MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities

TO: Joseph L. Perkins, P.E.
Commissioner
Northern Region

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FILE NO:

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FROM: Anton K. Johansen, P.E.
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SUBJECT: Right of Way
Title Defense

The highway and airport rights of way managed by the Department consist of a variety of title interests. Privately owned lands are typically acquired through negotiated purchase and clearly documented and described in some form of a recorded document. Highway rights of way crossing federal lands, however, were commonly established by PLO (Public Land Order) or Title 23 Highway Easement Deeds. Today, these grants make up the majority of our highway system.

As lands adjoining highways and airports are patented to individuals and developed, the Department has come under increasing attack by claimants who believe their interest to be senior to our rights of way. These conflicts arise primarily with native allotment claims although conflicts also occur when federal lands are patented to ANCSA corporations and administration of leases and material sites are transferred with the conveyance. For most of the conflicts, the issue at hand is whether the claimant's interest constituted a valid existing right prior to the establishment of the public right of way. The date that the conflicting private interests were created is a primary subject of debate between the federal agencies and the State of Alaska.

Title defense requires the involvement of the Attorney General's office to deal both with appeals of federal administrative decisions affecting the public's interest and potential litigation. More often than not, these conflicts with the right of way occur in areas where there are currently no funded projects. The result is a perpetual struggle to pay law bills. The alternative is to concede to the federal position and repurchase the rights of way from individual owners. We believe that the few cases we have been working on are the tip of the iceberg and therefore, by this memo, are requesting Headquarters participation in the funding for continuing defense of the Department's interests.

Background:

Public Highway Interest: Between 1942 and 1958 and under the authority of the Departments of Interior and Commerce, a series of Public Land Orders established rights of way for highway purposes across unreserved federal lands in Alaska. Specifically, the Public Land Orders were "subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes". Originally, the rights of way were withdrawn from the public domain which prevented conflicting entries by homesteaders and mining claimants. By statehood, all of the withdrawals had been converted to easement interests. This conversion allowed the federal government to issue patents for the underlying fee estate that would be subject to the highway easement. In 1959, The Omnibus Act Quitclaim deed transferred approximately 5,400 miles of

highway rights of way to the State of Alaska. A quitclaim deed does not warrant title, but only conveys that interest, if any, held by the grantor.

At the close of federal jurisdiction over highways in Alaska, new rights of way over federal lands were often acquired through a Title 23 Highway Easement deed (Act of August 27, 1958 – 23 U.S.C., Sections 107(d) and 317). These rights of way, issued by the Federal Highway Administration were authorized as a part of the development of the Interstate highway system. Through this authorization, FHWA could appropriate lands managed by certain other federal agencies and transfer those lands to the state highway department. The Highway Easement deeds were issued subject to "outstanding valid claims, if any, existing on the date of this grant".

Public Airport Interest: Prior to statehood, many airports were withdrawn from the public domain as Air Navigation Sites. At statehood, the majority of these were conveyed via the Omnibus Act Quitclaim deed or issued in subsequent patents to the State of Alaska. The State received a fee interest in these airports, however, these transfers were also without warranty and subject to the valid claims that existed prior to the withdrawal of the lands for airport purposes.

The State also leased land for airports from the federal government under the authority of the Act of May 24, 1928 (45 Stat. 728; 49 U.S.C. 211-214). The lands were leased for a term of 20 years and granted an exclusive right to operate and maintain an airport. When the fee estate of the airport lands is conveyed from BLM to a third party, the fee estate would be made subject to the remaining term of the 20 year lease.

Conflicting Claims: The "prior existing rights" and "valid outstanding claims" that could potentially defeat a federal highway or airport grant included homesteads, mining claims, native allotments and a variety of other interests. Currently our title defense activities involve few claims other than native allotments and ANCSA conveyances. This is due to the fact that there is a fairly well documented paper trail identifying the date that a valid interest was created by a homestead entry or mining claim location. There is also a well-established body of state law regarding conflicts between public highway grants and private claims.

Prior to the enactment of the Alaska Native Claims Settlement Act (P.L. 92.203 December 18, 1971), native allotments were provided for by laws passed in 1887, 1906 and 1910. Alaska Native leaders, aware that these laws were to be repealed by ANCSA, organized and enrolled eligible applicants in the 1906 Native Allotment Act prior to the passage of ANCSA. As provided for in Section 18 of ANCSA, any applications that were pending as of the date of ANCSA could still be approved and a patent issued in accordance with the prior law. However, the pre-ANCSA date of the allotment application was not the date used by BLM to fix the claimant's interest. Instead, BLM used the "date of occupancy" as the date in which an inchoate interest was initiated. Information regarding the "date of occupancy" was not available in the public record prior to the application for the allotment. Therefore, the State's good faith assertion of a valid public right would have been made without knowledge of prior claims of this type.

Notification of Conflict: Prior to issuance of an allotment certificate, BLM reviews and adjudicates conflicting claims that may have an effect on the allotment. Where the allotee's claimed date of occupancy conflicts with a public right of way grant, BLM will typically issue a decision declaring the right of way grant null and void. The basis for this decision is that the use

and occupancy by a Native of a parcel of land creates an inchoate preference right which, once vested through the filing of an application, relates back to the date of the initiation of the use and defeats all subsequently made appropriations of the land including subsequently issued rights of way.

Allotment lands are held in trust by the federal government and managed by the Bureau of Indian Affairs for the benefit of the Native allotee. BIA or a realty manager under contract to BIA defends and files actions on behalf of the allotee. Prior to certification of the allotment by BLM, BIA will contest decisions made in the BLM adjudication process that it considers adverse to it's clients interests. After certification, BIA has also contested the use or validity of public rights of way due to the fact that BLM did not specifically reference an existing right of way in the allotment certificate.

Example Cases:

Mentasta Spur Road: In 1988, Ahtna, Inc., the Mentasta Village Traditional Council and Frank Sanford appealed the BLM decision to make Sanford's allotment subject to a PLO right of way for the Mentasta Spur road. The state's appeal eventually resulted in success when the Interior Board of Land Appeals (IBLA) issued a judgement in 1991 validating the PLO right of way.

Edgerton Highway Material Site: Lucy Williams applied for a native allotment on March 27, 1972. The application claimed use and occupancy from July 1955. On August 17, 1965, the State of Alaska filed an application for a material site and was granted a right of way subject to all valid existing rights existing on the date of the grant. BLM declared the right of way null and void as to lands in conflict with the Williams allotment. In an appeal to IBLA, the state contended that it should be allowed to contest the allotment, that the right of way is a valid existing right and that legislative approval does not preclude inquiry into the sufficiency of the allotment applicant's use and occupancy. On December 12, 1992, the IBLA rejected the state's arguments and held that Native allotment applications always defeat conflicting right of way grants even when issued prior to the allotment application. The next course of action was to file a suit in federal District Court to review the IBLA decision. The District Court held that the sovereign immunity of the federal government prevented review of the IBLA decision. This case proceeded to the U.S. Supreme Court where on June 26, 1995 they refused to review the 9th Circuit Court of Appeals affirmation of the District Court decision. The State currently remains in possession and control of the material site pending an action by the federal government to eject the State. At such time the federal government would have waived immunity and the State would be entitled to have the court review the merits of the IBLA decision. This case is fairly representative of several allotment contests we are currently involved with.

Edgerton Highway Channel Change ROW: On December 9, 1965, the State filed an application for a right of way along the Lower Tonsina river. A grant was issued on November 8, 1966. On August 11, 1971, BIA filed a Native allotment application on behalf of Joe J. Goodlataw, Sr.. Mr. Goodlataw's claimed use and occupancy was from August 1954. Due to this conflict, BLM issued a "null and void" decision regarding the State's right of way on June 29, 1992. The decision stated that "Mr. Goodlataw's use and occupancy of the land began prior to the date the right of way application was filed, and… the right of way grant was issued subject to valid existing rights,.." One of the common threads in these cases is that there was no evidence in the

BLM record which indicates that the allottee even used the land which was in conflict with the right of way grant. The state filed an appeal to IBLA in this case and is awaiting a decision.

Parks Highway: This case involves land which encompasses the Tanana river bridge at Nenana. The State of Alaska received a federal highway right of way crossing the river on December 9, 1965. The bridge crosses a small island in the Tanana river for which Dinah Albert filed a Native Allotment application on January 11, 1966. Albert's application claimed use and occupancy since 1938. The State appealed the allotment application and initially received an IBLA decision making the allotment subject to the right of way. In 1987, IBLA reversed its position that an issued federal right of way would take precedence over an inchoate but later-filed Native allotment claim. The State unsuccessfully appealed this decision and proceeded to the U.S. District Court. The Court ruled that the IBLA decision could not be judicially reviewed due to sovereign immunity of the federal government. The State continues in its position that the Albert allotment is subject to the preexisting highway right of way.

Teller Airport: The Teller Airport case does not involve a Native allotment, but is indicative of the potential magnitude of costs that can be incurred when the State is not vigilant in defending it's title interests. The initial construction of the new Teller Airport had taken place on public domain lands secured by a 20 year lease received from BLM in 1973. Teller Native Corporation selected and received the surface interest to the airport land subject to the lease on January 15, 1982. The administration of the airport lease was waived by BLM and transferred to TNC in 1983. The Department of Law recommended that DOT&PF challenge the waivers of administration through an appeal to IBLA and federal court, if necessary. DOL was concerned that a private corporation would not administer a lease consistent with the public interest. The Commissioner's office at that time was not interested in challenging these waivers of administration. Expansion of the airport in 1989 required a condemnation action against TNC. The condemnation was intended to secure the land encumbered by the old BLM 20-year lease and well as additional lands. The case generated valuation issues that eventually ended up being reviewed by the Alaska Supreme Court. The Court ruled that as the lessor had an expectation of receiving the land and improvements at the conclusion of a lease, that the State must pay TNC for the value of the improvements as well as the value of the land interest. Had the Department of Law successfully prevented the waiver of administration, the result could have been significantly different. The Department's initial appraisal of the land alone indicated a fair market value of approximately $39,000. After the Supreme Court's decision, a TNC appraisal including the value of the improvements suggested compensation due in the amount of 1.2 million dollars. This case has not yet been resolved.

Current Status:

Currently the Northern Region through the Attorney General's office is pursuing or has concluded more than 20 similar cases on the Parks, Edgerton, Glenn, Elliott, Steese and Denali highways as well as several smaller secondary routes such as the McCarthy road and Minto road. These cases are also not limited to highways but include several airport properties. Quite often the conflicts with Department facilities do not become apparent until the allotment is surveyed. Given the fact that the BLM allotment survey program is just now coming into full swing, we can reasonably conclude that these cases represent just the tip of the iceberg.

An adverse result in these cases could potentially sever many of the major highways in the state. Although there are occasional successes in defending a public right of way against an individual claim, our ultimate goal is to force a federal judicial review of several IBLA decisions and to receive a ruling in support of the public's interests which will have a state-wide effect.

The alternative to defending the State's interests is to acquire the contested areas by negotiated purchase or condemnation. Abandoning the defense of the State's interest would also likely lead to trespass claims against the State for past use of the land.

Conclusion:

The Northern Region has been leading the Department in defense of title cases primarily because more of our facilities are impacted by Native allotments than those in the other regions. However, a successful conclusion to our pursuit of these issues will clearly have a beneficial impact on public rights of way throughout the state.

Unfortunately, it is a rare occurrence when these cases fall within a funded highway or airport project. If they did, then paying law bills to resolve the conflict from the project funding would be more than justifiable. Since 1990, the Northern Region has incurred more than $150,000 in law bills that cannot be attributed to funded projects. As such, it is necessary to pay these bills out of operating and non-participating funds. With the continuing reduction of operating funding and the potential for increasing costs of defending the public's interests, we are requesting by this memo, Headquarters participation in paying these law bills. We are very interested in receiving your support on this issue.