 15 chains to point of beginning.

(f) A tract of land containing 60 acres, situated on the north side of the Alaska Highway, to include the pumping plant and accessories at Pumping Station "L", Canol Project, more particularly described as follows:

Beginning at a point on the center line of the Alaska Highway opposite the pump house at Mile Station 1370.0, thence by metes and bounds:

S. 53° E., 15 chains;
N. 38° E., 20 chains;
N. 53° W., 30 chains;
S 38° W., 20 chains;
S. 53° E., along center line of Alaska Highway approximately 15 chains to point of beginning.

(g) A tract of land containing 60 acres, situated on the north side of the Alaska Highway, to include the pumping plant and accessories at Pumping Station "M", Canol Project, more particularly described as follows:

Beginning at a point on the center line of the Alaska Highway opposite the pump house at Mile Station 1409.5, thence by metes and bounds:

S. 58°29' E., 15 chains;
N. 31°31' E., 20 chains;
N. 58 29' W., 30 chains;
S. 31°31' W., 20 chains;
S. 58°29' E., 15 chains to the point of beginning.

(h) A tract of land containing 3.45 acres located on the northeast side of the Alaska Highway at Mile 1285, more particularly described as follows:

Beginning at a point at latitude 63°00' N., and longitude 141°47' W., indicated by a wood post 4" x 6" x 5', marked ROW, RM USR, from which point the center line of the Alaska Highway bears S. 57°54' W. 165 feet, thence by metes and bounds:

S. 57°54' W., 133 feet to point 32 feet from center line of the Alaska Highway;
S. 32°06' E., 500 feet parallel to and 32 feet from center line of the Alaska Highway;
N. 57°54' E., 300 feet;
N. 32°06' W., 500 feet;
S. 57°54' W., 167 feet to the point of beginning.

(i) A tract of land containing 3.45 acres located on the north side of the Alaska Highway at approximately Mile 1344.6, more particularly described as follows:

Beginning at a point 32 feet north of the center line of the Alaska Highway from which the southeast corner of the ACS Repeater Station Building bears north, 125 feet, thence by metes and bounds:

West, 350 feet;
North, 300 feet;
East, 500 feet;
South, 300 feet;
West, 150 feet to the point of beginning.

(j) A tract of land containing 3.45 acres located on the northeast side of the Alaska Highway at approximately Mile 1429, more particularly described as follows:

Beginning at a point from which the intersection of the center lines of the Alaska Highway and the Richardson Highway, latitude 64°02'57" N., longitude 145°45' W. bears S. 31°24' W., 32 feet, N. 58°36' W., 280 feet, thence by metes and bounds:

S. 58°36' E., 500 feet;
N. 31°24' E., 300 feet;
N. 58°36' W., 500 feet;
S. 31°24' W., 300 feet to the point of beginning.

Reference No. 811 (cont.)
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Subject to valid existing rights, including the rights of natives based on occupancy, and the provisions of existing withdrawals (including the withdrawal of a 60-foot strip along the Alaska-Yukon Territory boundary, made by Proclamation of May 3, 1912, 37 Stat. 1741), the following-described lands are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and the mineral leasing laws, for classification and survey:

ALASKA-YUKON TERRITORY BOUNDARY

A tract of land containing 800 acres situated on both sides of the Alaska Highway, adjacent to the International boundary between the United States and Canada, more particularly described as follows:

Beginning at a point on the International boundary between the United States and Canada 22.50 chains south of the center line of the Alaska Highway, between Mile Stations 1221 and 1222 thereof, in approximate latitude 62°52' N., longitude 141°00' W., thence by metes and bounds:

West 80 chains;
North 100 chains;
East 80 chains to a point on the International boundary;
South 100 chains along the International boundary to the point of beginning.

GARDINER CREEK

A tract of land containing 480 acres lying on both sides of the Alaska Highway at the crossing of Gardiner Creek, more particularly described as follows:

Beginning at a point in the center line of the Alaska Highway at Mile Station 1247, in approximate latitude 62°50' N., longitude 141°25' W., thence by metes and bounds:

S. 50° W., 40 chains;
N. 40° W., 80 chains;
N. 50° E., 60 chains;
S. 40° E., 80 chains;
S. 50° W., 20 chains to the point of beginning.

LAKEVIEW

A tract of land containing approximately 270 acres lying on both sides of the Alaska Highway in the vicinity of Mile Station 1257, more particularly described as follows:

Beginning in the center line of the Alaska Highway at Mile Station 1257.5, in approximate latitude 62°55' N., and longitude 141°40' W., thence by metes and bounds:

N. 68° E., 22 chains;
S. 22° E., 80 chains;
S. 68° W., 48 chains more or less to the east shore of a lake;
Northerly with the meanders of the lake shore, 91 chains more or less;
N. 68° E., 18 chains more or less to the point of beginning.

JUNCTION OF NORTHWAY ACCESS ROAD AND ALASKA HIGHWAY

A tract of land containing 160 acres at the junction of Northway Road and the Alaska Highway, more particularly described as follows:

Beginning at a point in the center line of the Alaska Highway, 20 chains southeasterly from the junction of Northway Road, near Mile Station 1265, in approximate latitude 63°3' N., and longitude 141°47' W., thence by metes and bounds:

Southwesterly, at right angles to the Alaska Highway, 20 chains;
Northwesterly, parallel to the center line of said highway, 40 chains;
Northeasterly, parallel to the first course of this description, 40 chains;
Southeasterly, parallel to the second course of this description, 40 chains;
Southwesterly, parallel to the third course of this description, 20 chains to the point of beginning.

LITTLE BEAVER CREEK

A tract of land containing approximately 40 acres lying on the south side of the Alaska Highway, more particularly described as follows:

Beginning at a point in the center line of the Alaska Highway 30 chains westerly from Mile Station 1269, in approximate latitude 63°05' N., and longitude 141°51' W., thence by metes and bounds:

Southerly at right angles to the Alaska Highway, 20 chains;
Westerly, parallel to the Alaska Highway, 20 chains;
Northerly, at right angles to the Alaska Highway, 20 chains;
Easterly, with the center line of the Alaska Highway, 20 chains to the point of beginning.

MIDWAY LAKE

A tract of land containing approximately 1070 acres lying on both sides of the Alaska Highway and bordering on the north shore of Midway Lake, more particularly described as follows:

Beginning at a point in the center line of the Alaska Highway at Mile Station 1293.4, in approximately latitude 63°15' N., and longitude 142°15' W., thence by metes and bounds:

North 20 chains;
S. 82° E., 115 chains more or less;
S. 50° E., 72 chains more or less;
N. 75° E., 125 chains more or less;
S. 39° E., 40 chains more or less;
Southwesterly, at right angles to the center line of the Alaska Highway and crossing the same at Mile Station 1289.75, 68 chains more or less to the north shore of Midway Lake;
Westerly, with the meanders of the north shore of Midway Lake, 235 chains more or less to a point due south of the point of beginning;
North 27 chains more or less to the point of beginning.

JUNCTION OF THE FORTY MILE ROAD AND ALASKA HIGHWAY

A tract of land containing 160 acres situated at the junction of the Forty Mile Road and the Alaska Highway, more particularly described as follows:

Beginning at a point on the center line of the Alaska Highway 20 chains easterly from its intersection with the center line of the road to the Forty Mile area, said intersection being 200 feet west from Mile Station 1306 on the Alaska Highway, thence by metes and bounds:

Southerly, at right angles to the Alaska Highway, 20 chains;
Westerly, parallel to the Alaska Highway, 40 chains;
Northerly, crossing the Alaska Highway at right angles, 40 chains;
Easterly, parallel to the Alaska Highway and crossing the Forty Mile Road, 40 chains;
Southerly, 20 chains, to the point of beginning.

TOK JUNCTION

A tract of land containing approximately 3840 acres situated at the junction of the Alaska Highway and the Slana-Tok Road and lying on both sides of said roads, more particularly described as follows:

Beginning at a point in the center line of the Alaska Highway at Mile Station 1317.75, in approximate latitude 63°21' N., and longitude 143°00' W., thence by metes and bounds:

Southwesterly, at right angles to the center line of the Alaska Highway, 160 chains;
Northwesterly, at right angles to the preceding course, 160 chains;
Northeasterly, parallel to the first course of this description, 240 chains;
Southeasterly, parallel to the second course of this description, 160 chains;
Southwesterly, parallel to the third course of this description, 80 chains to the point of beginning.

CATHEDRAL RAPIDS

A tract of land containing approximately 160 acres situated on both sides of the Alaska Highway, more particularly described as follows:

Beginning at a point in the center line of the Alaska Highway at Mile Station 1345.25, thence by metes and bounds:

Southwesterly at right angles to the center line of the Alaska Highway, 10 chains;
Southeasterly, approximately parallel to the center line of the Alaska Highway, 40 chains;
Northeasterly, crossing the center line of the Alaska Highway at right angles to the Tanana River;
Northwesterly, by the meanders of the Tanana River to a point which bears northeasterly from the point of beginning;
Southwesterly at right angles to the center line of the Alaska Highway to the point of beginning.

Reference No. 811 (cont.)
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JOHNSON RIVER

A tract of land containing 36.66 acres lying on both sides of the Alaska Highway and south of the Johnson River, more particularly described as follows:

Beginning at a point which bears N. 58°55' E. from Mile Station 1386, thence by metes and bounds:

S. 58°55' W., 21.22 chains;
N. 27°10' W., 21.67 chains to the Johnson River;
Thence by meanders of south bank of the Johnson River northeasterly approximately 25 chains to a point which bears N. 35°54' W. from point of beginning;
S. 35°54' E., 15.05 chains to the point of beginning.

ROBERTSON RIVER

A tract of land containing approximately 540 acres situated near the confluence of the Tanana and Robertson Rivers, lying on both sides of the Alaska Highway, more particularly described as follows:

Beginning at a point in the center line of the Alaska Highway at Mile Station 1351.1, in approximate latitude 63°29' N., and longitude 143°52' W., thence by metes and bounds:

West 40 chains;
North 80 chains;
East 87 chains more or less to the west bank of the Tanana River;
Southerly, with the meanders of the west bank of the Tanana River, 91 chains more or less to a point due east of the point of beginning;
West 24 chains more or less to the point of beginning.

BERRY CREEK

A tract of land containing 480 acres lying on both sides of the Alaska Highway at the crossing of Berry Creek, more particularly described as follows:

Beginning at a point in the center line of the Alaska Highway at Mile Station 1377.8, in approximate latitude 63°42' N., and longitude 144°17' W., thence by metes and bounds:

North 40 chains;
East 80 chains;
South 80 chains;
West 80 chains;
North 40 chains to the point of beginning.

MILE 1387

A tract of land containing approximately 685 acres lying on both sides of the Alaska Highway and bordering on the west bank of Tanana River near the confluence of Johnson River, more particularly described as follows:

Beginning at a point in the center line of the Alaska Highway at Mile Station 1387.25 in approximate latitude 63°44' N., and longitude 144°40' W., thence by metes and bounds:

S. 33° W., 35 chains;
N. 57° W., 80 chains;
N. 33° E., 100 chains more or less to the west bank of the Tanana River;
Southeasterly, with the meanders of the west bank of Tanana River, 83 chains more or less;
S. 33° W., 50 chains more or less to the point of beginning.

BUENA VISTA

A tract of land containing approximately 10 acres on the Alaska Highway, more particularly described as follows:

Beginning at a point on the northerly right-of-way line of the Alaska Highway, approximately at Mile Station 1389.6, in approximate latitude 63°44' N., and longitude 144°40' W., thence by metes and bounds:

Easterly and northerly along the right-of-way line of the Alaska Highway (165 feet from the center line thereof), 13.50 chains;
N. 59° W., 9.75 chains;
S. 2°30' W., 11.60 chains to the point of beginning.

BUFFALO CENTER

A tract of land containing approximately 5440 acres at the junction of the Alaska Highway and the Richardson Highway, on the east bank of Delta River, more particularly described as follows:

Beginning at a point in the center line of the Alaska Highway at Mile Station 1427, approximately in latitude 64°1' N., and longitude 145 41' W., thence by metes and bounds:

South 80 chains;
West 155 chains, more or less, crossing Jarvis Creek and Richardson Highway to the east bank of Delta River;
Northerly, with the meanders of the east bank of Delta River 334 chains, more or less, to a point on the bank of said river which is 240 chains in northing from the point of beginning of this description;
East 180 chains, more or less, crossing Richardson Highway to a point due north of the point of beginning of this description;
South 240 chains to the point of beginning.

CLEARWATER CREEK

A tract of land containing 480 acres lying on both sides of the Slana-Tok Road at the crossing of Clearwater Creek, more particularly described as follows:

Beginning at a point in the center line of the Slana-Tok Road at Mile Station [illegible] approximately in latitude 63°10' N., and longitude 142°11' W., thence by metes and bounds:

West 10 chains;
North 80 chains;
East 60 chains;
South 80 chains;
West 50 chains to the point of beginning.

MINERAL LAKES

An area of approximately 600 acres lying on both sides of the Slana-Tok Road and on Mineral Lakes, more particularly described as follows:

Beginning at a point in the center line of the Slana-Tok Road at Mile Station 37.2, approximately in latitude 62°56' N., and longitude 143°25' W., thence by metes and bounds:

North 75 chains;
East 60 chains;
South 100 chains crossing the Slana-Tok Road and Mineral Lake;
West 60 chains;
North 25 chains to the point of beginning

COBB LAKES

A tract of land containing 480 acres lying on both sides of the Gulkana-Slana Road, north of Cobb Lakes, more particularly described as follows:

Beginning at a point in the center line of Gulkana-Slana Road at Mile Station 59.75 from the Richardson Highway, approximately in latitude 62 43' N., and longitude 144 5' W., thence by metes and bounds:

South 30 chains;
West 80 chains;
North 60 chains;
East 80 chains;
South 30 chains to the point of beginning

MILE TWENTY-FIVE

A tract of land containing 300 acres lying on both sides of the Gulkana-Slana Road more particularly described as follows:

Beginning at a point in the center line of Gulkana-Slana Road at Mile Station 25 from the Richardson Highway, approximately in latitude 62°26' N., and longitude 144 56' W., thence by metes and bounds:

North 20 chains;
East 60 chains;
South 50 chains;
West 60 chains;
North 30 chains to the point of beginning.

GULKANA JUNCTION

A tract of land containing 160 acres lying on both sides of the Richarrison Highway, approximately one-half mile north of the Gulkana River, more particularly described as follows:

Beginning at a point in the center line of the Richardson Highway 20 chains south of its intersection with the center line of the Gulkana-Slana-Tok Road, thence by metes and bounds:

East 20 chains;
North 40 chains;
West 40 chains crossing the Richardson Highway;
South 40 chains;
East 20 chains to the point of beginning.

NORTHWAY

A tract of land lying on the south side of the Tanana River, more particularly described as follows:

Beginning at a point on left bank of Tanana River, opposite the mouth of Gardiner Creek, approximate latitude 62°50' N., approximate longitude 141°32' W., U. S. G. S. map, Topographic Reconnaissance Map Upper Tanana Valley 1922.

Thence S. 45° W., 10 miles;

Thence N. 55° W., approximately 22 miles, crossing Nabesna River to east bank of the Kaluina River;

Thence northwesterly following east bank of Kaluina to the south bank of the Tanana River;

Thence southeasterly upstream, following left bank of Tanana River to the place of beginning;

containing an estimated area of 325 sq. mi. (208,000 acres).

Reference No. 811 (cont.)
Page 4 of 4

Federal Register Data

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PLO No. 386
Date Signed: 7/31/47
Filed Date: 8/07/47

TANANA

A tract of land lying on the north side of the Tanana River, more particularly described as follows:

Beginning at a point on right bank of Tanana River, approximate latitude 63°23'40" N., longitude 143°40' W., U. S. G. S. map, Topographic Reconnaissance Map Upper Tanana Valley 1922, and about 10 miles by airline downriver from Tanacross Indian Village;

Thence northwesterly approximately 2 miles to the summit of the divide between the streams flowing westerly into the Tanana River and streams flowing northerly and easterly into Lake Mansfield drainage basin;

Thence northerly along said divide to the watershed between the tributaries of George Creek and the streams flowing into Lake Mansfield drainage;

Thence northeasterly along that divide to the watershed between Wolf Creek and the streams flowing into Lake Mansfield drainage;

Thence along the divide, between streams flowing into the Yukon River Drainage and those flowing into the Tanana River, to the watershed on the west of Porcupine Creek;

Thence southwesterly along said watershed to the right bank of the Tanana River, approximate latitude 63 24' N., longitude 142 56' W.;

Thence following the right bank of Tanana River westerly, down-stream, to the place of beginning.

This area includes the drainage basin on the north side of the Tanana River between the initial point and the western boundary of the Porcupine Creek Valley.

This order shall not otherwise become effective to change the status of the surveyed or unsurveyed public lands which are not continued withdrawn by this order until 10:00 a. m. on October 2, 1947. At that time, subject to valid existing rights (including the rights of the United States to any lands containing improvements owned by it, and the rights of natives based on occupancy), and the provisions of then existing withdrawals, the unsurveyed lands shall become subject to settlement and other forms of appropriation in accordance with the appropriate laws and regulations, and the surveyed lands shall become subject to application, petition, location, or selection as follows:

(a) *Ninety-day period for preference-right filings.* For a period of 90 days from October 2, 1947, to December 31, 1947, inclusive, the surveyed public lands affected by this order shall be subject to (1) application under the homestead laws or the small tract act of June 1, 1938 (52 Stat. 609, 43 U. S. C. sec. 682a), as amended, by qualified veterans of World War II, for whose service recognition is granted by the act of September 27, 1944 (58 Stat. 747, 43 U. S. C. secs. 279–283), subject to the requirements of applicable law, and (2) application under any applicable public-land law, based on prior existing valid settlement rights and preference rights conferred by existing laws or equitable claims subject to allowance and confirmation. Application by such veterans shall be subject to claims of the classes described in subdivision (2).

(b) *Twenty-day advance period for simultaneous preference-right filings.* For a period of 20 days from September 12, 1947, to October 1, 1947, inclusive, such veterans and persons claiming preference rights superior to those of such veterans, may present their applications, and all such applications, together with those presented at 10:00 a. m. on October 2, 1947 shall be treated as simultaneously filed.

(c) *Date for non-preference right filings authorized by the public-land laws.* Commencing at 10:00 a. m. on January 2, 1948, any of the surveyed lands remaining unappropriated shall become subject to such application, petition, location, or selection by the public generally as may be authorized by the public-land laws.

(d) *Twenty-day advance period for simultaneous non-preference right filings.* Applications by the general public may be presented during the 20-day period from December 12, 1947, to December 31, 1947, inclusive, and all such applications, together with those presented at 10:00 a. m. on January 2, 1948, shall be treated as simultaneously filed.

Veterans shall accompany their applications with certified copies of their certificates of discharge, or other satisfactory evidence of their military or naval service. Persons asserting preference rights, through settlement or otherwise, and those having equitable claims, shall accompany their applications by duly corroborated affidavits in support thereof, setting forth in detail all facts relevant to their claims.

Applications for these lands, which shall be filed in the proper district land office (at Fairbanks or Anchorage, Alaska), shall be acted upon in accordance with the regulations contained in § 295.8 of Title 43 of the Code of Federal Regulations (Circular No. 324, May 22, 1914, 43 L. D. 254). Applications under the homestead laws shall be governed by the regulations contained in Parts 65 and 66 of Title 43 of the Code of Federal Regulations and applications under the small tract act of June 1, 1938, shall be governed by the regulations contained in Part 257 of that title.

Inquiries concerning these lands shall be addressed to the district land office at Fairbanks, or Anchorage, Alaska.

Very little of the land restored by this order has been surveyed. The major part of the area is of a character unsuitable for agricultural purposes.

WILLIAM E. WARNE,
Assistant Secretary of the Interior.

JULY 31, 1947.

[F. R. Doc. 47-4713; Filed, Aug. 7, 1947; 8:45 a. m.]

Reference No. 957

Federal Register Data

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PLO No. 601
Date Signed: 8/10/49
Filed Date: 8/15/49

[Public Land Order 601]

ALASKA

RESERVING PUBLIC LANDS FOR HIGHWAY PURPOSES

By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

Executive Order No. 9145 of April 23, 1942, reserving public lands for the use of the Alaska Road Commission in connection with the construction, operation, and maintenance of the Palmer-Richardson Highway (now known as the Glenn Highway), is hereby revoked.

Public Land Order No. 386 of July 31, 1947, is hereby revoked so far as it relates to the withdrawal, for highway purposes, of the following-described lands:

(a) A strip of land 600 feet wide, 300 feet on each side of the center line of the Alaska Highway (formerly the Canadian Alaskan Military Highway) as constructed from the Alaska-Yukon Territory boundary to its junction with the Richardson Highway near Big Delta, Alaska.

(b) A strip of land 600 feet wide, 300 feet on each side of the center line of the Gulkana-Slana-Tok Road as constructed from Tok Junction at about Mile 1319 on the Alaska Highway to the junction with the Richardson Highway near Gulkana, Alaska.

Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway, 150 feet on each side of the center line of all other through roads, 100 feet on each side of the center line of all feeder roads, and 50 feet on each side of the center line of all local roads, in accordance with the following classifications, are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved for highway purposes:

THROUGH ROADS

Alaska Highway, Richardson Highway, Glenn Highway, Haines Highway, Tok Cut-Off.

FEEDER ROADS

Steese Highway, Elliott Highway, McKinley Park Road, Anchorage-Potter-Indian Road, Edgerton Cut-Off, Tok Eagle Road, Ruby-Long-Poorman Road, Nome-Solomon Road, Kenai Lake-Homer Road, Fairbanks-College Road, Anchorage-Lake Spenard Road, Circle Hot Springs Road.

LOCAL ROADS

All roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior.

With respect to the lands released by the revocations made by this order and not rewithdrawn by it, this order shall become effective at 10:00 a. m. on the 35th day after the date hereof. At that time, such released lands, all of which are unsurveyed, shall, subject to valid existing rights, be opened to settlement under the homestead laws and the homesite act of May 26, 1934, 48 Stat. 809 (48 U. S. C. 461), only, and to that form of appropriation only by qualified veterans of World War II and other qualified persons entitled to preference under the act of September 27, 1944, 58 Stat. 747, as amended (43 U. S. C. 279–284). Commencing at 10:00 a. m. on the 126th day after the date of this order, any of such lands not settled upon by veterans shall become subject to settlement and other forms of appropriation by the public generally in accordance with the appropriate laws and regulations.

OSCAR L. CHAPMAN,
Under Secretary of the Interior.

AUGUST 10, 1949.

[F. R. Doc. 49-6642: Filed, Aug. 15, 1949; 8:46 a. m.]

ALASKA

NOTICE FOR FILING OBJECTIONS TO ORDER RESERVING PUBLIC LANDS FOR HIGHWAY PURPOSES [1]

For a period of 60 days from the date of publication of the above entitled order, persons having cause to object to the terms thereof may present their objections to the Secretary of the Interior. Such objections should be in writing, should be addressed to the Secretary of the Interior, and should be filed in duplicate in the Department of the Interior, Washington 25, D. C. In case any objection is filed and the nature of the opposition is such as to warrant it, a public hearing will be held at a convenient time and place, which will be announced, where opponents to the order may state their views and where the proponents of the order can explain its purpose, intent, and extent. Should any objection be filed, whether or not a hearing is held, notice of the determination by the Secretary as to whether the order should be rescinded, modified or let stand will be given to all interested parties of record and the general public.

OSCAR L. CHAPMAN,
Under Secretary of the Interior.

AUGUST 10, 1949.

[F. R. Doc. 49-6641: Filed, Aug. 15, 1949; 8:46 a. m.]

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Reference No. 1138

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Date Signed: 10/16/51
Filed Date: 10/19/51

[Public Land Order 757]

ALASKA

AMENDMENT OF PUBLIC LAND ORDER NO. 601 OF AUGUST 10, 1949, RESERVING PUBLIC LANDS FOR HIGHWAY PURPOSES

By virtue of the authority vested in the President and pursuant to Executive Order 9337 of April 24, 1943, it is ordered as follows:

The sixth paragraph of Public Land Order No. 601 of August 10, 1949, reserving public lands for highway purposes, commencing with the words "Subject to valid existing rights", is hereby amended to read as follows:

Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway and within 150 feet on each side of the center line of the Richardson Highway, Glenn Highway, Haines Highway, the Seward-Anchorage Highway (exclusive of that part thereof within the boundaries of the Chugach National Forest), the Anchorage-Lake Spenard Highway, and the Fairbanks-College Highway are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved for highway purposes.

Easements having been established on the lands released by this order, such lands are not open to appropriation under the public-land laws except as a part of a legal subdivision, if surveyed, or an adjacent area, if unsurveyed, and subject to the pertinent easement.

OSCAR L. CHAPMAN,
Secretary of the Interior.

OCTOBER 16, 1951.

[F. R. Doc. 51-12674; Filed, Oct. 19, 1951; 9:02 a. m.]

Reference No. 1139

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SECRETARIAL ORDER No. 2665
Part Affected: Hwy Rights-of-Way
Date Signed: 10/16/51

Office of the Secretary

[Order 2665]

RIGHTS-OF-WAY FOR HIGHWAYS IN ALASKA

OCTOBER 16, 1951.

SECTION 1. *Purpose.* (a) The purpose of this order is to (1) fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior and (2) prescribe a uniform procedure for the establishment of rights-of-way or easements over or across the public lands for such highways. Authority for these actions is contained in section 2 of the act of June 30, 1932 (47 Stat. 446, 48 U. S. C. 321a).

SEC. 2. *Width of public highways.* (a) The width of the public highways in Alaska shall be as follows:

(1) For through roads: The Alaska Highway shall extend 300 feet on each side of the center line thereof. The Richardson Highway, Glenn Highway, Haines Highway, Seward-Anchorage Highway, Anchorage-Lake Spenard Highway and Fairbanks-College Highway shall extend 150 feet on each side of the center line thereof.

(2) For feeder roads: Abbert Road (Kodiak Island), Edgerton Cutoff, Elliott Highway, Seward Peninsula Tram road, Steese Highway, Sterling Highway, Taylor Highway, Northway Junction to Airport Road, Palmer to Matanuska to Wasilla Junction Road, Palmer to Finger Lake to Wasilla Road, Glenn Highway Junction to Fishhook Junction to Wasilla to Knik Road, Slana to Nabesna Road, Kenai Junction to Kenai Road, University to Ester Road, Central to Circle Hot Springs to Portage Creek Road, Manley Hot Springs to Eureka Road, North Park Boundary to Kantishna Road, Paxson to McKinley Park Road, Sterling Landing to Ophir Road, Iditarod to Flat Road, Dillingham to Wood River Road, Ruby to Long to Poorman Road, Nome to Council Road and Nome to Bessie Road shall each extend 100 feet on each side of the center line thereof.

(3) For local roads: All public roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.

SEC. 3. *Establishment of rights-of-way or easements.* (a) A reservation for highway purposes covering the lands embraced in the through roads mentioned in section 2 of this order was made by Public Land Order No. 601 of August 10, 1949, as amended by Public Land Order No. 757 of October 16, 1951. That order operates as a complete segregation of the land from all forms of appropriation under the public-land laws, including the mining and the mineral leasing laws.

(b) A right-of-way or easement for highway purposes covering the lands embraced in the feeder roads and the local roads equal in extent to the width of such roads as established in section 2 of this order, is hereby established for such roads over and across the public lands.

(c) The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.

SEC. 4. *Road maps to be filed in proper Land Office.* Maps of all public roads in Alaska heretofore or hereafter constructed showing the location of the roads, together with appropriate plans and specifications, will be filed by the Alaska Road Commission in the proper Land Office at the earliest possible date for the information of the public.

OSCAR L. CHAPMAN,
Secretary of the Interior.

[F. R. Doc. 51-12586; Filed, Oct. 19, 1951; 8:46 a. m.]

Reference No. 1238

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SECRETARIAL ORDER No. 2665
Part Affected: Hwy Rights-of-Way
Date Signed: 7/17/52

[Order 2665, Amdt. 1]

ALASKA

RIGHTS-OF-WAY FOR HIGHWAYS

The right-of-way or easement for highway purposes covering the lands embraced in local roads established over the public lands in Alaska by section 2 (a) (3) and section 3 (b) of Order No. 2665 of October 16, 1951 (16 F. R. 10752), is hereby reduced, so far as it affects the Otis Lake Road, to 30 feet on each side of the center line thereof over the following-described lands only:

SEWARD MERIDIAN

T. 13 N., R. 3 W.,
Sec. 21, N½SW¼ and SW¼SW¼.

OSCAR L. CHAPMAN,
Secretary of the Interior.

JULY 17, 1952.

[F. R. Doc. 52-8071; Filed, July 23, 1952; 8:47 a. m.]

Reference No. 1573

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SECRETARIAL ORDER No. 2665
Date Signed: 9/15/56
Filed Date: 9/20/56

Office of the Secretary

[Order 2665, Amdt. 2]

ALASKA

RIGHTS-OF-WAY FOR HIGHWAYS

SEPTEMBER 15, 1956.

1. Section 2 (a) (1) is amended by adding to the list of public highways designated as through roads, the Fairbanks-International Airport Road, the Anchorage-Fourth Avenue-Post Road, the Anchorage International Airport Road, the Copper River Highway, the Fairbanks-Nenana Highway, the Denali Highway, the Sterling Highway, the Kenai Spur from Mile 0 to Mile 14, the Palmer-Wasilla-Willow Road, and the Steese Highway from Mile 0 to Fox Junction; by re-designating the Anchorage-Lake Spenard Highway as the Anchorage-Spenard Highway, and by deleting the Fairbanks-College Highway.

2. Section 2 (a) (2) is amended by deleting from the list of feeder roads the Sterling Highway, the University to Ester Road, the Kenai Junction to Kenai Road, the Palmer to Finger Lake to Wasilla Road, the Paxson to McKinley Park Road, and the Steese Highway, from Mile 0 to Fox Junction, and by adding the Kenai Spur from Mile 14 to Mile 31, the Nome-Kougarok Road, and the Nome-Teller Road.

FRED A. SEATON,
Secretary of the Interior.

[F. R. Doc. 56-7583; Filed, Sept. 20, 1956; 8:45 a. m.]

Reference No. 1684

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PLO No. 1613
Date Signed: 4/07/58
Filed Date: 4/10/58

[Public Land Order 1613]

[2350(6)]

ALASKA

REVOKING PUBLIC LAND ORDER NO. 601 OF AUGUST 10, 1949, WHICH RESERVED PUBLIC LANDS FOR HIGHWAY PURPOSES, AND PARTIALLY REVOKING PUBLIC LAND ORDER NO. 386 OF JULY 31, 1947

By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952, and the act of August 1, 1956 (70 Stat. 898) it is ordered as follows:

1. Public Land Order No. 601 of August 10, 1949, as modified by Public Land Order No. 767 of October 16, 1951, reserving for highway purposes the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway and within 150 feet on each side of the center line of the Richardson Highway, Glenn Highway, Haines Highway, the Seward-Anchorage Highway (exclusive of that part thereof, within the boundaries of the Chugach National Forest), the Anchorage-Lake Spenard Highway, and the Fairbanks-College Highway, is hereby revoked.

2. Public Land Order No. 386 of July 31, 1947, so far as it withdrew the following-described lands, identified as items (a) and (b) in said order, under the jurisdiction of the Secretary of War for right-of-way purposes for a telephone line and an oil pipeline with appurtenances, is hereby revoked:

(a) A strip of land 50 feet wide, 25 feet on each side of a telephone line as located and constructed generally parallel to the Alaska Highway from the Alaska-Yukon Territory boundary to the junction of the Alaska Highway with the Richardson Highway near Big Delta, Alaska.

(b) A strip of land 20 feet wide, 10 feet on each side of a pipeline as located and constructed generally parallel to the Alaska Highway from the Alaska-Yukon Territory boundary to the junction of the Alaska Highway with the Richardson Highway near Big Delta, Alaska.

3. An easement for highway purposes, including appurtenant protective, scenic, and service areas, over and across the lands described in paragraph 1 of this order, extending 150 feet on each side of the center line of the highways mentioned therein, is hereby established.

4. An easement for telephone line purposes in, over, and across the lands described in paragraph 2 (a) of this order, extending 25 feet on each side of the telephone line referred to in that paragraph, and an easement for pipeline purposes, in, under, over, and across the lands described in paragraph 2 (b) of this order, extending 10 feet on each side of the pipeline referred to in that paragraph, are hereby established, together with the right of ingress and egress to all sections of the above easements on and across the lands hereby released from withdrawal.

5. The easements established under paragraphs 3 and 4 of this order shall extend across both surveyed and unsurveyed public lands described in paragraphs 1 and 2 of this order for the specified distance on each side of the centerline of the highways, telephone line and pipeline, as those center lines are definitely located as of the date of this order.

6. The lands within the easements established by paragraphs 3 and 4 of this order shall not be occupied or used for other than the highways, telegraph line and pipeline referred to in paragraphs 1 and 2 of this order except with the permission of the Secretary of the Interior or his delegate as provided by section 3 of the act of August 1, 1956 (70 Stat. 898), provided: that if the lands crossed by such easements are under the jurisdiction of a Federal department or agency, other than the Department of the Interior, or of a Territory, State, or other Government subdivision or agency, such permission may be granted only with the consent of such department, agency, or other governmental unit.

7. The lands released from withdrawal by paragraphs 1 and 2 of this order, which, at the date of this order, adjoin lands in private ownership, shall be offered for sale at not less than their appraised value, as determined by the authorized officer of the Bureau of Land Management, and pursuant to section 2 of the act of August 1, 1956, supra. Owners of such private lands shall have a preference right to purchase at the appraised value so much of the released lands adjoining their private property as the authorized officer of the Bureau of Land Management deems equitable, provided, that ordinarily, owners of private lands adjoining the lands described in paragraph 1 of this order will have a preference right to purchase released lands adjoining their property, only up to the centerline of the highways located therein. Preference right claimants may make application for purchase of released lands at any time after the date of this order by giving notice to the appropriate land office of the Bureau of Land Management. Lands described in this paragraph not claimed by and sold to preference claimants may be sold at public auction at not less than their appraised value by an authorized officer of the Bureau of Land Management, provided that preference claimants are first given notice of their privilege to exercise their preference rights by a notice addressed to their last address of record in the office in the Territory in which their title to their private lands is recorded. Such notice shall give the preference claimant at least 60 days in which to make application to exercise his preference right; and if the application is not filed within the time specified, the preference right will be lost. Preference right claimants will also lose their preference rights if they fail to pay for the lands within the time period specified by the authorized officer of the Bureau of Land Management, which time period shall not be less than 60 days.

Reference No. 1684 (cont.)

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PLO No. 1613
Date Signed: 4/07/58
Filed Date: 4/10/58

8. The lands released from withdrawal by paragraphs 1 and 2 of this order, which at the date of this order, adjoin lands in valid unperfected entries, locations, or settlement claims, shall be subject to inclusion in such entries, locations and claims, notwithstanding any statutory limitations upon the area which may be included therein. For the purposes of this paragraph entries, locations, and claims include, but are not limited to, certificates of purchase under the Alaska Public Sale Act (63 Stat. 679; 48 U. S. C. 364a–e) and leases with option to purchase under the Small Tract Act (52 Stat. 609; 43 U. S. C. 682a) as amended. Holders of such entries, locations, and claims to the lands, if they have not gone to patent, shall have a preference right to amend them to include so much of the released lands adjoining their property as the authorized officer deems equitable, provided, that ordinarily such holders of property adjoining the lands described in paragraph 1 of this order will have the right to include released lands adjoining such property only up to the centerline of the highways located therein. Allowances of such amendments will be conditional upon the payment of such fees and commissions as may be provided for in the regulations governing such entries, locations, and claims together with the payment of any purchase price and cost of survey of the land which may be established by the law or regulations governing such entries, locations and claims, or which may be consistent with the terms of the sale under which the adjoining land is held. Preference right claimants may make application to amend their entries, locations, and claims at any time after the date of this order by giving notice to the appropriate land office of the Bureau of Land Management. Lands described in this paragraph, not claimed by and awarded to preference claimants, may be sold at public auction at not less than their appraised value by the authorized officer of the Bureau of Land Management, provided that preference claimants are first given notice of their privilege to exercise their preference rights by a notice addressed to their last address of record in the appropriate land office, or if the land is patented, in the Territory in which title to their private land is recorded. Such notice shall give the claimant at least 60 days in which to make application to exercise his preference right, and if the application is not filed within the time specified the preference right will be lost. Preference right claimants will also lose their preference rights if they fail to make any required payments within the time period specified by the authorized officer of the Bureau of Land Management, which time period shall not be less than 60 days.

9. (a) Any tract released by Paragraph 1 or 2 of this order from the withdrawals made by Public Land Orders Nos. 601, as modified, and 386, which remains unsold after being offered for sale under Paragraph 7 or 8 of this order, shall remain open to offers to purchase under Section 2 of the act of August 1, 1956, supra, at the appraised value, but it shall be within the discretion of the Secretary of the Interior or his delegate as to whether such an offer shall be accepted.

(b) Any tract released by Paragraph 1 or 2 of this order from the withdrawals made by Public Land Orders Nos. 601, as modified, and 386, which on the date hereof does not adjoin privately-owned land or land covered by an unpatented claim or entry, is hereby opened, subject to the provisions of Paragraph 6 hereof, if the tract is not otherwise withdrawn, to settlement claim, application, selection or location under any applicable public land law. Such a tract shall not be disposed of as a tract or unit separate and distinct from adjoining public lands outside of the area released by this order, but for disposal purposes, and without losing its identity, if it is already surveyed, it shall be treated as having merged into the mass of adjoining public lands, subject, however, to the easement so far as it applies to such lands.

(c) Because the act of August 1, 1956 (70 Stat. 896; 48 U. S. C. 420–420c) is an act of special application, which authorizes the Secretary of the Interior to make disposals of lands included in revocations such as made by this order, under such laws as may be specified by him, the preference-right provisions of the Veterans Preference Act of 1944 (58 Stat. 747; 43 U. S. C. 279–284) as amended, and of the Alaska Mental Health Enabling Act of July 28, 1956 (70 Stat. 709; 48 U. S. C. 46–3b) will not apply to this order.

10. All disposals of lands included in the revocation made by this order, which are under the jurisdiction of a Federal department or agency other than the Department of the Interior may be made only with the consent of such department or agency. All lands disposed of under the provisions of this order shall be subject to the easements established by this order.

11. The boundaries of all withdrawals and restorations which on the date of this order adjoin the highway easements created by this order are hereby extended to the centerline of the highway easements which they adjoin. The withdrawal made by this paragraph shall include, but not be limited to the withdrawals made for Air Navigation Site No. 7 of July 13, 1954, and by Public Land Orders No. 386 of July 31, 1947, No. 622 of December 15, 1949, No. 808 of February 27, 1952, No. 975 of June 18, 1954, No. 1037 of December 16, 1954, No. 1059 of January 21, 1955, No. 1129 of April 15, 1955, No. 1179 of June 29, 1955, and No. 1181 of June 29, 1955.

ROGER ERNST,
Assistant Secretary of the Interior.

APRIL 7, 1958.

[F. R. Doc. 58-2659; Filed, Apr. 10, 1958; 8:45 a. m.]

XXI. Post 1/1/13 Revisions

3/14/13: Section IV. B. Public Land Order Chronology – Page 16 – Revised "July 31, 1947 – PLO 386" paragraph 2, second sentence from "…*for purposes of a pipeline and telephone line respectively.*" to "…*for purposes of a telephone line and pipeline respectively*."

3/14/13: Section XX. Appendix A – Public Land Orders. Inserted images of PLO 84 at page 86 and PLO 270 at page 87.

3/24/13: Inserted Section XXI. Post 1/1/13 Revisions at page 99 and added to Table of Contents.

3/24/13: Removed a reference in Section XVII. b. Bureau of Indian Affairs that equated tribal lands to restricted lands held in trust by BIA for individual natives.