2014 Legislation
DOT&PF Right of Way Issues
Problem Statement

DOT&PF proposed legislation on August 1, 2013 with the intent to improve efficiencies, reduce administrative burdens and streamline our land acquisition and disposal processes. The focus of this legislation was on the relationship between DOT and DNR. To a lesser extent the legislation involved housekeeping revisions to DOT's land disposal authorities as well as a proposal to relax a constraint on the Alaska Railroad's ability to convey fee title to DOT. In order to outline the problems that led us to the conclusion that legislation was the necessary solution, each of these issues will be discussed starting with the smallest and progressing to the most significant.

Alaska Railroad Conveyances

AS 42.40.285(1) prohibits the Alaska Railroad from conveying its entire interest in land (fee) unless it obtains legislative approval. DOT requires a fee interest in right of way acquired for airports, controlled access facilities and urban projects. DOT Northern Region requested legislation in 2007 for a fee transfer for the Fairbanks International Airport and in 2009 for the Illinois Street project. DOT Central Region has also used this process to acquire a fee interest from ARRC. The project development process can be very lengthy as a result of design, environmental and funding issues. The requirement that ARRC, a state owned entity, pass legislation to obtain approval to transfer fee title to DOT for a public project can add an additional 1 to 2 years to the process. We believe that this is an unintended consequence of the ARRC statutes and that it would be in the public interest to allow for fee transfer of lands to DOT without legislative approval. This can only be accomplished with the currently proposed bill.

DOT&PF Land Disposal Authorities

Public Facilities – AS 35.20.070 provides for the disposal of lands acquired for public facilities projects. The current statute also constrains DOT from conveying excess lands to anyone other than the "persons, heirs, successors or assigns in whom it was vested at the time of taking." As most public facilities parcels were acquired in fee, there are often no original owners or successors in interest who are interested in a reversion of title and DOT is constrained from disposing the excess lands to another party. Often the only option is a disposal to DNR and then a reconveyance to a third party under DNR's more flexible disposal authorities. An example is a parcel of land acquired for Trooper housing in Fort Yukon in 1980.

The parcel was turned over to Health and Social Services who then leased it to the Council of Athabascan Tribal Governments (CATG), a tribal entity. The lease expired in 2003 with the HS&S recommendation that the property would be turned over to CATG. Due to the constraints in our existing Title 35 disposal statute, we have been unable to enter into negotiations with CATG and convey this parcel. The proposed revision releases the existing constraints on Title 35 land disposals and would allow this transaction to take place. This can only be accomplished through the proposed bill.

Highway Remnants/DNR Fee Estate – Remnant parcels may be created by a highway realignment in which DOT holds a highway easement over DNR lands. Adjoining private parties may desire to obtain title to these remnants. Once the excess DOT ROW is released, DNR has authority under AS 38.05.035(b)(7) to convey the remnants to an adjoining owner. A more difficult challenge arises when an adjoining private owner has an encroachment in the DOT ROW over DNR lands. There are several examples of this such as private parking pads constructed within the Tongass Highway ROW in SE Region, a sewage lagoon constructed in the highway right of way for the Glenn Highway, and a garage/septic system encroachment in the Cordova - Power Creek road right of way. In these situations we have found that once DOT vacates the portion of the right of way encumbered by the encroachments, DNR is constrained by its disposal authorities and cannot transfer title of the remnant to the adjoining owner as they do not meet DNR's preference right criteria. The proposed legislation intends to resolve this limitation by removing the remnant authority from AS 38.05.035(b)(7) and placing it within DOT's authority under the proposed AS 19.05.080. DOT's current disposal authority would allow conveyance to an adjoiner. This exception to the Alaska Land Act would be noted in a revised AS 38.05.030(b).

<u>DOT&PF/DNR Land Transactions</u>

Omnibus QCD Properties - DOT's authorities for land acquisition, management and disposal are stated in Title 02 (Airports), Title 19 (Highways) and Title 35 (Public Facilities). The title basis for much of the property managed by DOT is derived in part from federal land transfers such as the 1959 Omnibus Act Quitclaim Deed and lands transferred by other means from DNR. The Omnibus QCD conveyance was to the State of Alaska as opposed to specifically naming DOT as grantee. While DOT's authority to manage the highway system under Title 19 is clear, the Omnibus QCD also conveyed airport lands, material sites, and several other improved and unimproved small parcels that were intended to support highways or other public facilities that has resulted in some confusion over the years. The indefinite identification of who was to manage the lands conveyed by the Omnibus QCD has required partial legislative fixes in the past. Prior to 1994, AS 38.05.030 Exceptions only allowed DOT to dispose of lands it had acquired for Title 19 (Highways) projects. This limitation became clear when DOT found it did

not have authority to dispose of excess airport properties (Unalakleet airport). Legislation was enacted to clarify that DOT could also dispose of excess land acquired for Title 02 (Airport) and Title 35 (Public Facilities) properties. The exception as provided in the statute only applied to "real property acquired" by DOT and while it may have been intended to apply to lands transferred by the Omnibus QCD, this remains to be a cloud that has been brought to our attention in the past (2010 Galena airport land disposals). In order to achieve a final resolution of this issue, the proposed legislation offers new sections AS 02.15.025, AS 19.05.130 and AS 35.20.015. In each of these sections, it is specifically stated that lands conveyed to the State of Alaska under the Omnibus QCD are not "public domain" land. That is, they were intended to be under the ownership of the State of Alaska through the Department of Transportation as opposed to DNR, and managed by DOT and if determined to be excess, disposed under DOT's authority. The proposed legislation intends to clarify that DOT has exclusive authority hold title to the lands conveyed to the State of Alaska under the Omnibus QCD. This exclusive authority would eliminate continuing questions as to DOT's authority to manage and dispose of Omnibus QCD lands. While this issue should have been addressed in the 1994 legislation, the proposed bill should result in a final resolution.

Land Transfers From DNR to DOT – DOT management of DNR held lands has historically been accomplished through a variety of mechanisms including ILMT/ILMA (Interagency Land Management Transfers/Assignments), Public Right of Way Permits, Tidelands permits or leases, leases for public facilities, as well as a combination of Free Use Permits, ILMAs and Sales Contracts for material sites. A couple of decades of observational experience by DOT staff have led to the following conclusions: DOT's priorities are not necessarily DNR's priorities and DNR's obligation to manage public domain lands for multiple uses hinders the ability of the state to advance public infrastructure projects in a timely and efficient manner. The proposed legislation includes new sections to Title 02, 19 and 35 that will allow for a streamlining of the land transfer process by clarifying that:

- A DNR transfer of land or material to DOT is not a "disposal" of state land.
- A land transfer vest control in DOT of the surface, material and mineral estate.
- Similar to Federal Highways appropriation of BLM and Forest Service lands for federal-aid highway projects, upon filing a map, DNR will have 4 months to either issue a QCD to DOT or certify to the governor that the transfer is not in the public interest.

The reality is that while DNR and DOT are two of the most closely related sister agencies, the administrative burden to effect a land transfer is often far more complex and time consuming than an acquisition of land from a private party. The purpose of this proposed legislation is not only to reduce the risk resulting from the advertising of multi-million dollar infrastructure projects without having finalized the DNR/DOT land transfer but to reduce the constraints upon

DNR that result in such delays. The land transfer system is currently broken or at least severely impaired. The loss of a multi-million dollar project due to a failure to process a land transfer in a timely manner would be an unacceptable result for the State of Alaska. When funds may be placed at risk due to a delayed project advertising date while waiting for a DNR land transaction to be completed, we have two fairly poor options to proceed with. First we elevate the issue to the Commissioner's office. This may result in increased pressure at the staff level but often doesn't speed the transaction due to the level of administration and public notice required under the current DNR process. The second option is that DOT proceeds to advertise and award the project without formal DNR authorization recognizing that neither agency would want to "own" the failure to advance the project. Because of these options, we cannot cite specific projects that have failed to advance or funds that have been lost as a result of the current land transfer process. Our objective is not to thumb our noses at the DNR authority or land transfer process, but to propose a procedure that actually works and is in the best interest of the public. We believe this legislation is required to accomplish that objective.

A good recent example of an overly burdensome Land Use Permit (Early Entry Authorization that will lead to a Public Right of Way Permit) for a highway project is the EEA issued for the "Road to Tanana". It includes such provisions as "*Termination. This permit does not convey an interest in state land and as such is revocable, with our without cause and is revocable at will if the department (DNR) determines that the revocation is in the state's interest.*" This and similar provisions suggest that DNR alone represents the state's interests and that DOT is not necessarily on equal footing. Under a section regarding the plan of operations, the EEA states under paragraph 24. b. that "*Scope of disturbance is limited to the area necessary to accommodate a road constructed to the currently proposed design limits and standards; this permit does not authorize disturbance outside those limits for the purposes of obtaining additional material under the authority of AS 38.05.565(b)(3)…"* While this is consistent with the DNR statute passed in the 2012 legislation, it makes no sense that it be applied to DOT and state owned transportation infrastructure. DOT has defined a 300' wide right of way for the project while the initial construction is proposed to a single lane road with pullouts. Under this DNR authorization, neither DOT construction nor maintenance could extract material from within the defined right of way without further authorization and payment on a cubic yard basis. DOT is unable to determine how this strategy benefits the state's best interests or those of the travelling public.

Material Site Transfers – The initial reason for this proposed legislation arose out of our difficulty with material sites on state owned lands. DOT has several hundred material sites on DNR lands with over 400 in Northern Region alone. In recent years the backlog of expired or soon to expire material sites had grown into administrative burden that became overwhelming for both DNR and DOT staff. This produced concerns, as noted above, that failure to authorize

sites necessary for project advertising could result in a loss of funds. In addition, many of the sites were necessary for ongoing maintenance activities. In keeping with DNR's multiple use management objectives, our requests for new contracts were limited in term, quantity and area to be authorized. We proposed an alternative to material sales contracts that would provide exclusive use by DOT, and remove limitations on term and quantity that required continuing extension of expiring contracts. The reality is that DOT does not relinquish material sites unless the quality of the material is no longer acceptable or the site is depleted. The continuing administrative burden on both agencies does not recognize this reality.

In the summer of 2010, DOT & DNR started working together to solve our huge backlog of expired or expiring contracts. We didn't believe that exchanging one complex process for another would benefit either agency so we looked to for transfer that would allow DOT to manage the sites under DOT's authority and with limited DNR oversight and control. We thought the ILMA process would be the appropriate vehicle and nominated 20 material sites to process as ILMAs in April of 2011. Of the 20 proposed sites, 14 were initially rejected primarily due to multiple use management conflicts identified by DNR. DNR proceeded to process the remaining 6 sites as ILMAs. We met on January 31, 2013 along with Fish & Game and Forestry staff. F&G and Forestry raised concerns that led us to believe that the ILMA process might succeed with no more than 3 of the remaining 6 sites. Our intention was to convert our entire inventory of DNR material sites to ILMAs if we had found our test of the first 20 sites to be successful. If the process was to continue with about a 15% success rate, it would not make a lot of sense to proceed along the ILMA track. One way to increase efficiency in these material site transactions is to adopt a process that can be uniformly and consistently applied across our material site inventory. It would not be beneficial to have some sites under a material sale contract and some under an ILMA or other various forms.

Our legislative proposal with respect to material sites is twofold. First, all land transfers for new material sites would follow the same process as we have outlined for other land transfers. That is, upon filing a map, DNR would have 4 months to issue a QCD or certify to the Governor that it was not in the public's interest. Existing material sites would be addressed in an amendment to AS 35.05.030 by adding paragraph (h). This paragraph establishes that extraction and use of materials from state sources is not a "disposal" when used for the construction or maintenance of an airport, highway, or public facility owned by the state. It also provides that DNR may not collect payments, set time limitations or restrict DOT access to material sites owned by the state. The intent of this addition is to eliminate most of the administrative overhead including the development of material sales contracts, accounting of materials used and fees and continuous reapplication for increased quantities or extension of terms. We acknowledge that DNR's 2012 legislation regarding designation of material sites under AS 38.05.550 has reduced the time required for public notice of material sales contracts

on existing sites. However, we question the need for the level of DNR administration and oversight that treats the state's primary provider of transportation infrastructure no different than any other third party.

Special Provisions – Two special provisions are included in this bill to resolve long standing problems. First, AS 19.40.055 Maintenance Stations is introduced to provide legislative authority and direction to effect the transfer of DNR lands for roads, camps and airstrips at Franklin Bluffs and Happy Valley along the Dalton Highway. DOT has requested these sites for almost 20 years without success. The need for these sites as maintenance stations and airstrips is becoming more important with increasing proposals along this corridor for resource development. Second, AS 38.05.823 is amended to address the 2006 exchange of rights of way between the State of Alaska and the U.S. Forest Service. This section clarifies that the transferred lands include not only State owned uplands but also State owned submerged lands.

Summary – It is in the best interest of the public that the State of Alaska facilitates the development of transportation infrastructure. We believe that with regard to land transfers, this process can be streamlined by relieving DNR of the constraints imposed under current statutes and providing a means by which DOT can appropriate state lands and manage them under our exclusive authority. Legislation is necessary to accomplish this goal.