

May 19, 2016

R&M No. 2386.01

Randal V. Davis, PLS
DOT&PF Southcoast Region – Right of Way
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Email to randal.davis@alaska.gov

RE: Dyea Road, Skagway, Alaska, ROW Boundary Opinion

Dear Mr. Davis:

Your question relates to the application for a driveway permit from the owner of U.S. Survey No. 3342 along Dyea Road near Skagway. The question is whether the Department of Natural Resources (DNR) or the Department of Transportation (DOT&PF) is the appropriate agency to issue the driveway permit. The conflict arises because the Dyea Road right-of-way (ROW) adjoining U.S. Survey No. 3342 exceeds its historically documented width of 100-feet as a result of the DNR platting and ROW dedication for the Dyea Point subdivision.

The conclusion is that this conflict cannot be resolved through a title review alone and should be decided on an administrative basis. While there does not appear to be a paper trail assigning management for this small parcel to DOT&PF, the most appropriate solution is for DOT&PF to incorporate it into its management jurisdiction.

Location

The property in question is located northwest of Skagway at approximate milepost 4.3 of Dyea Road. U.S. Survey No. 3342 lies within the East half of Section 3 of Township 28 South, Range 59 East, Copper River Meridian.

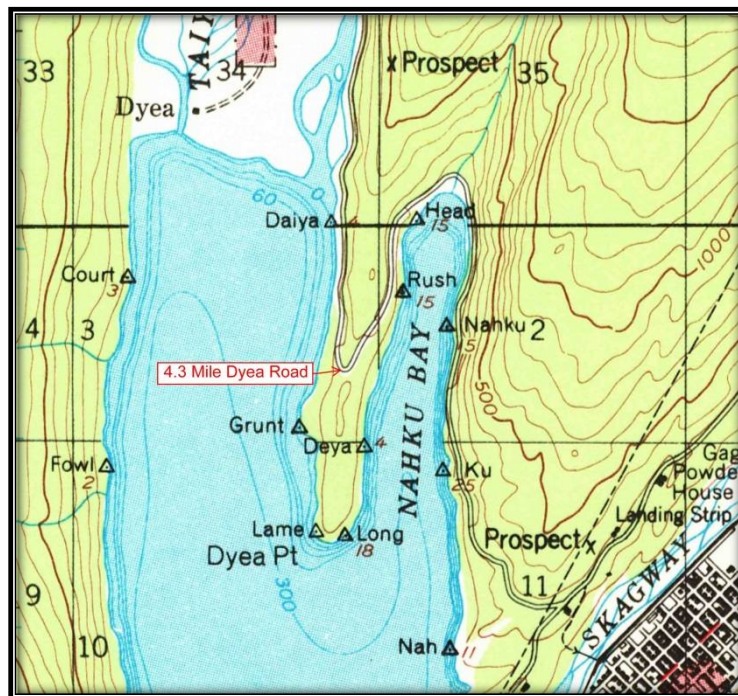


Figure 1 – USGS Quad Skagway (B-1) 1949 Rev. 1978



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Skagway - Dyea Road ROW

In 1932, homesteaders in the Dyea area petitioned the Forest Service, the Bureau of Public Roads and the Alaska Road Commission to construct a road to the valley from Skagway. At the time, all agencies denied the petition.

“The road project finally got off the ground in 1940... in May 1940, ARC engineers were dispatched to the area for a preliminary survey. By the end of the 1942 season, the road had been extended to the head of Long Bay. Thereafter, road construction continued in small increments. In 1947...April the agency erected the 200-foot steel bridge over the Taiya River. That same year, the road was completed all the way to West Creek.”¹

Page 7 of the Alaska Road Commission Summary of Activities in Fiscal Year 1946 reported: *“Construction of the new Skagway-Dyea road was advanced 1 mile to mile 5, making 5.3 miles of road with the branch.”* This suggests that the Dyea road passing to the North of U.S. Survey No. 3342 had been constructed as of that time.

Public Land Orders were the basis for establishment of highway ROW across unreserved federal lands under the management of the Department of the Interior between April 4, 1942 and April 7, 1958.

On August 10, 1949, PLO 601 was issued as the first public land order for highway purposes in Alaska with a statewide effect. Subject to valid existing rights, routes were classified as “Through” roads with a 300-foot wide withdrawal (e.g. Richardson/Glenn/Alaska Highways) and “Feeder” Roads with a 200-foot wide withdrawal (e.g. Elliott/Steese/Edgerton Cutoff) and “Local” with a 100-foot wide withdrawal. “Local” roads were not specifically named but were considered to consist of all roads not classified as “Through” or “Feeder”, established or maintained by the Alaska Road Commission. The combination of PLO No. 757 and Secretarial Order No. 2665, both effective on October 16, 1951, served to release the withdrawals for the “Feeder” and “Local” classified roads and replace them with highway easements.

As the Skagway – Dyea Road was not specifically named in the “Through” or “Feeder” classifications, it would be relegated to the category of unnamed “Local” roads that were constructed or maintained by the Alaska Road Commission and subject to a 100-foot wide highway easement.

Between 1950 and 1957 the Alaska Road Commission issued A.R.C. Orders No. 34 and 40 along with multiple supplements and revisions to A.R.C. Order No. 40. The stated intent was to identify and classify the roads and highways under the jurisdiction of the Alaska Road Commission. These classification reports were the precursor to the current Alaska Highway System Inventory and provide evidence that the Skagway - Dyea Road was subject to a PLO 601/SO 2665 “Local” Road 100-foot wide right-of-way. Order No. 34 dated October 11, 1950 identified the Skagway – Dyea Road as Route No. 44D, a “Local” road with a length of 7.6 miles. ARC Order No. 40 from February 6, 1951 through 1957 identified the Skagway – Dyea Road initially with the old Route Number of 44D and then transitioning to the new Route Number 050.1.

The ROW for the Skagway – Dyea Road was conveyed to the State of Alaska in 1959. Section 21(a) of the Alaska Omnibus Act, enacted on June 25, 1959² 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*

¹ Legacy of the Gold Rush by Frank B. Norris 1996 National Park Service - https://www.nps.gov/parkhistory/online_books/klgo/adhi/
This history of the Skagway area includes references of the construction of the Dyea Road taken from a variety of sources including Alaska Road Commission Annual Reports for 1941 through 1947.

² P.L. 86-70, 73 Stat. 141

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 for these facilities. In that deed, the Skagway – Dyea Road is listed as Federal-Aid Secondary Class "A" Route No. 997. It was described as "From FAP Route 97 ferry slip at Skagway northerly through Skagway; thence westerly to a point west of the Taiya River Crossing."

The preceding confirms that subject to prior existing rights and subsequent acquisitions, the Skagway – Dyea Road ROW is generally 100-feet wide, 50-feet on each side of its centerline as of statehood.

Skagway – Dyea Road Projects

According to the current Alaska Highway System Inventory, the Skagway – Dyea Road commences at its intersection with the Klondike Highway (CDS 299500) approximately 2.5 miles northeast of Skagway, then winds along the coast of Taiya Inlet to the Dyea Townsite at milepost 7.2

Only the initial section of Dyea Road from the Klondike Highway intersection to the Yakutania Point spur has been mapped for ROW by DOT&PF³. Further sections of Dyea road including the area at milepost 4.3 were improved in 2005⁴. A control survey was performed for the design/construction work and the existing ROW was defined and placed on the plan & profile sheets for the purpose of ensuring that the design slope limits did not encroach onto adjoining properties.

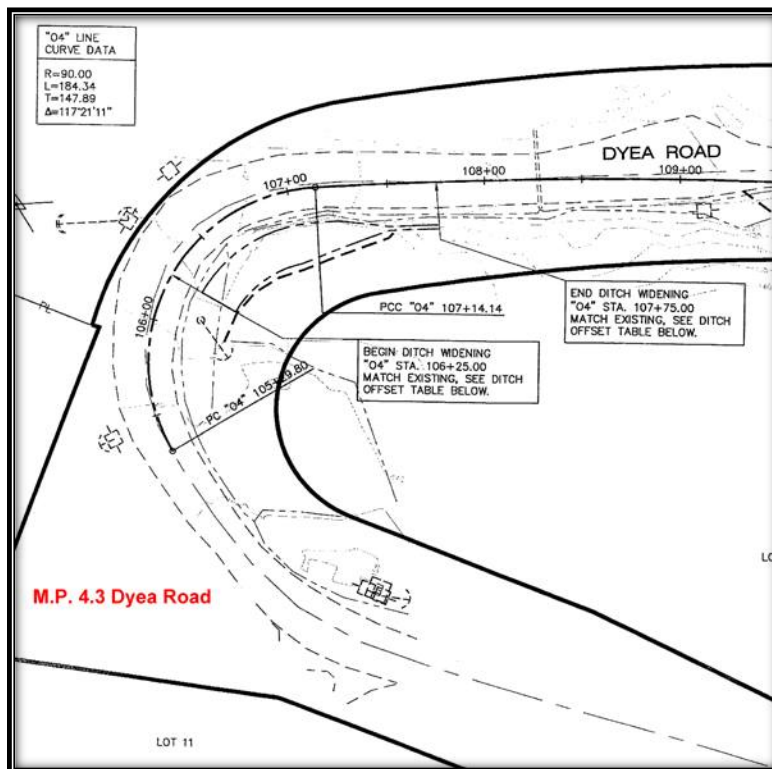


Figure 2 - Sheet F7 "04" Line P&P

³ Project No. RS-0997(4)/69149 – Skagway – Dyea Road Reconstruction, 1991, filed as Plat 93-3 Skagway Recording District.

⁴ Dyea Road MP 4.2 – 8.1 Safety Improvements Project No. HHE-0997(7)/68575 – As-built Plans for construction ending June 1, 2005.

The plans for these projects confirm that the existing centerline of the physical road has been substantially realigned from its location at statehood. As a result, there is no longer a uniform relationship between the current road centerline and the Omnibus QCD conveyed ROW.

Figure 2 shows the plan view of that portion of Dyea Road fronting U.S.S. 3342 at M.P. 4.3. Although not binding, it is interesting to note that the heavy "project" ROW line incorporates the triangular area of dedicated ROW between the North boundary of U.S.S. 3342 and the southerly PLO ROW line.

Subdivision Platting and Dedications

The plat for Dyea Point Subdivision⁵ was a subdivision of state land by DNR. It was prepared prior to Skagway assuming platting authority (1984) and prior to DNR becoming the platting authority in the Unorganized Borough (1998). The plat generally shows the Skagway – Dyea Road ROW as being 100-feet in width except for the enlarged triangular area along the north boundary of U.S. Survey No. 3342.

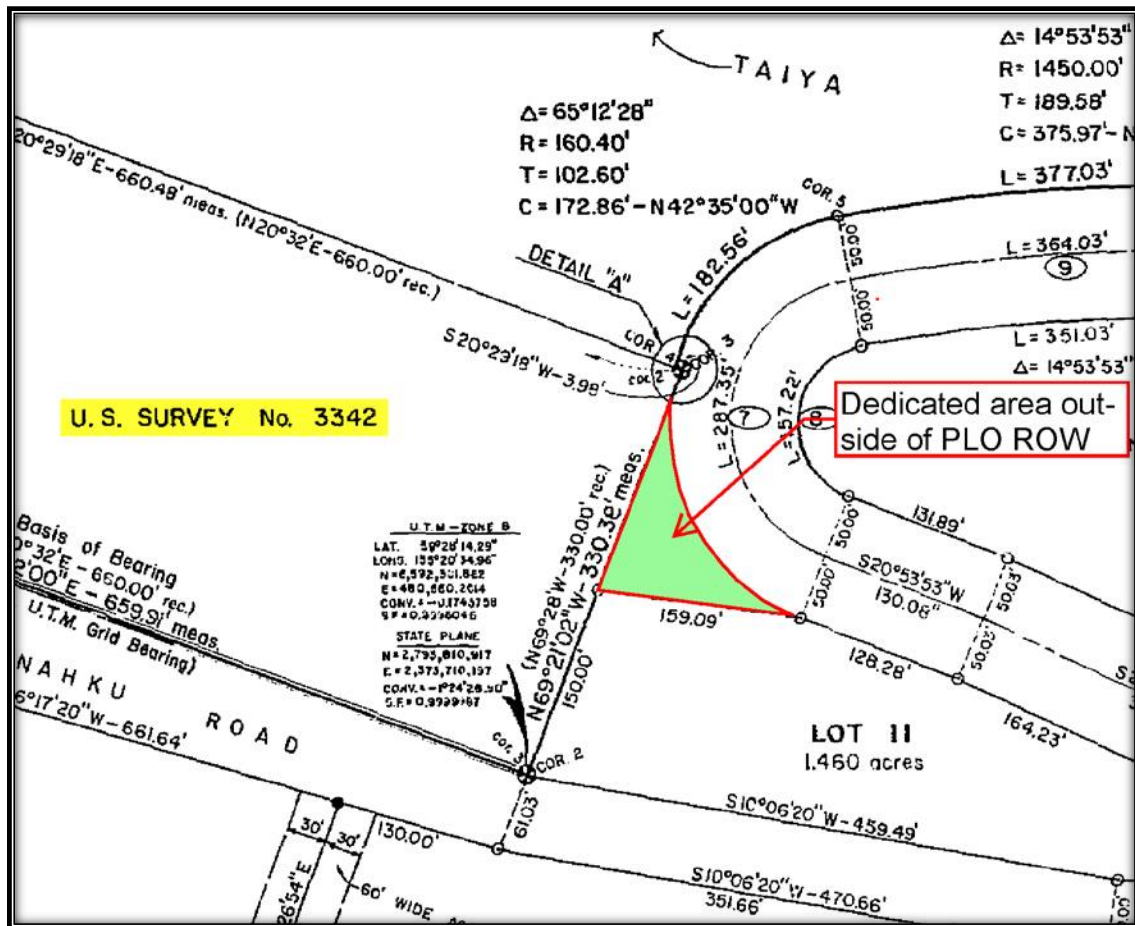


Figure 3 - Plat 80-1 MP 4.3 Dyea Road

⁵ Dyea Point, Alaska Subdivision – ASLS 79-183 – Filed as Plat 80-1 Skagway Recording District on March 3, 1980.

The outer road ROW jogs in almost 4 feet where it intersects U.S.S. 3342 presumably because of PLO 601 being subject to prior existing rights. However, the BLM abstract for U.S.S. 3342 indicates that the Homesite application was filed on January 6, 1953 and the patent issued on March 7, 1958. Just on the face of the abstract it would appear that for this land to be open for a 1953 entry application, it would have been in unreserved status which would have allowed PLO 601 to take effect for the full 100-foot width. If this is correct, the plat should have shown the 50-foot offset PLO ROW line passing through U.S.S. 3342 as the superior right. It may have been that the surveyor who prepared Plat 80-1 was unaware of the PLO 601 status for the Dyea Road or it may be that other documents in the BLM Homesite file that would explain this discrepancy. In any event, the conflict area is small and may not be worth resolving until a project comes along that warrants full ROW mapping for this portion of Dyea Road.

Plat 80-1 also includes a certificate of dedication of easements and rights-of-way signed by a DNR director. Typically, the use of such a certificate in a platting authority requires an acceptance certificate to complete the dedication. If this plat was filed by a private party with only a certificate of dedication, it would be considered a "common-law" dedication where the acceptance of the dedication would be by public use. It has been held that where an entity such as a state agency, that has both the authority to dedicate and accept the offer of dedication, the acceptance may be considered automatic and will take place immediately to complete the dedication process. As a result, Plat 80-1 has created a "layered" ROW for Dyea Road. That is, there is a ROW based on PLO authority and a ROW based on the platting dedication.

In a similar situation that I was involved in, a property owner issued an express easement to the Alaska Road Commission and then subdivided the property along with a dedication over the express easement. 50 years later when the ROW was to be vacated the question was whether it could be entirely vacated under the DOT AS 19.05.070 disposal statute or the local government platting authority. Our recommendation was that both processes should be run to ensure that both layers of ROW were released. This does not present a problem at this time for Plat 80-1 but may be something to be aware of in the future.

With regard to DNR acceptance of the ROW dedications in Plat 80-1, even if the plat included an executed acceptance certificate by DNR, DNR by regulation does not accept responsibility for roadway improvements. This is supported in 11 AAC 53.640 Dedication to the public. *"By a note or certificate on the plat, the department will accept a dedication under AS 40.15.030. Acceptance for public use does not obligate the department, any governing body, or the public to construct, operate, maintain, or manage improvements."* Paragraph (c) of this regulation states that *"An owner of land within a platted subdivision is not required to obtain a permit from the department under 11 AAC 96 in order to ...(3) install customary private appurtenances, including a driveway, culvert, mailbox and address signpost, if they do not impair public access on the public right-of-way or easement."*

I did not investigate whether the Skagway Municipality has assumed management of any dedicated ROW created through their platting authority. It might seem logical that a municipality that asserts platting authority and creates road rights-of-way by their acceptance of a subdivision dedication would also be accepting responsibility for management of the roads. That is not the case and a good example would be the Fairbanks North Star Borough (FNSB). The North Star Borough has the second largest population in Alaska after the Municipality of Anchorage. As 2nd Class Borough, the FNSB asserts platting authority and accepts dedications of ROW for the public through this process. However, the FNSB does not have road powers and so their ability to manage the roads within the borough that are not under the jurisdiction of DOT&PF or the Cities of Fairbanks and North Pole is very limited.

Although Plat 80-1 was filed prior to the Municipality of Skagway platting authority, a current subdivision under their Title 20 regulations would require conformity with: *"The regulations of the Alaska Department of Transportation and Public Facilities relating to safety or access and the preservation of the public interest and investment in streets and highways if the subdivision or any lot contained therein abuts on a state highway or street."* (Section 20.04.040)

Within the limitations of this report, I do not see that DNR or the Municipality of Skagway have any management jurisdiction to issue a driveway permit along Dyea Road including the subject triangular area adjoining U.S.S. 3342.

Ownership vs. Management

The primary fault in the DNR title report for Dyea Road that assigns management authority to DOT for both the PLO ROW portion and the dedicated triangle is that a title report will generally reveal ownership as opposed to management authority. Note that the DNR title report assigns title to the State of Alaska rather than DOT&PF. This is because the Omnibus Act QCD granted land interests generally to the "State of Alaska" and DNR has periodically asserted that they are the only agency that can accept title granted to the "State of Alaska". That has little effect on DOT&PF because the Title 19 statutes clearly provide DOT&PF authority over the highway system including the authority to acquire, manage and dispose of the highway land interests. DNR has also asserted that where Omnibus Act QCD highway easements cross lands patented to the State such as the land encompassed by the Dyea Point Subdivision, the doctrine of "Merger of Title" has terminated all of those highway easements conveyed from the federal government. This suggests that these highway corridors are merely State owned lands that DNR allows DOT&PF to manage.

Management of a facility may be based in a variety of other authorities including unrecorded and in some cases unwritten agreements that cannot be determined by a title review. At one point in my career I assisted DOT Headquarters Planning staff in updating their State Highway System inventory records. One of the larger hurdles was getting them past the concept of classifying sections of road in the system according to ownership. The correct view is to classify the roads by management, and then ownership if that information is available. There are many rights-of-way in the highway system where DOT&PF holds no deed or specific ownership interest. In these situations, it can be said that DOT&PF holds title in trust for the public by assuming management authority. These would include ROW based in RS-2477/section line easements, patent reservations, subdivision dedications and public prescriptive easements.

Management of certain highway facilities can be difficult to track because agencies have exchanged management authority on certain sections of road based on availability of equipment, efficiency and geography. For example, there are portions of Cushman Street in Fairbanks that were acquired and are owned by DOT, other sections held in fee by the City of Fairbanks, others based on subdivision dedication, and so on. By agreement, DOT and the City have in the past exchanged maintenance on these sections so that the City maintains some portions owned by DOT and DOT maintains some portions owned by the City.

Under AS 19.10.030 *"The department is responsible for the construction and maintenance of the state highway system."* The Skagway – Dyea Road is clearly on the state highway system and the definition of "highway" under AS 19.10.399(7) provides additional guidance: *"highway means the entire width between the boundary lines of every way that is publicly maintained when a part of it is open to the public for purposes of vehicular travel, ..."* This means that the department's responsibility extends to the full width of the ROW.

A driveway under both Alaska and federal regulations is a permitted encroachment. Maintenance of driveways is the responsibility of the party whose land they serve. However, to ensure that they are safely designed, located and

constructed, they cannot connect to a road managed by DOT&PF until a permit has been granted in compliance with 17 AAC 10.020. Driveways and approach roads.

Management Limitations and Considerations

DOT&PF's management jurisdiction is limited to those roads listed on the State Highway System Inventory. A typical road corridor will be intersected by multiple roads and points of access that are not under the jurisdiction of DOT&PF. Where a DOT&PF road has been mapped, a continuous "Project" ROW line may be drawn across these intersecting streets and roads to identify the break in management jurisdiction. This line is generally based on the construction limits for the project. Roads that have not benefitted from this level of ROW mapping may have the limits of management and maintenance identified in the DOT&PF Roadway Information Portal (RIP) reports or other documents.

While it might seem odd that all DOT&PF need do to incorporate and assume management of a subdivision dedicated ROW is to enclose it within a "Project" ROW line, that is not too far off the mark. Many years ago when DOT&PF wished to incorporate a municipal managed ROW into a highway project, it would obtain a resolution approving the action. It is now understood that that this approval takes place when a DOT project obtains "Local Government Approval" from the municipality. The effect of incorporating an adjoining ROW dedication into a DOT&PF project is illustrated in the Alaska Supreme Court Case Safeway v. State.⁶ In this case Safeway requested that DOT&PF vacate a portion of the Seward Highway ROW that consisted of a portion of subdivision dedicated ROW that DOT had incorporated into its project ROW. DOT&PF denied the request. Safeway pursued the vacation at the Municipality Platting Board and received approval over DOT's objections. The Supreme Court ruled that the Municipality could only vacate its interest in the ROW but that it had no authority to vacate DOT's interest that it secured once the ROW plans showing the incorporated ROW were recorded.

If the subject triangular area of dedication at MP 4.3 were an intersection with a non-DOT&PF road, a line would be drawn, either by mapping or by M&O/Planning log to identify the limits of maintenance and management. If it were to be a newly constructed road, 17 AAC would still require the submittal and approval of an approach road permit from DOT. If DNR were to accept management jurisdiction of the triangular area and recognize that they had jurisdiction to issue a permit for access over it from the adjoining U.S. Survey to Dyea Road, the problem would just increase in complexity. Once DNR granted authority for a driveway across the triangle, a driveway permit from that parcel onto Dyea Road would still be required from DOT&PF. This would be the worst-case scenario.

Before I retired from DOT&PF in May of 2014, I spent that Spring working on legislation to improve the relationship between DNR and DOT regarding land management issues. Had the legislation been successful, (it was not..) it would have provided a solution for a particularly frustrating problem that an adjoining landowner had on the Glenn Highway. The owner held a U.S. Survey adjoining the Glenn PLO 300-foot wide ROW. He had constructed a sewage lagoon that in part encroached on the highway ROW. Relocation of the system onto the U.S. Survey would have been prohibitively expensive and we had determined that the Glenn Highway corridor would not suffer by vacating a narrow strip to accommodate the lagoon. The problem arose when we found that most of the lagoon constructed in the ROW crossed DNR owned lands. If we vacated it, the owner would then have to purchase the land from DNR. DNR determined that the landowner did not qualify for a preference right sale and so was left with no available solution. The proposed legislation would have acknowledged DOT&PF's authority to unilaterally dispose of land where an Omnibus Act ROW crossed State lands including those managed by DNR. I understand that there are similar situations along the Tongass Highway.

⁶ Safeway v. State, 34 P.3d 336 (Alaska 2011)

If DOT&PF was to refuse to issue a driveway permit onto Dyea Road because of the indefinite management over the triangular area, it would be poorly perceived by those who are likely to be contacted further up the chain of command.

DOT&PF's authority to permit a driveway into the existing ROW is based on its obligation to control access to the highway facility for safety purposes. Arguably, the landowner already has the right to construct a driveway across the triangular area without permit from DNR or the Municipality of Skagway. Once that is accomplished, he cannot enter PLO ROW or the physical road way without an approved driveway permit from DOT&PF.

Summary and Conclusion

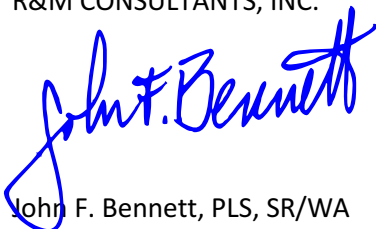
DOT&PF manages the Skagway – Dyea Road and ROW adjoining U.S. Survey No. 3342. The existing road ROW is primarily based on a PLO 601 highway easement conveyed to the State under the 1959 Omnibus Act Quitclaim Deed. The existing ROW was supplemented and enlarged with a triangular area of ROW dedication created by Plat 80-1. There has been no documented acceptance of management authority by DOT&PF for this triangular dedication and it has not clearly been incorporated into the DOT&PF ROW through a ROW mapping effort. DNR asserts that DOT&PF has management authority over this area and would be the agency from which the property owner should request a driveway permit.

While there is no paper trail establishing DOT as the management authority over this area, it is logical and reasonable that DOT&PF assume management and consider the triangle incorporated into the Dyea ROW. This could benefit future road improvement projects and be consistent with DOT&PF's obligation to manage access into the ROW and onto the highway facility.

We appreciate the opportunity to provide this review. Should you have any further questions, please feel free to contact me directly at jbennett@rmconsult.com or 907.456.4304.

Sincerely,

R&M CONSULTANTS, INC.



John F. Bennett, PLS, SR/WA
Senior Land Surveyor