Seward Highway

ROW Mapping & Land Exchange

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Introduction

This story is not a conventional surveying & mapping presentation. It is a three part story that starts with one of my final tasks as I approached retirement from DOT&PF in the spring of 2014. That task was to assist with legislation that would change the relationship between DNR & DOT with respect to a variety of land and ROW issues. Then it moves into my post DOT&PF job with R&M Consultants and an assignment to facilitate a land exchange among three government entities as a part of a re-alignment of the Seward Highway. And then we come full circle by bringing elements of the 2014 legislation back as a tool to resolve and clarify some difficult issues relating to DNR and DOT land management authorities.

Having spent almost 30 years in the public sector with DOT&PF, it was entirely up to me to decide which subjects and projects that I would present at programs such as this ASMC conference. Now that I am in the private sector I have learned about this new concept of the "client" relationship. In that relationship, the client pretty much dictates the schedule of your work, the extent of your work and to whom you may release information regarding the project.

While my subject, the Seward Highway Land Exchange is a public project, I am still bound by the client relationship and must obtain permission before I can discuss the project with others. I was granted permission to present this project with the condition that I use the appropriate amount of discretion with potentially sensitive information.

Your first question might be, "Who could possibly be offended by what might be said regarding a ROW mapping project?" After all, this project involves only three parties, all state entities. They include DOT&PF, the Alaska Railroad, and DNR. To some people in the audience, that alone will explain a lot. I don't want to suggest that there are good guys or bad guys in this relationship. Occasionally, this relationship leads to conflict and results in some glaring inefficiencies in state government. DOT&PF and DNR are sister agencies with likely the closes ties of any two state agencies. ARRC on the other hand, is not considered to be a state agency but a for profit quasi-public corporation wholly owned by the State of Alaska. This distinction is lost on the average citizen taxpayer and often they want to know:

- Why is it so difficult for the parties to reach agreement in these relationships?
- Why does every transaction between the entities take so long?
- Why do these transactions end up costing the taxpayer so much?

After all, in the taxpayer's eyes, these are not three separate entities; they are collectively, the "State of Alaska".

The conflict arises because each entity has a separate mission, defined in the Alaska Constitution and statutes. And their employees, as would be expected, advocate for their agency and their specific mission.

Although I represent DOT&PF in this story, I will do my best to emulate the Fox News motto and deliver a "Fair and Balanced" presentation. "I report, you decide…"

Legislation

DOT&PF needs lands and materials to construct and maintain its highways and airports. Given amount of land owned by the State of Alaska it is reasonable that many highway and airport projects will cross or be in close proximity to these lands. As DNR is charged with the management of the State's public domain lands DOT&PF must secure permission to use these lands or materials. (If this sounds like we are asking ourselves for permission to use state owned lands and materials to build state owned infrastructure, you would be correct. If one of the voices in your head had to ask another voice in your head for permission to carry out an action you would be considered a schizophrenic.)

But this is the way it has always been and the process has at times works efficiently and sometimes not. On most DOT&PF projects we are driven by deadlines. To make the federal fiscal year deadlines and avoid losing federal funds, we must advertise a project by a certain date. Before we advertise we must certify that we have all the land interest necessary to construct the project. This is a risk management tool that prevents the state from mobilizing a contractor to a site that will place the contractor into trespass or require that the state absorb contract delay claims. Generally the ROW and materials we require from DNR are in the same category of interests that need to be secured prior to project advertising. Many times in my career we have seen projects at risk because a backlog or prioritization at DNR delayed receipt of the necessary permissions. Generally the only resolution was to "elevate" the issue. In my last few years, "elevation" to meet project deadlines became more frequent and it started to get the attention of the agency Commissioners and the Governor's office.

In DNR's defense, they argued that they were bound by the constitutional requirement of multiple use management. This meant that just because a piece of land or cubic yards of material were requested by DOT&PF for a public project, DNR was required to consider whether the project use was in the state's best interest and weigh this use against other public or private potential uses. And in the same manner as DOT&PF staff, DNR was often assigned far more tasks than could possibly be accomplished by the existing staff resulting in a "triage" form of management. Often it was easier to defer DOT&PF's requests as opposed to the private developer who had a legislator's ear.

In 2012 DNR and DOT worked together to craft a new model for an efficient transfer of authority for material sites to DOT that would alleviate many of the issues resulting from the existing material sale contracts. We tested this process against 20 expired or soon to expire material sites and found that due to internal DNR objections or those of other agencies, only 10% were likely to succeed. Because of the legal limitations that DNR believe it was bound to, this process was abandoned.

The DNR and DOT&PF commissioner's and staff met in late November of 2013 to discuss the issues. Both agencies along with their Department of Law representatives agreed that the problems could not be resolved with existing authorities and that legislation would be required.

The proposed legislation was to be jointly offered by DNR and DOT&PF (at the Governor's office direction). It was initially offered before the House Transportation Committee in the spring of 2014 as HB 371 and then to the Senate Transportation Committee as SB 211. Although it was initially offered to streamline project delivery by removing duplicate public processes and clarifying management authority for state lands, it also provided a vehicle to address other outstanding issues. The bill would also provide uniform language in DOT&PF's land disposal authorities across airports, highways and public facilities; allow a streamlined process for appropriation of DNR managed lands and materials; and allow ARRC to convey fee title to DOT&PF without legislative approval among other things. Ultimately, due to the late offering of the bill in the legislative session, it did not pass. HB371 successfully made it through the House Transportation Committee but SB 211 was not favored by the Chair of the Senate Transportation Committee and although it was heard a couple of times in the committee it was held there while the legislative session clock ran out in mid-April.

How, you might ask, would this legislation have related to the Seward Highway projects? As I will discuss in a bit, the Seward Highway land exchange required its own legislation due to the land disposal limitations place on State Parks and the Alaska Railroad. However, one major point we were trying to make did not actually require legislation but we included it in the bill for purposes of clarification and because we believed it would add weight to our interpretation of the issue. This was to clarify DOT&PF's authority as primary manager of the surface estate for highway, airport, and public facility lands under Article VIII, s. 6 of the Alaska Constitution by resolving ambiguity in State law regarding over lapping management authorities held by DOT&PF and DNR.

Purpose

The Seward Highway and Alaska Railroad rights-of-way from Girdwood to Potter Station intertwine along a narrow corridor between the waters of Turnagain Arm and the base of the

Chugach Mountains. The rail and highway corridors have been reconstructed and realigned to varying degrees both before and after statehood. The railroad and highway each have established right-of-way interests with uniform widths and it was desired that those widths be maintained with the relocated facility to the extent possible. (i.e. highway – 300' width; railroad – 200' width) Typically this would be accomplished through traditional ROW acquisition and disposal practices. However, in this area, the rail and highway corridors pass through the lands of the Chugach State Park. In order to protect the integrity of the Park, the legislation that formed the park and subsequent federal grant obligations prevent it from easily being dissolved and conveyed to other parties. As a result it was decided that the best solution would be a land exchange between the three parties that minimized the net change in land ownership. (Land Exchange = disposal of old ROW and acquisition of new ROW) To accomplish this goal it is necessary to survey, map and identify the interests and parcels to be exchanged. Theoretically, by maintaining the original ROW corridor widths, a shift along a fairly constrained corridor should result in little net gain or loss in land holdings. Part of the mapping project included of what was lost and what was gained by each party to see if additional compensation would be required to settle up the accounts.

In mid-2013, R&M Consultants, Inc. was awarded a contract for the surveying and mapping of the Seward Highway corridor located generally between Girdwood and Potter Station. The mapping project was required to comply with a Memorandum of Agreement between the Department of Transportation and Public Facilities (DOTPF), the Department of Natural Resources – Division of Parks and Recreation (DNR) and the Alaska Railroad Corporation (ARRC). The MOA was established to facilitate land exchanges that would result from improvements and realignments to the Seward Highway and Alaska Railroad corridors. As an extension of the surveying and mapping effort, the R&M contract was amended to include the task of "Land Exchange Facilitation".

Each party to the MOA operates under distinct and separate authorities and missions that can be incompatible. Successful completion of the proposed land exchange requires an understanding of each party's needs as well as each party's legal authority to resolve the issues.

Location

The project is located on the Seward Highway from Girdwood near milepost 90 then northwest to Potter Station near milepost 115 and continuing to the northerly line of T11N near MP 118.

Chronology

It is now 2016. I'm sure one question is when all three parties are state entities, how long could it possibly take to realign the rail and highway corridors and complete the land exchange. The first MOU was in 1990. So we are approaching 3 decades without the first conveyance document being issued. The first problem is priorities. When an issue must be resolved prior to advertising of the project, it will become the priority. When issues are deferred to a post-construction obligation, they lose all sense of priority. Everyone moves on to the next project to be advertised. This occurs most often with post construction surveying & platting obligations. Generally, certification of the right-of-way or ensuring that all the required land interests are in place is required prior to advertising. But when the parties are all state agencies or entities, construction will often take place under a "right of entry" with the necessary surveys and conveyances to be completed after construction.

4.7.89: Alaska Railroad - Blanket Permit No. 6012 for Roadways, Road crossings and Automatic Crossing Signals. This permit consolidated prior contracts between ARRC and DOTPF that allowed construction, operation and maintenance of highway facilities within the ARRC rights-of-way including the Seward Highway.

8.10.90: Memorandum of Understanding between DOTPF and DNR. The MOU recognized the separate responsibilities and authorities of the respective agencies and the fact that the Seward Highway alignment had moved since the initial 1951 construction. In order to reduce the uncertainty of a floating easement, the MOU proposed to fix the highway ROW based on DOTPF centerline surveys performed in 1981 and 1983 and a proposed relocation to tidewater. The MOU was intended to foster cooperation between the agencies and reduce the impact to the Park by reducing the acreage encumbered by highway easements. (Note: An MOU like this often appear on their face to be high level formal agreement, but unfortunately, they are often drafted in a vacuum by well-intentioned staff who know what they want to accomplish, but don't always have a complete understanding of the laws, issues or processes required to accomplish it.)

8.26.93: Amendment No. 1 to Memorandum of Understanding. The Amendment establishes the 300-foot wide tidewater relocation of the highway ROW identified in the initial MOU according to the ROW map for Project IR-OA3-1(11), Girdwood to Bird Point. The MOU provides that excess ROW for the Old Seward highway be relinquished and that the old Seward highway corridor be appraised along with additional areas required by DOTPF or ARRC that are outside the existing ARRC and DOTPF existing ROW. Recognizing that legislative authority is required to convey fee title for legislatively designated (Parks) and ARRC lands, the parties agree to collaborate in preparing the legislation. (Note: Park land disposal is similar to DOT&PF

disposal of access control. DOT&PF can unilaterally dispose of excess ROW but requires FHWA approval to dispose of any access control.)

6.7.00: Chapter 116, SLA 2000 (SB 235) Effective date June 6, 2000. Article 2. Potter Station to Girdwood.

- Chugach Park – upon a finding by the Commissioner of DNR of no significant adverse effect to the Park, the Chugach Park is authorized to:
    - Grant a highway easement to DOTPF
    - Convey a property interest to ARRC for railroad relocation
    - Grant utility easements
    - Receive interests in land in exchange for interests granted DOTPF & ARRC
    - The interest granted DOT may not exceed the interest necessary to relocate and widen the Seward Highway (highway easement to highway easement)
- ARRC – Provides legislative authorization to convey interests in land in exchange for interests in land conveyed to ARRC.
- The Governor shall report to the legislature by January 8, 2001 or as soon as possible after that date and
    - identify the lands transferred to or from the Chugach State Park that requires an amendment to statutes and
    - submit any legislation required to make those amendments.

10.16.01: Memorandum of Agreement between DOTPF, ARRC and DNR.

- DOTPF is the lead agency in accomplishing the Seward Highway land exchange goals:
    - Provide as-built surveys and preliminary ROW maps
    - Appraise existing and relocated highway and rail corridors including separate values for additional areas required by DOTPF or ARRC outside the existing corridors.
    - Survey and monument relocated ARRC corridor and utilities. Provide a legal description of relocated ARRC corridor to DNR for DNR conveyance to ARRC.
    - Relinquish highway ROW excess to the relocated 300’ corridor.
    - Prepare all required title research, conveyance documents and plats necessary to exchange land interests between the parties.
    - Prepare report to legislature required to define Chugach Park boundaries.
- DNR and ARRC are to cooperate with the land exchange tasks.

5.2011: Chugach State Park Management Plan, Public Draft Review

- Land and Water Conservation Fund – "*All of Chugach State Park is considered an LWCF protected area and is subject to the program provisions. Any property within an LWCF protected area may not be wholly or partly converted to anything other than public outdoor recreation uses without the prior approval of the Secretary of the U.S. Department of the Interior.*"
- Rather than individual grants encumbering specific sites improved with the funds, a sum total of $3.5 million in LWCF grants now encumbers the full 495,000 acres of the CSP.

3.16.12: Public Facilities Master Agreement between ARRC and ADOTPF; ARRC Contract No. 9670. This contract supersedes the 4/7/89 Blanket Permit No. 6012 between ARRC and DOTPF.

5.8.13: Seward Highway: Right-of-Way Study, Contract with R&M Consultants, Inc.

Nature of Interests and Valuation of Exchanged Lands

The land exchange will generally be made on the basis of equal value rather than equal area as the value of lands throughout the corridor may vary according to an appraisal, the nature of the interest held by the parties and the encumbrances upon those interests. The initial MOU presumed an exchange on the basis that any 1 square foot of land was the same as any other 1 square foot of land in the corridor. Quantifying the exchange balances would be a purely mathematical exercise. Even if the land quality was the same, the title interests vary and the encumbrances in the form of non-highway easements and other valid existing rights will have an effect on value.

- Chugach State Park – Of the three parties to this transaction, the CSP land interest may be the easiest to define. CSP was legislatively designated in 1970 by A.S. 41.21.121. Lands within T10N, R1E, SM (NTP 1) were conveyed from the federal government to the state on March 27, 1964. Lands within T10N, R1W, SM (NTP 2) were conveyed to the state on October 1, 2002. Lands TA'd to the State are essentially considered to be held in fee except that a survey is required before the patent can be issued. Except where the Park lands are subject to prior existing rights or encumbrances issued subsequent to establishment of the Park, the valuation of Chugach State Park lands conveyed as a part of the Land Exchange should be set at 100% of FMV.

  The nature of the interest held by CSP might be fairly straight forward but the limitations on disposal and acceptance of lands can make the land exchange challenging. The imposition

of LWCF 6(f) status on all of the CSP lands requires National Park Service oversight of any disposal and a requirement that disposed lands be replaced by those of equal or better recreational value rather than purchased for fair market value. In this case, the existing Seward ROW corridor was determined to not be subject to the 6(f) restrictions.

An interesting note is that CSP does not have authority to receive or convey the lands to be exchanged. The 2000 legislation allows the Park boundaries to be shifted or be "de-parked" therefore allowing DNR to perform the appropriate land transactions. So once CSP land has been "de-parked" and the LWCF 6(f) restrictions removed, the exchange of CSP parcels can commence.

- DOT&PF – The traditional view is that the Seward highway ROW within the project limits is held as a highway easement established primarily by federal Public Land Orders and conveyed to the State in 1959 under the Omnibus Act Quitclaim Deed. While the scope of a highway easement is limited to highway purposes, it represents a strong encumbrance that precludes virtually all alternative uses by the owner of the underlying fee as being incompatible with facility operations and safety. As a result, it is generally accepted that the primary right remaining in the fee owner is that of reversion. At such a time that the highway ROW becomes excess to the department's needs, the fee owner may apply to DOTPF under 17 AAC 10.105 for a disposal. Recognizing the cost of acquiring highway easements and their strong nature, compensation for new easements is typically set at 90-100% of fair market value (FMV). 17 AAC 10.105(b) requires payment to the department of 90% FMV to vacate and release an existing highway easement.

  Our discussions with DNR Parks and DNR AAG's raised an alternative view that DOT&PF actually holds no interest in the existing highway right-of-way through the Chugach State Park. This was based on the doctrine of "merger of title" that says a land owner cannot hold an easement for their benefit that crosses land they own. The easement is terminated by merging with the fee estate. In this case the easement interest for the Seward Highway that we believed was received as a part of the 1959 Omnibus QCD merged with the fee estate of those lands that had been TA'd or patented to the State of Alaska. Once we had a better understanding of the DNR position, DOT&PF through their DOL AAG embarked on the production of a legal opinion that would document the basis of the Seward Highway ROW. (Issued July 8, 2015)

  The same AAG who assisted DOT&PF with the 2014 legislation was assigned to work on the opinion. The opinion brought forward the assertion in the legislation that DOT&PF is the primary manager of the surface estate where transportation facilities cross state owned lands. The opinion also dispelled the idea that no easement for the Seward highway existed

as a result of "merger of title". The legal references noted that unlike privately held easements, the beneficial rights in publicly held easements are split into use and control rights. The right to control and manage highway easements for the benefit of the public is located in a state or other government body. The right to use the highway easement rests with the public. As a result, even if the highway easement and the fee estate are held by the same governmental entity, title will not merge.

What is clear is that under Alaska Statutes, DNR is the manager of the state public domain lands and DOT&PF is the manager of transportation related facilities.

The interest in the Seward highway ROW was transferred to DOT by way of the Alaska Omnibus Act and the QCD. As an exclusive government purpose property, the Seward Highway never became part of the state public domain. Therefore, DOT holds fee title to the highway right of way and has the exclusive power to manage and control the property for transportation purposes. These authorities are founded in the State Constitution. Under Title IV, article I, § 1 the Constitution provided that the "Highway" Department was authorized to "purchase, acquire, take over, or condemn" private land and public land deemed necessary and reasonable for highway use". Furthermore, under Title I, article III, § 2, the department was empowered to "accept and dispose of Federal funds or property available for highway and public works construction, maintenance…"

The Constitution's Article VIII authorizes the Legislature to provide for the administration of three types of state land:

a. Article VIII, Section 5 authorizes laws for the administration of public facilities and transportation systems, which includes highways.
b. Article VIII, Section 6 authorizes laws for the administration of the public domain which by definition was designed to exclude highway facilities. ["The State public domain is defined to include all lands and interests therein that are acquired by the State except for (1) lands used or intended to be used exclusively for governmental operations,…"]
c. Article VIII, Section 7 authorizes the legislature to designate areas of the public domain for specific purposes.

As only the "Department" was authorized to receive title to the Omnibus conveyed highway easements, and as these corridors dedicated exclusively for "governmental operations" were to be excluded from the public domain, the management of the fee interest of state owned lands within the original Seward Highway ROW is with DOT&PF.

While the focus of the opinion was on the Seward Highway through the Chugach State Park,

the constitutional authorities suggest that any similarly situated lands such as any DOT&PF managed airport or highway interests that cross state owned fee estate should be treated in a similar manner. Of the several issues raised in the 2014 legislation, this would resolve the sometimes conflicting management and disposal of transportation facilities by placing management of the fee estate solely with DOT&PF. (Explain Eureka Lodge disposal)

But the issue is not yet completely resolved. The opinion has been delivered to DNR and their AAGs and a mutual agreement on the issues has yet to be reached. Conclusion may require a re-submittal of the 2014 DNR/DOT legislation or action through other means.

At this time and until more clarity can be brought to the nature of title held by DOT&PF, valuation of the Seward highway ROW released as a part of the Land Exchange should be set at 90% FMV based on the traditional view of their status as a highway easement.

- Alaska Railroad - The interest conveyed to ARRC by the federal government under ARTA lies somewhere between "an exclusive use easement" and fee and is somewhat difficult to assess given the initial language in ARTA, its amendments, State legislation and interpretive differences between the Seward Highway Land Exchange parties.

  Under ARTA, the interest conveyed to ARRC by patent was segregated into surface and subsurface estates in which the surface estate was to consist of "not less than an exclusive use easement" and the subsurface estate consisted of the right to use that which was necessary for railroad purposes. In any event, the conveyance was to include the entire federal interest in the rail properties.

  In a letter dated April 8, 2013, the ARRC provided comments to DOTPF regarding the Seward Highway MP 105-107 Windy Corner project. *"ARRC's right-of-way through the project area includes submerged lands along Turnagain Arm, and does not include any section line easements. ARRC expects to receive the same rights on any lands exchanged to accommodate the proposed relocation. However, ADNR has refused to relinquish such rights on similar projects presently ongoing in other portions of the State (citing AK statehood Act Public Law 85-508, the Equal Footing Doctrine, Submerged Lands Act 43 USC 1301-1315, AS 19.10.010, and others). ADOT will have to work with ADNR to allow transfer of like rights as part of this project. ARRC also notes that ADOT and ADNR have yet to transfer the ARRC right of way changes caused by track realignments between Bird and Girdwood in the 1990s and 2000s."* While the ARRC/DNR issues are not completely clear, the statement suggests an assertion by ARRC that the lands they received by patent under ARTA are neither subject to rights existing prior to the federal railroad interest nor the burdens of post conveyance state statutes. Issues that would be considered in assessing the nature of the ARRC ROW would be reversionary interests, section line easements

(federal and state), submerged lands and other prior existing rights.

a. Reversion: The original §1209 version of ARTA provided for reversion to the United States and patent to abutting land owners upon discontinued use of the lands by the Alaska Railroad. Where the railroad was to cross a federal homestead patent, the patent reservation for railroads would allow the federal railroad to impose a 200-foot wide railroad easement without payment to the homesteader. In the future, reversion would allow the unencumbered use of the land to return to the homesteader when and if the railroad use was no longer required. This reversionary provision was repealed by Pub. L. 108-7 in 2003. The result was that where the ARRC ROW was based on an easement interest, the repeal of the reversionary clause effectively converted the interest to a fee estate. The repeal of the ARTA reversionary language was in part related to proposed land exchanges between ARRC/DOT&PF/Chugach Native Corporation due the Seward Highway MP 8-18 highway realignment. It was also realized that additional land exchanges along the Seward highway would benefit from the repeal of the reversionary language. Under the original §1209 reversions, ARRC would effectively had no trading stock by which to make a land exchange once the rail corridor had been realigned.

   The elimination of the reversionary interest was considered by some to have constituted an uncompensated taking of a real property interest. To the extent that this was the case, the statute of limitations for a claim against the U.S. has long since passed. As a result, State legislation was proposed to correct these actions as they applied to certain properties on the Eielson branch line. The Alaska Legislature passed CHSB 146, effective May 17, 2012 which was "…*intended to replace the reversionary rights of the abutting land owners that were repealed by the United States Congress in 2003*." A similar situation occurred regarding the relinquishment of the Copper River and Northwest Railroad ROW in 1941. However, rather than eliminating the reversionary interest, the railroad ROW was made available for a highway between Chitina and McCarthy. At some point in the future, if the highway ROW was to be vacated, the owner of the underlying fee estate would obtain unencumbered use of their land.

b. Prior Existing Rights – Section Line Easements under RS-2477: A patent issued by the federal government is subject to prior existing rights whether or not those rights are stated in the patent. A federal patent is essentially the same as a quitclaim deed and can only pass those rights held by the grantor. The Territorial Legislature accepted the federal RS-2477 offer of a 66-foot wide highway easement along surveyed section lines on April 16, 1923. As the initial railroad construction was completed by July 15, 1923, there was little opportunity for application of federal section line easements in the railroad corridor. However, the Eielson Branch line between Ladd Field (Ft. Wainwright)

and Eielson Air Force Base was constructed in the late 1940's and so there existed an opportunity for federal section line easements to come into existence prior to the railroad interest. The current federal position is that RS-2477 section line easements based solely upon legislative acceptance (as opposed to construction) are not valid. This is not critical as the acceptance of RS-2477 section line easements is a matter of state law. While ARTA appears to have eliminated the reversionary interest of the homesteaders, the question is whether the ARTA language could serve to eliminate all valid prior existing rights that were unidentified in the Railroad patents. The answer is in the 1983 Alaska Supreme Court Alaska Land Title Association opinion. *"…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.*"

c. Application of State Law – State section line easements under A.S. 19.10.010: In addition to RS-2477 based federal section line easements, ARRC lands are also subject to 100-foot wide "State" section line easements that apply to all lands owned by the state or acquired from the state. ARRC has previously argued that its lands are not state lands because the Alaska Railroad Corporation Act created a legal existence independent of and separate from the state. It is assumed that this is their basis to suggest that their lands are not subject to 100-wide state section line easements. In 2000, the Alaska Supreme Court disagreed with that assertion stating that the ARC Act also makes ARRC "*an instrumentality of the State within the Department of Commerce and Economic Development*". ARRC is an Alaskan corporation and subject to Alaska State law. ARRC might argue that the ARTA provision that ensures an interest of "*not less than an exclusive use easement*" (emphasis added) conflicts with the application of State SLEs. ARTA Section 1213 Conflict with other laws states that "*The provisions of this chapter shall govern if there is any conflict between this chapter and any other law."* This is in addition to a general legal rule that when a federal law conflicts with a state law, the federal law takes priority and the state law does not have any effect. However, this rule would only apply when there is an actual conflict and the overlay of State SLE's does not create a conflict with the concept of an "*exclusive use easement"*, it just places the management of the ARRC right-of-way over the SLE as a higher priority as long as it is necessary for the safety and security needs of the Railroad. This layering of easement rights also exists within state owned and managed controlled access highways and airports. The State's management authority and its need to ensure the safety and security of the traveling public limits unimpeded public access across highways and airports that are subject to section line easements. But if the Railroad lands or rights-of-way encumbered by the SLEs are eventually disposed, they will be conveyed subject to

the existing section line easements.

d. Submerged Lands/Tidelands: The previously mentioned April 8, 2013 letter by ARRC also suggested a conflict with DNR's assertion that ARRC lands are subject to State ownership as "submerged lands" where the ARRC ROW extends out into the waters of Cook Inlet along the Seward Highway and other locations. The State asserts ownership of "submerged lands" and tidelands along its coastline. "*The Submerged Lands Act of May 22, 1953 states that all lands permanently or periodically covered by tidal waters up to, but not above, the line of mean high tide and seaward to a line three geographic miles distant from the coast mean low tideline is owned by the state.*" The question of submerged lands ownership in relation to the land exchange is important for both the status of the previously existing ARRC ROW corridor and the realigned ARRC ROW corridor that will in part consist of lands conveyed from the Chugach State Park.

The first question is whether the existing ARRC corridor included title to the submerged lands. In support of the ARRC position, the Alaska Railroad Corporation Act language suggests that their lands include submerged and tide lands. The US Surveys that defined the Railroad ROW corridor through the NTP 1 & 2 segments distinguished between "lots" (uplands) and "parcels" (submerged lands) with a note on the first sheet stating that "Parcels shown on this plat identify submerged lands". The conveyance from the federal government to the Alaska Railroad included "Parcels A to K" for U.S. Surveys No. 9011 and 9012 indicating a federal assertion of some interest in the tidelands within the Railroad ROW and intent to transfer that interest to ARRC. The patent transferring these lands to ARRC was "S*ubject to the right, title, and interest, if any, that has otherwise vested in the State of Alaska in any submerged lands among the above-described lands which are situated beneath nontidal navigable waters up to the ordinary high water mark or which are permanently or periodically covered by tidal waters up the line of mean high tide.*" The authority of the federal government to reserve tide and submerged lands for Alaska Railroad use prior to statehood was addressed in a 1971 9th Circuit case. Specifically this case related to the eastern shore of Knik Arm and the bed of Ship Creek and the necessity of these lands for wharves and docks in support of the railroad operations. The result was the "*…quieting title in the United States to the tidelands and submerged lands contiguous with and adjacent to the Alaska Railroad Terminal Reserve.*" Where the submerged lands adjacent to the Terminal reserve were considered necessary for railroad operations, the question along the Seward Highway is whether the submerged lands along the mainline corridor would be considered necessary for railroad operations in the same manner. Another distinguishing characteristic between the Terminal Reserve lands and the mainline railroad corridor is that the Terminal Reserve was based on a withdrawal and considered to be held in fee while the railroad corridor was considered to be an easement interest. One view is that

at statehood, Alaska received title to the submerged and tidelands along the Seward Highway subject to the federal railroad easement. The question is whether the repeal of the ARTA reversionary language could have any effect where the underlying fee interest is held by the State of Alaska and is subject to the public trust doctrine.

The second question is whether submerged and tidelands within Chugach State Park lands can legally be conveyed to ARRC in fee and without limitations. The Legislature provided the necessary approvals for the land exchanges required to accomplish the realignments of the Seward highway and rail corridors in 2000. However, the language within Ch. 116 SLA 2000 does not specifically express the intent of the legislature to transfer full title to lands subject to the public trust doctrine. This issue was considered in a 2011 AGO opinion relating to a proposed land exchange with the Izembek National Wildlife refuge. Similar to the Seward highway land exchange legislation, the Izembek approval appeared to provide an authority to convey the state's entire interest. The nature of public trust submerged lands as defined in the U.S. Supreme Court decision *Illinois Central Railroad Co. v. Illinois*, and Alaska Supreme Court decision *CWC Fisheries, Inc. v. Bunker* suggests that the public's interest in these lands is to be retained and protected absent the clearly expressed or necessarily implied intent of the legislature. The conclusion of the AG opinion was that "*The passage of House Bill 210 did not authorize DNR to disclaim its ownership or public trust responsibilities in the submerged lands and waters encompassed by the Illinois Central and CWC Fisheries decisions…".* It appears unlikely that a different conclusion would be reached for the Seward Highway land exchange legislation. The result may be that CSP conveyance of submerged lands to ARRC would be limited to an easement or other less than fee interest.

Current Status (All Ahead Slow…)

- Most of the surveying and mapping has been completed.
- There has been little discussion with DNR or their AAGs since delivery of the DOT&PF legal opinion regarding the existing Seward Highway ROW.
- Once we DOT&PF and DNR have resolved the status of the existing ROW, we will focus on the other title issues such as section line easements and tidelands.
- When DOT&PF and DNR are in alignment with regard to the title issues, we will pursue resolution of these issues with the Alaska Railroad.
- The 2014 proposed DNR/DOT legislation may be resurrected again in the future to resolve the issues that require a change in statutes to accomplish.