STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907)269-5100
FAX (907)279-5832

January 23, 2002

Greg Oczkus
Greg Oczkus Law Offices
202 Hafling Building
430 West 7th Avenue
Anchorage, AK 99501

Re. Errata
Shawn Stephan/United Rentals
R/W ID # 111.009
Our file: 661-02-0208

Dear Mr. Oczkus:

I am writing to correct an error in my January 15, 2001 letter concerning the Shawn Stephan/United Rentals encroachment. In my letter, I stated that 17 AAC 20.010 is still effective when in fact it was annulled in 1997. That regulation, adopted in 1969, stated, "It shall be unlawful to place, erect, or maintain any outdoor advertising sign within the right-of-way of any highway or highway lands, nor shall any permit be issued for the placement or erection of the sign." By the time the regulation was annulled, AS 19.25.105(d) explicitly prohibited by statute outdoor advertising within the right of way unless posted in accordance with one of the statutory exceptions. As explained in my January 15, 2001 letter, your clients' sign was unlawful under 17 AAC 20.010 and does not fit within the exceptions to AS 19.25.105(d).

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:
James E. Cantor
Assistant Attorney General

JEC/bap

cc: Dave Heier, DOT&PF Right of Way Section
Jim Sharp, DOT&PF Right of Way Section

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907)269-5100
FAX: (907)279-5832

January 23, 2002

Greg Oczkus
Greg Oczkus Law Offices
202 Hafling Building
430 West 7th Avenue
Anchorage, AK 99501

Re. Errata
Shawn Stephan/United Rentals
R/W ID # 111.009
Our file: 661-02-0208

Dear Mr. Oczkus:

I am writing to correct an error in my January 15, 2001 letter concerning the Shawn Stephan/United Rentals encroachment. In my letter, I stated that 17 AAC 20.010 is still effective when in fact it was annulled in 1997. That regulation, adopted in 1969, stated, "It shall be unlawful to place, erect, or maintain any outdoor advertising sign within the right-of-way of any highway or highway lands, nor shall any permit be issued for the placement or erection of the sign." By the time the regulation was annulled, AS 19.25.105(d) explicitly prohibited by statute outdoor advertising within the right of way unless posted in accordance with one of the statutory exceptions. As explained in my January 15, 2001 letter, your clients' sign was unlawful under 17 AAC 20.010 and does not fit within the exceptions to AS 19.25.105(d).

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:
James E. Cantor
Assistant Attorney General

	CHIEF R/W AGENT
	PRE AUDIT
X	ENGINEERING
	APPRAISALS
	NEGO
X	Relo
	UTILITIES
	RETURN TO:
	FILE

JEC/bap

cc: Dave Heier, DOT&PF Right of Way Section
Jim Sharp, DOT&PF Right of Way Section

bcc: Bill Cummings, Assistant Attorney General
John Bennett, ROW Chief, Fairbanks ✓
Rick Kauzlarich, Statewide ROW Chief, Juneau

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907)269-5100
FAX: (907)279-5832

January 15, 2002

Greg Oczkus
Greg Oczkus Law Offices
202 Hafling Building
430 West 7th Avenue
Anchorage, AK 99501

RECEIVED
JAN 18 2002

Re. Shawn Stephan/United Rentals
R/W ID # 111.009
Our file: 661-02-0208

Dear Mr. Oczkus:

I am writing in response to your letter of October 15, 2001, addressed to Tucker Hurn, Department of Transportation and Public Facilities right of way agent. Your clients, Shawn Stephan and United Rentals, have built signs and asphalt parking areas within the Old Seward Highway right of way. Since at least 1994, the Department of Transportation has been asking your clients to either remove their property from the right of way or apply for proper permits. Your clients have neither removed their property nor applied for permits, instead asserting a right to freely maintain their property within the right of way.

Your clients neither own nor control the Old Seward Highway right of way. The right of way stems from Public Land Order ("PLO") 601, issued by the Secretary of the Interior in 1949. That PLO established that 100 feet on each side of the center line of the Anchorage-Potter-Indian Road was "withdrawn from all forms of appropriation under the public land laws." The road was already in existence at the time the PLO was issued. State v. Alaska Land Title Association, 667 P.2d 714, 724 (Alaska 1983). Your clients predecessor, Benjamin L. Taylor, applied for entry on December 29, 1950. Accordingly, Mr. Taylor's entry was subject to PLO 601 and did not include the lands withdrawn by PLO 601.

PLO 757 and Departmental Order 2665 were issued on the same day in 1951. PLO 757 amended a paragraph of PLO 601. It changed the classification of what was by then known as the Seward-Anchorage Highway from a feeder road to a through road, and

established that the withdrawal along this roadway would be 150 feet on each side of the center line. As explained by the Alaska Supreme Court in State v. Alaska Land Title Association, 667 P.2d at 719, "PLO 757 amended the sixth paragraph of PLO 601, [reference to footnote omitted], increasing the withdrawal for the Seward Highway (the Anchorage-Potter-Indian Road in PLO 601) from 100 feet to 150 feet on each side of the center line." This change in width did not change the width of the PLO withdrawal in front of Mr. Taylor's entry because he had already entered. The outer 50 feet of the 150 foot withdrawal specified in PLO 757 was thus subject to his valid existing right.* The previously withdrawn 100 feet on each side of the center line of the Seward-Anchorage Highway remained withdrawn. PLO 757 reaffirmed that the withdrawn lands were "withdrawn from all forms of appropriation under the public land laws."

PLO 757 released some lands from withdrawal status, but the lands released were not on the Seward-Anchorage Highway. Section 3(b) of Departmental Order 2665 established that the lands released from withdrawal status would henceforth be rights-of-way or easements. Section 3(b) of Departmental Order 2665 specified the lands that would be subject to rights-of-way or easements as the feeder roads and local roads listed in Section 2 of the Departmental Order. The Seward-Anchorage Highway was not on this list.

Section 3(a) of Departmental Order 2665 affirmed the status of the Seward-Anchorage Highway lands as follows:

> A reservation for highway purposes covering the lands embraced in the through roads mentioned in section 2 of this order [including the Seward-Anchorage Highway] was made by Public Land Order No. 601 of August 10, 1949, as amended by Public Land Order No. 757 of October 16, 1951. That order operates as a complete segregation of the land from all

---

* An argument could be made that "a full 150 foot easement became fixed across [property adjacent to the Seward Highway] by operation of the section 321d patent reservation and promulgation of PLO 757, and thus may be unaffected by the Right-of-Way Act of 1966." Alaska Land Title Association, 667 P.2d at 724. If this were the case, the outer 50 feet of the 150 foot right of way would probably consist of an easement, not a withdrawal. In any event, the State will not make this assertion as to the Stephan parcel at issue if this matter can be resolved short of litigation. If the State is required to litigate its rights, it reserves the right to present all of its legal arguments.

forms of appropriation under the public-land laws, including the mining and the mineral leasing laws.

In 1954, Mr. Taylor received a patent to the lands he had entered. The patent broadly described the land conveyed, apparently including the land that had previously been withdrawn in PLO 601as modified by PLO 757. The patent referenced the official plat of the survey of the land. That survey was done in 1917 and did not show the Seward Highway or any other subdivisions of land existing in 1954. The patent did not explicitly note that title was subject to the PLOs. Nonetheless, in State v. Alaska Land Title Association, 667 P.2d 714 (Alaska 1983), the Alaska Supreme Court ruled that the title to land subject to PLO 601 and PLO 757 remained subject to those PLOs even though the patent from the United States did not explicitly reference the PLOs. This is because the PLOs were published in the Federal Register and the public was thus on constructive notice of their existence. The court rejected a statute of limitations defense as well as estoppel arguments based on the passage of twenty years, during which governments had stood by while the lands in question were developed. (In State v. Simpson, 397 P.2d 288 (Alaska 1964), the Alaska Supreme Court rejected similar estoppel arguments made in connection with a non-PLO right of way.)

In 1956, Congress allowed for the revocation of the PLO land withdrawals. 43 U.S.C. § 971a – e. The statutes provided that upon revocation the land would not become part of the adjoining estate, such as Mr. Taylor's. If a withdrawal was revoked, the land would become subject to easements as established by the Secretary of Interior. Lands within such an easement could not be utilized or occupied without the permission of the Secretary. The Secretary could sell the restored lands for not less than their appraised value, giving a preference right to holders of adjoining claims or entries and to owners of adjoining private lands.

In 1958, the Secretary of Interior issued Public Land Order 1613, exercising the authority granted by Congress to change the status of the withdrawn lands to easements. PLO 1613 allowed lands released from withdrawal that adjoined private property to be sold at not less than appraised value. Adjoining landowners were given a preference right to purchase at appraised value. Your clients' predecessors did not purchase any of the released land and thus neither they nor your clients ever acquired an interest in the released land.

PLO 1613 also specified that the lands within the newly-created easements, including the Seward-Anchorage Highway, could not be occupied or used for other than highways, telegraph lines and pipelines without the permission of the Secretary of the

Interior. The State of Alaska acquired the rights of the United States, including its permit authority, at statehood.

The fact that the easements could not be used for purposes other than highways, telegraph lines and pipelines without the permission of the Secretary of the Interior was discussed in Matanuska Valley Bank v. Abernathy, 445 P.2d 235 (Alaska 1968). In that case, a purchaser of land was granted rescission because a substantial portion of the roadhouse he thought he purchased was in a PLO 1613 easement. The Court explained that Public Land Order 1613 "reserved to the United States an easement 150 feet wide on each side of the Glenn Highway and prohibited the area from being used for other than highway, telegraph, or pipeline purposes." Unbeknownst to the parties, a "substantial portion of the roadhouse buildings were located on land under the permanent control of the United States." Thus, the "mutual assumption of the parties that the buildings were suitably located for their continued use for roadhouse purposes was found to be erroneous."

Some people, although not your clients' predecessors, exercised their ability under PLO 1613 to purchase the released land adjoining their property by submitting an application and money to the federal government. Before the federal government issued title documents to these people, some of them conveyed their adjoining lands to others. The federal government later determined that it must convey the released lands ("the highway lot") to the original applicant, not to the current owner of the adjoining land, because equitable title vested in the original applicant when they submitted their application and money. Robert and Patricia Bailey et al., 89 IBLA 369 (IBLA 84-874 et al. 1985). This left the ownership of the land originally withdrawn by PLO (the highway lot) and the ownership of the land adjoining the former PLO withdrawal in different hands.

To complicate matters, the Alaska Department of Transportation and Public Facilities vacated fifty feet of its PLO easement along the Old Glenn Highway in Eagle River and Chugiak. This left the owner of the highway lot with a fee adjacent to the highway, and the owner of the formerly adjoining land with no direct highway frontage. To make matters worse, the owner of the highway lot had in some instances by this time died, dissolved, or disappeared. The statute you cited in your letter, AS 09.45.015, was enacted in 1986 to help alleviate the problem created by the IBLA's Bailey decision. That statute set up a presumption that after 1958, a conveyance of land adjoining a highway reservation listed in PLO 1613 conveyed land up to the center line of the highway. The statute only set up a presumption. It did not convey or establish any ownership interests. More importantly, the presumption was explicitly "subject to any

highway reservation created by Public Land Order 601 and any highway easement created by Public Land Order 1613." The 1986 legislature thus explicitly recognized the continuing effect of both PLO 601 reservations and PLO 1613 easements. Because the presumption is subject to the PLO right of way, it is inapplicable to your clients' situation.

A companion statute, enacted in the same bill in 1986, AS 09.45.052(b), allowed adjoining landowners to adversely possess against property owned by a person holding equitable title from the United States pursuant to paragraphs 7 and 8 of PLO 1613. Those paragraphs were the paragraphs giving adjoining landowners a preference right to purchase released lands at appraised value. AS 09.45.052(b) allowed an adjoining landowner claiming adverse possession under color of title to accumulate years of possession during the period when the owner of the "highway lot" merely held equitable title under Bailey. This statute does not grant rights against the State of Alaska because the State of Alaska does not hold equitable or actual title under paragraphs 7 and 8 of PLO 1613. Furthermore, adverse possession cannot lie against the state.

The bottom line of this analysis is that your clients do not hold title to land within 100 feet of the original center line of the Seward Highway. Your clients' predecessor took title subject to a PLO 601 withdrawal. Your clients never acquired equitable or actual title to the withdrawn portion when the withdrawal was revoked. The current easement cannot be used for any purpose other than highways, telegraph lines or pipelines without a permit.

AS 19.25.200, enacted in 1971 before the construction of your clients' signs and parking areas, also prohibits encroachments within the highway right of way without a permit. The Department of Transportation and Public Facilities has informed your client that it can issue a permit for the parking lots encroaching on the right of way. It cannot, however, issue a permit for the signs you assert your clients erected approximately seventeen years ago.

AS 19.25.090 and 19.25.105(d) prohibit outdoor advertising within the right of way unless on a bus bench, bus shelter, or trash receptacle under the authority of a permit. This prohibition on outdoor advertising has been in effect since 1949, long before the erection of your clients' sign. In 1969, 17 AAC 20.010 was adopted stating, "It shall be unlawful to place, erect, or maintain any outdoor advertising sign within the right-of-way of any highway or highway lands, nor shall any permit be issued for the placement or erection of the sign." That regulation is still effective.

The statutes prohibiting signs acquired their present shape in 1970 when AS 19.25.090 was amended to read: "Except as provided in sec. 105 of this chapter, all outdoor advertising is prohibited." AS 19.25.105 addressed advertising within 660 feet of the edge of the right of way and included an exception for signs advertising activities on the property upon which they were located. You cited this exception, AS 19.25.105(a)(2), as justification for your clients' sign. However, that exception only applies to signs on private property outside the right of way where activities may be lawfully conducted, not within the right of way where private activities may not be conducted. It is thus inapplicable.

If your client wishes to apply for a permit for its parking lot encroachments, please ask them to contact the Department of Transportation and Public Facilities immediately. If the signs have not been removed or if no application for a permit has been submitted within ninety days, this office will file suit to eject the encroachments.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:
James E. Cantor
Assistant Attorney General

JEC/bap

cc: Dave Heier, DOT&PF Right of Way Section
Jim Sharp, DOT&PF Right of Way Section

bcc: Bill Cummings, Assistant Attorney General
John Bennett, ROW Chief, Fairbanks ✓
Rick Kauzlarich, Statewide ROW Chief, Juneau