

#28.6

TO: John Withey, Supervisor  
Right-of-Way Relocation  
DOT/PF--Anchorage

DATE: March 25, 1981

FILE NO:

TELEPHONE NO:

D.O.T. & P.F.  
RIGHT OF WAY  
ANCHORAGE

MAR 26 1981

RECEIVED

FROM: Susan Urig<sup>su</sup>  
Assistant Attorney General  
Department of Law--Anchorage

SUBJECT: State of Alaska's  
Authority to Lease  
PLO and '47 Act  
Rights-of-Way

You have requested our advice concerning the authority of the Department of Transportation and Public Facilities to lease portions of rights-of-way in which the State has an interest pursuant to various public land orders (particularly PLO 2665) and pursuant to the '47 Act, 48 U.S.C. §321(d). Briefly stated, it is our opinion that the State has the authority to lease such right-of-way, subject to certain conditions set out below.

AS 19.05.070 provides the Department with the authority to dispose of land acquired for highway rights-of-way. The statute provides, in full, as follows:

"Sec. 19.05.070. Vacating and disposing of land and rights in land. (a) The department may vacate land, or part of it, or rights in land acquired for highway purposes, by executing and filing a deed in the appropriate recording district. Upon filing, title to the vacated land or interests in land inures to the owners of the adjacent real property in the manner and proportion considered equitable by the Commissioner and set out by him in the deed.

(b) If the department determines that land or rights in land acquired by the department are no longer necessary for highway purposes the department may:

- (1) transfer the land or rights in land to the Department of Natural Resources for disposal, or
- (2) sell, contract to sell, lease, or exchange land or rights in land according to terms, standards and conditions established by the commissioner. Emphasis added.

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TRANSPORTATION

(c) Proceeds received from disposal of land or rights in land as authorized by this section shall be credited to the funds from which the purchase of the land was made originally.

Thus, AS 19.05.070 provides the Department with the authority to lease state land or rights in land, which include highway right-of-way. The statute sets out certain requirements with which the Department must comply before it can lease an interest in land, however.

AS 19.05.070(b) provides that the department must first determine that the department's interest in real property is no longer necessary for highway purposes. After that determination has been made, section (b) (2) provides that the department may lease its land or rights in land according to terms, standards and conditions established by the Commissioner. As I understand it, no such terms, standards or conditions have been established. Because you have told me that applications for leases of state rights-of-way will be numerous in the future, I suggest that the department establish guidelines for leasing. Since the statute does not specifically state that regulations must be adopted, however, it would probably be sufficient if the department drew up general standards to be applied to each application for a lease that would provide criteria for the department's decision to grant or deny the application. A form lease, containing standard terms and conditions, should also be established to comply with the terms of the subsection. Standard criteria might include considerations previously discussed with you, including the requirement that the grant of the lease would not cause any harm to the underlying interest in land below the right-of-way, that the grant of a lease would not cause another property owner to be landlocked and that public notice of the State's intent to grant the lease might be required.

You have mentioned a concern that leasing of the State right-of-way might in some way be a violation of the terms of the State's grant of right-of-way by the federal government. If the State leases its right-of-way there will be no violation of federal law because, at statehood, Alaska acquired full authority to use right-of-way along State roads. Supervision by the federal government over such rights-of-way was terminated at that time.

As to this particular application, the property owner in Clam Gulch is applying for the lease of a right-of-way that was originally reserved by the terms of the '47 Act, 48 U.S.C. §321(d). The '47 Act provided that a right-of-way for highways constructed or to be constructed by the United States or any state created out of the Territory of Alaska was reserved when a patent was issued. Therefore, the terms of the '47 Act show an intent by the federal government that when statehood was granted, the new State of Alaska would take over '47 Act rights-of-way.

In like manner, Public Land Order 2665, which was issued prior to statehood, also reserved rights-of-way for highway purposes along various roads located in the territory of Alaska. Since the Order did not provide that such rights-of-way would be reserved specifically to the United States, it must be assumed that was the intent. When Alaska became a state, however, section 21(a) of the Alaska Omnibus Act required that the United States transfer to the State of Alaska "all lands or interests in lands. . . pertaining to roads in Alaska, which [were] owned, held, administered, or used by the Secretary [of Commerce] in connection with the activity of the Bureau of Public Roads in Alaska." Therefore, at statehood, the authority of the federal government as it related to highway right-of-way reserved by the terms of the '47 Act and relevant Public Land Orders was transferred to the State of Alaska. Thus, upon statehood, Alaska acquired the authority to use the right-of-way along State roads so long as such use complied with the terms of applicable State statutes.

In conclusion, assuming the department will comply with the requirements set out in AS 19.05.070, it has the authority under state law to lease rights-of-way to private individuals. Furthermore, there would be no effect on the interests of the federal government as a result of the State's grant of such applications for leases, because the federal government has relinquished its interest in such right-of-way to the State of Alaska.

Please find enclosed the letter I sent to the applicant, Mr. Patmor. Please contact me if I can be of further assistance.

SU:bla

Enclosure (as stated)