was assuming control over the land for highway purposes."[185] As land or rights in land acquired for State highway purposes can only be vacated by DOT&PF, the Municipality's vacation could only release the Municipality's interest. Note: In order to protect its interest, it is important for DOT to record its right-of-way plans within a reasonable period.

XIV. Federal Patent Reservation (General)

Federal Patent Reservation (General) - Rights-of-way for roadways may be provided and specifically described as to location and width in the patents of certain types of federal conveyances. An example of such conveyances would be BLM Small Tracts parcels.[186] The Small Tracts surveys were essentially small parcel (2.5 acres) subdivisions based on the rectangular system as opposed to federal townsite subdivision surveys. The Small Tract survey did not provide for platted street rights-of-way similar to townsite plats but instead provided specific reservations for roadway and public utility purposes. These rights-of-way were typically 33-feet wide and located on one or more of the 4 sides of the tract allowing for up to a 66-foot wide right-of-way between tracts.

Identifying and locating an express right-of-way as reserved in a federal Small Tract patent is fairly straightforward. What gets more complicated in analyzing rights-of-way adjoining Small Tract parcels is that they may also be subject to a Public Land Order easement. Note that while a Small Tract patent might include a "'47 Act" reservation, the Alaska Supreme Court has found that they cannot be applied to a Small Tract parcel.[187] In a later case, the Supreme Court ruled that the specific Small Tract rights-of-way were intended for access streets serving interior lots while the PLO road right-of-way was for "local" roads. As these two authorities were not in conflict, a PLO could be applied to a Small Tract if the appropriate criteria were met.[188]

XV. Public Prescriptive Easements

The subject of Public Prescriptive Easements is well covered in a paper by Dan Beardsley[189] and so I will limit my comments to a view of how I have seen these interests handled in the past by DOT&PF.

The law of prescriptive easements is nearly identical to the laws of adverse possession,

185 Safeway, Inc. v. State, Dept. of Transportation and Public Facilities, 34 P.3d 336 (Alaska, 2001)
186 Small Tracts - Act of June 1, 1938 (52 Stat. 609)
187 See State of Alaska Dept. of Highways v. Crosby, 410 P.2d 724 (1966)
188 See State Dept. of Highways v. Green, 586 P.2d 595 (1978)
189 See Public Prescriptive Rights across Public Lands by Daniel W. Beardsley. An earlier version of this paper was included in the 1994 edition of the Alaska Society of Professional Land Surveyors *Standards of Practice* Manual and has been updated for several subsequent presentations.

except that prescriptive easements are based on use rather than full possession.[190] Alaska case law has established that a prescriptive easement can be acquired by the public across private lands. However, the ability of the State to acquire a right-of-way by this method requires a greater burden of proof due to a conflict with the constitutional provision that property not be taken without just compensation.[191] The Alaska statutes dealing with adverse possession[192] are also the statutory basis for prescriptive easements.

Occasionally when developing a titles & plans project for an existing right-of-way, we will find that portions of the public highway are without benefit of an interest established by one of the many other authorities listed in this paper. There are a variety of reasons why and how this may have occurred. If our research can support non-permissive public use of the private property in excess of 10 years, we will outline the physical footprint of the road ("*ditch to ditch*") on the plans and note that the existing right-of-way is based on an easement by prescription. We recognize that this assertion is just a "*claim*" of a prescriptive easement and can be contested by the owner of the servient estate. Generally, we find that the "*claim*" provides a sufficient interest to move ahead with project construction and that the risk that our claim may be contested is low. If we had reason to believe that a high value project could be at risk due to our assertion of an easement by prescription we would also have the opportunity to quiet title through a condemnation action.

DOT has a risk management process referred to as right-of-way "*Certification*" that is performed for each project advertised for construction. Before any project can move to advertising, the Regional ROW Chief must certify that all of the right-of-way required for construction of the project as designed either exists or has been acquired as a part of the project. Federally funded projects also require compliance with federal regulations that a sufficient interest in ROW has been acquired[193] and that the necessary ROW has been acquired prior to advertising.[194]

Generally, I have found that many claims of prescriptive easements are related to village roads or those classified "*local*". We identified many such roads as a result of an early1999 DOT&PF modified design procedure referred to as the "*Gravel to Pavement*" projects. The purpose of these projects was to limit the design effort on certain roads to grading and hard surfacing in order to extend the maintenance life for the minimum cost. This class of roads generally consisted of local roads maintained by DOT&PF but for which there was little if any mapping or title evidence to support our claim of a right-of-way. The level of research we were

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190 No Room For Squatters: Alaska's Adverse Possession Law – Jennie Morawetz – Alaska Law Review, Volume 28, Number 2, December 2011 (Duke Law School)

191 Ault v. State, 688 P.2d 951, 956, (1984) "Because of the obvious tension between state's ability to acquire land by adverse possession and constitutional prohibition against state's taking private property without just compensation, it is appropriate to narrowly view circumstances under which state may acquire property by adverse possession and, for such purposes, good faith should be defined as honest and reasonable belief in validity of the title."

192 A.S. 09.45.052 Adverse Possession and A.S. 09.10.030 Actions to recover real property in 10 years.

193 23 CFR §1.23(a) in that a right-of-way acquired by the state shall be "*of such a nature and extent as are adequate for the construction, operation and maintenance of a project*."

194 23 CFR §635.309(c)(1), (2) & (3)

able to perform was also limited to a review of in-house and other public records. Rarely was a survey performed for these projects. Our risk assessment for advancing the "*certification*" of right-of-way for advertising was based on documented public maintenance & operation in excess of 10 years, no history of complaints and a clear note on the plans that no construction activity would take place beyond the existing footprint of the road.

Another category of projects that may have inadvertently led to the establishment of easements by prescription are those constructed under the 1960's "*Pioneer Access Road*"[195] program or the 1970's "*Local Service Roads & Trails*"[196] program. Both programs were state funded. While the program allowed the state to acquire right-of-way for projects, it was generally intended that the local government obtain any land interest required for construction of local service roads and trails. The lower level of scrutiny in determining whether a public right existed and a lack of oversight to ensure that one was acquired may have resulted in portions of roads being constructed without benefit of a public right-of-way.

Note that while the public may obtain an easement by prescription against a private owner, the reverse is not true. State land may not be acquired by adverse possession or prescription, or by any other manner except by conveyance from the State.[197] This prohibition also applies to other of instrumentalities of the State.[198] Similarly, a public prescriptive easement cannot be obtained across lands owned by the federal government, held in trust by the federal government for Alaska natives (allotments) or protected by specific federal legislation such as the Alaska Native Claims Settlement Act.[199]

In 2002 and 2003 the Alaska Legislature considered Senate Bills 309 and 93 respectively, which intended to repeal the concept of adverse possession referring to it as "*legal thievery*" of property or at least significantly reduce its effects on private property. Testimony from the Department of Law, utilities and title companies successfully persuaded the legislature that the impacts to roads, utilities and the loss of a mechanism to clear title between owners could be significant. The resulting bill maintained the ability of utilities and public transportation agencies to assert public prescriptive easements.[200]

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[195] Article 01 Roads to Areas Rich in Mineral Resources - A.S. 19.30.020-051 - § 1 Ch 47 SLA 1959 and Ch 154 SLA 1960

[196] Article 03 Local Service Roads & Trails - A.S. 19.30.111-251 - § 2 Ch 84 SLA 1971

[197] A.S. 38.95.010 – "*No prescription or statute of limitations runs against the title or interest of the state to land under the jurisdiction of the state. No title or interest to land under the jurisdiction of the state may be acquired by adverse possession or prescription, or in any other manner except by conveyance from the state."*

[198] A.S. 9.45.052(a) - Alaska Mental Health Trust; A.S. 42.40.450 - The Alaska Railroad; A.S. 14.40.291(b)) - The University of Alaska; A.S. 44.33.755 - Municipal Trust property held by the Department of Commerce, Community and Economic Development.

[199] Land conveyed by the federal government to a native individual or corporation pursuant to ANCSA is exempt from adverse possession claims so long as it is undeveloped, not leased and not sold. 43 U.S.C. § 1636(d)(1)(A)(i) (2006).

[200] A.S. 9.45.050 (c) and (d)