

**MS 35-3-035-1 Parks Highway MP 166**  
**Pass Creek Material Site**  
**DOT&PF Merger of Title Briefing**

Background:

1. MS 35-3-035-1 is located at MP 166 of the Parks Highway within Sections 30 & 31 of T. 33 N., R. 2 W., Seward Meridian. This 249 acre site is a 3,500' x 3,100' rectangle that straddles the Parks with the 20 acre developed portion located on the west side of the highway. It was obtained for the construction of the Parks Highway in the early 1960's.
2. The site was included in the Statewide Material Site Inventory performed by R&M Consultants, Inc. in 2010. The report labels the site's Potential Status as "Significant" and states that "The site appears to contain significant quantities of sand and gravel and should be retained by DOT&PF for future use."
3. The Department of Highways obtained federal Right of Way Grants for the material site and the highway ROW in late 1962. Although the Highway and Material site grants were issued separately, they were both issued under the same BLM Case File (A052629), under the same authority (Act of August 27, 1958 (72 Stat. 885; 23 U.S.C. 317)) and with the same Expiration Date of Grant (None). Both were considered to be easement interests over federal lands. The Grant for the material sources listed the Pass Creek site as Parcel 12-1.
4. The lands underlying the Pass Creek Site were conveyed to the State of Alaska by Tentative Approval in 1967. The BLM TA included the following statement: "The patent will also contain reservations for the State of Alaska...Also rights-of-way will be reserved for material source sites in connection with the highway, Anchorage parcel 12-1, containing approximately 249 acres."
5. The Pass Creek Site at MP 166 lies entirely within the DOT&PF Northern Region with the Regional Boundary being at MP 163, Little Coal Creek. The site also resides entirely within the Mat-Su Borough.

Merger of Title:

1. Merger of Title is a legal doctrine where a property owner holds an easement over a parcel of land and later acquires fee title to that parcel resulting in the extinguishment of the easement interest. A simple application of this doctrine would suggest that pre-statehood highway easements granted to the Territory of Alaska and subsequently conveyed to the State under the Omnibus Quitclaim Deed or post-statehood ROW Grants issued by the federal government would be extinguished if and when the State takes title to the fee estate crossed by these easements.
2. Merger – Federal Position: The federal interpretation of the Merger of Title doctrine is that it applies to easement and fee interests conveyed to the State of Alaska. While the TA for the fee

estate underlying the Pass Creek site included a statement that the material site grant would be reserved in the following patent, the BLM administrators will ultimately issue a Merger of Title decision that prior ROW grant interests merge upon patent and are extinguished. In 1981, the Attorney General appealed to the Interior Board of Land Appeals that merger was inapplicable because DOT&PF and DNR were two separate entities with separate authority to acquire, manage and dispose of land interests. The IBLA dismissed the appeal on the basis that the patent is issued to the State and not DNR specifically and so there was no injury to the State by applying the merger of title doctrine. This IBLA decision has in the past been offered by DNR/DOT staff asserting that the federally issued highway grants are extinguished upon receipt of TA or patent for the underlying lands. While an IBLA decision can be instructive, its effect is directed to lands subject to federal law as opposed to lands subject to state law. Once the TA was issued, the lands underlying the Pass Creek site became subject to state law.

The federal position was clarified with an instruction memorandum issued by BLM in 1982. The memo reinforced their position that prior easements or ROW grants issued to the State would not be reserved in subsequent patents due to merger.

3. Merger – DNR Position: A 1983 memo between DNR and DOT discussed “Interagency Land Management Assignments”. The memo suggests that an ILMA could be issued from DNR to DOT for certain interests that are extinguished upon patent to the State by merger of title. It is unclear whether acceptance of the “merger” doctrine was a long standing DNR position but it appears to have been directed more toward material site and airport parcels rather than highway ROW Grants.

In 2014, the DNR Chief of Realty Services issued an email stating “Per your question regarding BLM’s merger of title, this action does not extinguish prior rights given to the state i.e., DOTPF if they were still in existence at the time.” A draft 2015 memo discussing the applicability of the merger doctrine when DNR issues easements to other state agencies mentioned a 2015 meeting with the AGO stating “The most important conclusion was that Merger of Title does not apply for public easements issued to State agencies.”

4. Merger – DOT&PF Position: A 1989 memo from DOT NR to DNR provides evidence that DOT had submitted applications for material site authorizations on the Parks Highway that purportedly had been extinguished by merger. Recent discussions with Northern Region staff indicate an acceptance of the merger doctrine as it applies to prior federal material site grants. Further discussions with supervisory Central Region staff and the HQ ROW Chief indicates that discussions with the AGO has led them to the conclusion that merger will not extinguish federally granted public easements.

As a part of the Seward Highway realignment land exchange between DOT&PF, DNR-Parks and the Alaska Railroad, two AGO opinions were issued. On 7/8/15 the DOT&PF AAG argued that merger does not apply to public easements and if in fact the Seward Highway easement merged with the patented fee estate, the Alaska constitution would require that the fee interest be vested in DOT&PF. The 10.28.15 DNR AAG rebuttal argued that fee would not vest

in DOT and that while the Seward Highway easement did merge with the State's fee interest "...the public road right-of-way remained intact and managed by ADOT."

5. Merger – State Law: In 2008-2009, DOT&PF was involved in litigation regarding a department managed beach access off of Kenai Spur Road that was being blocked by an adjoining land owner. (SOA v. Offshore Systems – Kenai) The access road was established under federal Public Land Orders and conveyed to the State in the 1959 Omnibus QCD. The lands underlying the road were subsequently conveyed by patent to the State of Alaska. The defendant in the case argued that the ROW easement for the road had been extinguished under merger of title. The 7/9/09 Order on Summary Judgment confirmed that under state law, merger will not extinguish a public easement stating "To find otherwise would mean that all public roadways deeded to the State of Alaska by quitclaim deed by the federal government in 1959 were automatically vacated upon issuance of the federal patent of the remainder of these lands..." The Pass Creek material site ROW Grant constituted a valid prior existing public easement interest that also would not be extinguished by merger upon receipt of patent to the underlying fee estate.

#### Other Pass Creek Site Issues:

1. Denali State Park

- a. The lands in the vicinity of the Pass Creek site were incorporated into the Denali State Park in May of 1970. The northerly boundary of the State Park is located at the northerly boundary of T. 33 N., R. 2 W., S.M. at approximate Parks Highway MP 169.5.

The 2006 Denali State Park Management Plan recommends a "Cooperative Management Agreement between State Parks and DOT&PF concerning gravel extraction sites adjacent to the highway." With an objective to "Clarify management authority over sites and start a restoration program for those sites no longer in use." It further notes that inactive sites could be restored and utilized as controlled access..." for recreational use.

An August 20, 1980 DOT&PF Central Region ROW issued a letter of non-objection for DNR-Parks to use MS 35-3-035-1 indicating the acknowledgment by DNR Parks of DOT&PF as material site manager.

- b. There has been ongoing tension between State Parks and DOT&PF regarding the status of existing ROW for the Seward Highway through the Chugach State Park. Of concern to DOT is Parks assertion that the AS 41.21.151 language establishing the Denali State Park, was formed out of "State-owned land and water" without exception or reservation of the highway interests, along with a suggestion that Parks management authority over the highways is superior to that of DOT&PF.

2. AGDC Pipeline Projects

- a. ASAP – The ASAP line received a ROW Lease from DNR in 2012, however this project is now on the shelf. The project did identify the Pass Creek site as a potential material

source but it was to be considered in a future authorization and was not included in the 2012 lease document.

- b. Alaska LNG – The ROW Lease application for this project was recently submitted to DNR in October of 2019 and so there are no current authorizations relating to this project. The project also identifies the Pass Creek site as a potential alternate material source.
- c. Discussion with AGDC Land staff indicates that both projects would be subject to DOT's rights if the site constituted a valid pre-existing material source.

### 3. Environmental Document

- a. The 9/11/18 Categorical Exclusion document for the Parks Highway MP 163-183 project states that NEPA 4(f) and 6(f) LWCF resources exist within the project area but project activities do not constitute a "use" of 4(f) property or a "conversion" of 6(f) property. This assumes that project activities will take place within the existing ROW.
- b. Note: If it is determined that "merger of title" has in fact extinguished the Pass Creek material site grant, the validity of the main line highway ROW grant would also be in question. Both the material site and highway ROW exist under the same federal authority. If the highway grant is extinguished, the 4(f) & 6(f) conclusions may no longer be valid.

### 4. Mat-Su Borough

- a. Ordinance 17.30 regarding Earth Materials Extraction Activities could affect the Pass Creek site but not if it was a valid existing site prior to the effective date of the ordinance in 2005.

### Summary:

The Pass Creek site would be an available valid existing site if it is determined that "merger of title" did not extinguish the 1962 federal grant upon receipt of the TA for the underlying fee estate. There is support in Alaska law, opinions issued by the AGO and the positions according to CR & HQ staff that merger did not and could not extinguish the Pass Creek site grant. There even appears to be some support at some levels of DNR for this position. If the federal grant is determined to be a valid existing right that preceded the formation of the Denali State Park, leases for proposed pipeline projects and the Mat-Su Borough ordinance 17.30, then those interests would be subject to the grant. The environmental document for the current project would also remain valid because if merger did not occur, construction activity for the Parks Highway MP 163-174 Rehabilitation project will remain within the existing highway right-of-way.

To move forward, it will be necessary for DOT&PF NR & HQ to assert the continuing validity of the BLM ROW Grant for the Parks Highway and the Pass Creek site for the public, DOT and their contractors and to ensure that staff are made aware of this assertion.

MS 35-3-035-1 Parks Hwy MP 166 - Pass Creek Site Documents			
Date	Activity	Source Document	Folder
10/3/61	BLM Decision - ROW Grant for MS35-3-035-1; BLM A052629; Parcel No. 12-1 Ptns of Sections 29 & 30, T33N R2W SM, 249.08 acres	35-3-035-1 Grant.pdf	BLM
11/9/62	BLM Decision - <b>Highway ROW Grant A052629</b> Recorded in B26 P392; Talkeenta Recording District; 12/15/62 Permitted Use: Highway Purposes Authority: Act of August 27, 1958 (72 Stat. 885; 23 U.S.C. 317) <b>Expiration date of grant: None</b>	B26 P392 BLM Highway ROW Grant 11.9.62.pdf	DOT&PF
11/15/62	BLM Decision - <b>Material Site ROW Grant</b> (Amends 10/3/61 Grant) A052629 Recorded in B26 P361; Talkeetna Recording District; 12/8/62 Permitted Use: Material Sites Authority: Act of August 27, 1958 (72 Stat. 885; 23 U.S.C. 317) <b>MS 35-3-035-1; Pass Creek Site; Parcel 12-1</b> <b>Expiration Date of Grant: None</b>	B26 P361 BLM MS ROW Grant Am 11.15.62.pdf	DOT&PF
7/12/67	BLM Decision TA Approved A062976; T33N R2W SM Doc 2008-001480-0; Talkeetna Recording District; 9/10/08 <b>"The patent will also contain reservations for the State of Alaska...Also rights-of-way will be reserved for material source sites in connection with the highway, Anchorage 052629 parcel 12-1, containing approximately 249 acres."</b>	Tentative Approval 7.12.67.pdf	BLM
7/2/68	DOH to BLM letter material site proof of utilization	MS Data 35-3-035-1 FBX.pdf	DOT&PF
10/25/68	ROW Map F-035-3(4) Palmer-Cantwell Highway - Sheets 67-75	Petersville-AK RR F-035-3(4) T33N R2W.pdf	DOT&PF
10/25/68	F-035-3(4) ROW Map Title Sheet w/ BLM Grant recording data	F-035-3(4) Plamer-Cantwell w Rec Info.pdf	DOT&PF
2/14/69	Site Plat MS 35-3-035-1; A052629; Pcl 12-1; Project F-035-3(4); 249 Ac.	MS Data 35-3-035-1 FBX.pdf	DOT&PF
5/9/70	2 ch 233 SLA 1970; AS 41.21.151 Denali State Park Established	Alaska Statutes Denali State Park 2019.pdf	DNR-Parks
5/20/77	BLM Township Survey Plat approved; T33N R2W SM	Township Survey T33N R2W SM.pdf	BLM
8/20/80	Letter from DOT CR to DNR Parks Non-objection for Parks to use MS 35-3-035-1	MS Data 35-3-035-1 FBX.pdf	DOT&PF
9/24/81	IBLA 80-564 (58IBLA118) Appeal of BLM Decision Material Site Grant Merger	058IBLA118 STATE OF ALASKA 9.24.81.pdf	Merger
7/28/82	BLM Instruction Memo - ROW interest extinguished by Merger of Title	1982.7.28 - BLM Memo - Merger of Title.pdf	Merger
11/10/83	DNR to DOT memo ILMAs - DNR may issue ILMA upon Merger of Title	11.10.83 DNR Memo ILMA - Merger.pdf	Merger

MS 35-3-035-1 Parks Hwy MP 166 - Pass Creek Site Documents			
Date	Activity	Source Document	Folder
8/4/89	NR DOT to DNR Memo - Application for material sources due to "merger".	Sample NRDOT-DNR MS App due to merger.pdf	Merger
6/30/06	Adoption of 2006 Denali State Park Management Plan	2006 Denali State Park Management Plan.pdf	DNR-Parks
5/26/09	BLM MTP Tract A T33N R2W SM showing A052629 MS & highway ROW	MTP T33N R2W SM.pdf	BLM
7/9/09	Superior Ct. Order on Summary Judgement - SOA v. Offshore Systems - Kenai P19 of 22 - <b>Merger of Title not applicable to public easements.</b>	7.9.09 Order on Summary Judgment.pdf	Merger
12/10/10	MS Inventory MS 35-3-035-1 Pass Creek Site by R&M Inc. Report notes that site "...should be retained by DOT&PF for future use."	2010 R&M MS Inv MS 35-3-035-1 Pass Creek.pdf	DOT&PF
7/25/11	AGDC ASAP Line ROW Lease - ADL 418997 Doc 2012-000165-0; Talkeetna Recording District; 2/2/12	ADL 418997 AGDC Lease Talkeetna RD.pdf	AGDC
3/24/13	Highway ROW in Alaska 2013 - JF Bennett - Merger of Title Excerpt	Merger of Title - Highways Paper jfb.pdf	Merger
9/25/14	DNR email - <b>Merger does not extinguish prior rights given to state.</b> From DNR Chief Realty Services	DNR - Merger of Title DOTPF interests.pdf	Merger
7/8/15	AGO/DOT Seward Hwy ROW - Discussion of Merger issue.	AGO DOT Seward Hwy ROW 7.8.15.pdf	Merger
10/28/15	AGO/DNR Chugach Park-Seward Hwy - Discussion of Merger issue.	AGO DNR Interests in ROW 10.28.15.pdf	Merger
1/14/16	AGDC ASAP Line Map Book sheet 157 showing MS 4B-A Pass Creek Site	ASAP Map Book Sheet 157-158.pdf	AGDC
9/11/18	Categorical Exclusion Parks Highway MP 163-183 Rehabilitation	Parks MP 163-183 CatEx 9.11.18.pdf	DOT&PF
10/1/19	SOA General Land Status Map Southcentral Alaska - Shows Park Boundaries	2019 Alaska General Land Status.pdf	DNR
10/23/19	AGDC Alaska LNG Map Book sheet 110 showing ALT-MS-612.19 Pass Creek Site	Alaska LNG Map Book Sheets 109-111.pdf	AGDC
10/31/19	AGDC Alaska LNG Pipeline - ROW Lease Application	10.31.19 AGDC Alaska LNG Mainline App.pdf	AGDC
1/26/20	Alaska Mapper S30/31 T33N R2W SM - Showing ADL 418997 AGDC/ASAP over MS	Alaska Mapper MP 166 Parks.png	DNR