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MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities

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

DATE: September 18, 1997

FILE NO:

TELEPHONE NO: 451-2210

FROM: Anton K. Johansen, P.E.
Regional Director
Northern Region

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.

MEMORANDUM State of Alaska

Department of Law

TO: John Horn, P.E.
Regional Director
DOT/PF, Northern Region

DATE: April 5, 1990

FILE NO: 225-90-0073

TEL. NO.: 452-1568

FROM: E. John Athens, Jr.
Assistant Attorney General

SUBJECT: Funding of litigation for Native allotment conflicts

CONFIDENTIAL

Melissa in Right-of-Way at DOT/PF informed me that she had no source from which to pay legal fees and costs for litigation resulting from conflicts between Native allotments and highway rights-of-way. This is because these conflicts usually do not concern open projects, thus there is no project to which the legal costs and fees can be billed.

The typical situation concerns a right-of-way grant issued by the BLM to the state in the mid - 1960's. In about 1970 the allottee files a Native allotment application with the BLM alleging use and occupancy beginning in the early 1960's. The BLM in the 1980's adjudicates the allotment claim and rules that since the claim of use and occupancy predates the right-of-way grant, the grant is null and void. If there was legislative approval of the allotment under ANILCA, the state is not allowed a hearing.

The state currently has about 10 of these cases on appeal before the Interior Board of land Appeals. We have recently filed one case in the U.S. District Court. We also have one case set for a contest hearing next month.

The alternative to litigating these cases is either to abandon the right-of-way or reacquire the right-of-way. Because many of the conflicts concern such major highways as the Parks Highway and the Dalton Highway, abandonment of the right-of-way is not a viable option. Whether the department would find it to be in the public interest to accede to the BLM null and void determination and reacquire the rights-of-way would seem to me to depend on how many conflicts there are and the reacquisition costs. I have no estimate of either number of conflicts we can expect or the costs. I would note that we have already received 4 null and void determinations from the BLM this year based on Native allotment right-of-way conflicts. Because of the thousands of

	CHIEF R/W AGENT
X	PRE AUDIT
X	ENGINEERING
	TITLE
	PLANS
	MATERIALS
X	APPRAISALS
X	NEGOTIATIONS
X	Relocation / Prop. Mgmt.
ICH	AIRPORTS
	RETURN TO: Pre-audit
	FILE

pending Native allotments, I would expect to see more null and void determinations.

DOT/PF has a statutory obligation to protect the highway system. AS. 19.05.010. Because we do have substantial legal arguments that the highway right-of-way grants are valid existing rights to which the allotments must be made subject, I believe that we must get a final determination in federal court. I would therefore urge the department to secure appropriate funding to carry on the necessary litigation.

If you would like me to furnish you with specifics as to legal arguments or the cases we have, please let me know.

EJA/jag
cc: Right of-Way, DOT/PF

Right of Way Title Defense/Native Allotments
Information Sheet

Description of Project:
Defense for airport and highway rights of way against native allotment claims which purportedly precede the acquisition of the public's right of way title interest.

Contact Person:
Mr. Stephen C. Sisk, P.E., Northern Region Director Phone: 907-451-2210

Other Agencies:
DNR - Div. of Land is also involved in contesting and appealing Native Allotment claims which have an adverse effect on State interests. The Department of Law prepares the appeals and handles litigation.

Constituency:
Native allottees and the public users of transportation facilities.

Policy and decision opportunities:
A policy decision can be made to pro-actively resolve these adverse claims by recognizing the continuing requirement to protect the public's interest and to fund its defense.

Facts:
Federal airport and highway right of way grants as well as Public Land Order easements are at risk due to subsequent claims by a native allottee that their rights by occupancy precede the federal grants. Where the federal government has accepted the allottee's claimed date of occupancy, Null and Void decisions have been rendered against the public's interest requiring appeals, litigation and potential re-acquisition or abandonment of right of way. AS 19.05.010 provides a statutory obligation to protect the highway system. FAA Grant assurances provide a contractual obligation on the part of DOT&PF to protect airport property interests.

Statement of Controversy:
Most of the claims occur against existing rights of way and therefore the required appeals, litigation or re-acquisition are not eligible for federal participation. Generally, state funds are required to defend or re-acquire the public's interest.

Other:
None

Alternative Strategies:
No-Action: Lack of timely response to federal decisions will limit the State's opportunity to appeal. Require allottees to file inverse condemnation suits against the state to resolve claims.

Recommendations:
State funding of DOL and DOT&PF title defense activities.

STATE OF ALASKA
DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES RIGHT OF WAY

FACSIMILE TRANSMITTAL FORM

RECEIVER:	Rod Platzke
LOCATION:	DEC Director
FAX PHONE NO:	

SENDER:	J. Bennett
LOCATION:	ADOT/PF Right of Way
FAX PHONE NO:	

NUMBER OF PAGES: 1 PLUS TRANSMITTAL PAGE

CONTACT: JB AT 474-2413 IF THERE ARE ANY PROBLEMS WITH TRANSMITTAL OF DOCUMENTS.

MESSAGE: Information sheet as per tinkers format. Comments? — If none, I'll send over hard copy

JB

Document sent to Platzke on cc:mail 1:25 PM 7/13/95

MEMORANDUM

State of Alaska
Department of Law

TO: Anton Johansen
Regional Director
DOT/PF, Northern Region

08-12-97 02:47 RCVD

DATE: August 11, 1997

FILE NO:

TEL. NO.: 451-2905

RECEIVED
AUG 27 1997

FROM: E. John Athens, Jr.
Assistant Attorney General
AGO, Fairbanks

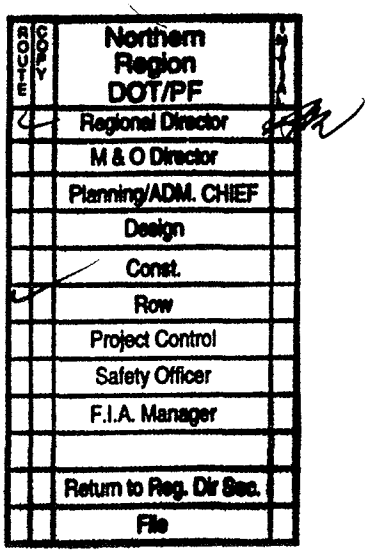
SUBJECT: DOT/PF Funding of Native Allotment Litigation

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

This litigation, both administrative and judicial, arises out of the BLM's cancellation of 23 U.S.C. § 317 right-of-way grants and other interests issued to the state in the 1960's. The BLM cancels the grants and interests where they conflict with a later filed Native allotment application. These grants and interests are actual highway rights-of-way, material sites used to construct and maintain the highways, or airports.

The cancellations impact the State Highway System because they effectively sever many of the major highways in the state. DOT/PF is put in the position by the BLM where the state must defend the highways it has constructed and the public has used and relied on for over twenty years. Examples of the highways involved in the litigation are as follows:

1. Parks Highway (*Albert*, *Foster*, and *Bryant*)
2. Edgerton Highway (*Williams*)
3. Glenn Highway "Tok Cutoff" (*Johnson*, *Craig*, *Sinyon*, and *Mohamad*)
4. Chitina-McCarthy Road (*Billum*)
5. Elliott Highway (*Lewis*)
6. Kobuk-Dahl Creek Road (*Brown*, *Weisner*)
7. Mentasta Spur Road (*Sanford*)



8. Minto Road (*Silas*)

9. Steese Highway (*Felix*)

10. Denali Highway (*Carlson*)

There have been many more such cases affecting these and other roads. Allotment claims even occasionally affect urban areas. DOT/PF had to defend its rights-of-way at the Airport Way and University Avenue intersection in Fairbanks (*Dementief*).

There are also a number of cases which impact state airports, e.g. St. Mary's Airport, Stebbins Airport, Kaltag Airport. Examples of such cases are as follows:

1. St. Mary's Airport (*Paukan, Thompson*)

2. Stebbins Airport (*Odinzoff*)

3. Kaltag Airport (*Solomon*)

4. Shismareff Airport (*Takak*)

5. Dillingham Airport (*Paulson*)

6. Chignik Airport road (*Stepanoff*)

7. Tuluksak Airport (*Alexie, Alexie, Peter*)

Although all of the cases are framed in terms of individual allotment claims which conflict with certain state right-of-ways or airports, the bigger picture is that the cases are collectively an attack by the BLM of state interests wherever they conflict with Native allotment claims.

It is this bigger picture that has been the premise of the federal court litigation the state has been involved with respect to some of these cases (*Albert, Williams, Foster*, and *Bryant*). The Attorney General's Office would not have initiated such litigation had there

been no overriding interest to resolve a state-wide problem. The alternative to defending the state's interests is to acquire by purchase or condemnation the needed interests. Abandoning the defense of the state's interests would also likely lead to trespass claims against the state for past use of the land. Such a claim in the form of a demand letter from the BIA has already been made with respect to the state's use of the material site located on the land now claimed by Lucy Williams (*Williams*) as her allotment.

It is hoped that the above information will assist you in developing a plan for DOT/PF to fund this litigation. If you need further information, please give me a call.

EJA/arp

I:\ATHENSJ\MISC\ALLOTMEN.MMN

July 22, 1997

Re: DOT/PF funding of Native allotment litigation

This litigation, both administrative and judicial, arises out of the BLM's cancellation of 23 U.S.C. § 317 right-of-way grants issued to the state in the 1960's. The BLM cancels the grant where they conflict with a later filed Native allotment application. These grants are either actual highway rights-of-way or material sites used to construct and maintain the highways.

The cancellations impact the State Highway System because they effectively sever many of the major highways in the state. DOT/PF is put in the position by the BLM where it must defend the highways it has constructed and the public has used and relied on for over twenty years. Examples of the highways involved in the litigation are as follows:

1. Parks Highway (Albert, Foster, and Bryant)
2. Edgerton Highway (Williams)
3. Glenn Highway "Tok Cutoff" (Johnson, Craig, Sinyon, and Mohamad)
4. Chitina-McCarthy Road (Billum)
5. Eliot Highway (Lewis)
6. Kobuk-Dahl Creek Road (Brown, Weisner)
7. Mentasta Spur Road (Sanford)
8. Minto Road (Silas)
9. Steese Highway (Felix)

There have been many more such cases affecting these and other roads. There are also a number of cases which impact state airports, e.g. St. Mary's Airport, Stebbins Airport, Kaltag Airport. Allotment claims even occasionally affect urban areas. DOT/PF had to defend its rights-of-way at the Airport Way and University Avenue intersection in Fairbanks (Dementief).

Although all of the cases are framed in terms of individual allotment claims which conflict with certain state right-of-ways, the bigger picture is that the cases are collectively an attack by the BLM of state rights-of-ways wherever they conflict with Native allotment claims. It is this bigger picture that has been the premise of the federal court litigation the state has been involved with respect to some of these cases (Albert, Williams, Foster, and Bryant). The Attorney General's Office would not have initiated such litigation had there been no overriding interest to resolve a state-wide problem.

I:\ATHENS\MISC\ALLOTMEN.MMN

MEMORANDUM State of Alaska

Department of Transportation & Public Facilities
Northern Region, Right of Way

TO: Rodney Platzke, P.E.
Director, Design & Construction

DATE: July 7, 1995

FILE NO.: c:wp60\doc\lawbills.075

TELEPHONE NO.:

FROM: John Miller
Chief, Right of Way

SUBJECT: Law Bills

You asked for a report on the history and current status of efforts by the Department of Law to protect the interests of this Department that are not associated with any specific Federal aid project (and thus must be underwritten with all State funds). The attached report provides this.

As you will note, most of these cases involve the IBLA reneging on previous grants. This usually means a native allottee is now the ostensible owner of something that heretofore had been public. There are several cases where a segment of the right of way for the Parks and Tok Highways is no more. Technically, the road is owned by the allottee.

Our appeals of these bizarre rulings have generally been denied, all the way to the U.S. Supreme Court in one case, on the grounds that, although the Federal government has generally given up its sovereign immunity as regards most matters, it is specifically not liable to lawsuit on matters involving "indian lands". However, we (the DOT/PF and/or the public) are in "possession and use" of the lands, and we aren't about to abandon these highways anytime soon. There are, I suppose, a number of things we could do about this, including:

> Do nothing. Wait until the allottee's legal staff take action to eject the public "trespassers". Ironically, once they do this the matter is no longer under the sovereign immunity "umbrella" and the entire matter of the right of way being summarily vacated can be fully adjudicated by the Courts.
>
> Commence acquisition. This would likely involve condemnation and would likely not be Federal-aid participating.

The situation is somewhat more difficult as regards pits. Again we could just continue to use them as in the past for maintenance purposes (John Athens recommends we do exactly this), but we would be taking big risks to include one of them as a state furnished source in one of our contracts. The allottee's legal staff could time their suit for ejectment to follow shortly after the NTP for a major contract and perhaps cause some very expensive claims. Also, it is not inconceivable that we could be sued for the value of all the material that has come out of the pit over its life. Neat, huh!

MEMORANDUM

State of Alaska

Department of Transportation
and Public Facilities

TO: John A. Miller
Chief Right of Way Agent

DATE: June 28, 1995

FROM: Angel Bunger
Right of Way Assistant
Pre-Audit

SUBJECT: Non-project specific lawbills

As you requested, I have compiled information regarding Department of Law charges that do not pertain to specific active projects. I have tried to identify the basic issue of each case, its current status and charges incurred since 1990. This summary is based on information received from John Athens of the Attorney General's Office, Right of Way files, Pre-audit lawbill records and the input of many helpful Right of Way staff members.

As stated, these cases are not related to a specific project and therefore have no funding set aside for paying the expenses incurred. Currently, lawbills related to these cases are being forwarded to Susie Zimmerman, Project Control who pays them as best she can using funds remaining in the operating budget at the end of each fiscal year. Typically, the total of these lawbills exceeds the amount of available funds and therefore many remain unpaid, causing chronic accounting difficulties for both the Department of Transportation and Public Facilities and the Department of Law.

Since 1990, the Attorney General's Office has billed Northern Region Right of Way nearly $150,000 for work performed on non-project specific cases. More than 96% of these charges are related to defending rights of way, material sources and airports against native allotment claims. A few cases are able to be charged to active projects in the vicinity--but many simply do not have active projects available. Some of the other lawbill charges in qusetion involve issues such as encroachments, camping in highway rights of way (i.e. Parks Highway), hazardous waste, and responses to legislative audits which have amounted only to about $5,100 over the last five years.

Native Allotment Conflicts

Most of these cases involve grants received by the State for rights of way, material sites or airports that have since been declared null and void by the Bureau of Land Management (BLM) due to the approval of native allotment applications. Upon approval of the allotment, the effective date is retroactive back to when "use and occupancy" first began. A few of these cases, however, involve native allotment claims that the BLM has denied, but are being appealed by the

applicant and the Department of Law is monitoring and preparing to respond as needed to protect the State's interests.

Of the cases described in Attachment A:

- 20% of these cases will definitely require further work by the Department of Law and require some source of payment.

- 30% are awaiting some decision and could very well require further action depending on the outcome of that decision.

- In many of the remaining cases, current appeal procedures have been exhausted and the State's interests are still considered null and void. Pending legislative solution or a breakthrough in judicial precedence, the State's interests in these rights of way, material sites and airports remain legally compromised. Therefore, reacquisition appears to be the only alternative to protect the State's interests, but this would also require a specific source of funding.

Attachments: A. Summary of Native Allotment/Right of Way conflict cases
B. Spreadsheet summary of overhead lawbill charges
C. Memo from John Athens dated 6/23/95
D. Memo from John Athens dated 6/27/95

ATTACHMENT A.

The following are summaries of some of the native allotment/right of way conflict cases the Department of Law has been handling. The dollar amount indicated is the rounded total of charges billed since 1990.

Dinah Albert, US District Court F90-006. $37,300. This case involves the bridge across the Tanana River at Nenana, particularly the island upon which the bridge was built. This island was granted to the State in right of way grants in 1965 and 1966. This grant was declared null and void due to Dinah Albert's native allotment, claiming 1938 as the beginning of her "use and occupancy" of the land in question. According to John Athens, "The US District Court held that this conflict could not be judicially reviewed because of the sovereign immunity of the United States. This District Court decision was affirmed by the Ninth Circuit Court of Appeals. There are no other proceedings pending."

Emma Bell, IBLA 91-1113. $500. In 1990, BLM approved Emma Bell's native allotment and declared SOA's right-of-way A-064236 null and void. The State appealed this decision. In 1991 BLM vacated the 1990 decision as stipulated in a settlement agreement between the State and Ms. Bell. Ms. Bell agreed to amend the boundary of her allotment claim to exclude the state's right-of-way, thereby eliminating the conflict. Case closed.

John Billum, IBLA 88-614. $1800. According to the Attorney General's Office, this native allotment conflict case is currently considered inactive, but they are monitoring the case should action become necessary, but no significant work is anticipated. According to John Bennett, this case can be charged to the McCarthy Road Location Study and that Commissioner Perkins is requesting a formal opinion from the State Attorney General.

Mabel Brown, IBLA 88-481. $400. "This case involves a conflict between an allotment claim and the Kobuk/Dahl Creek Road. Last summer an evidentiary hearing was held on the question of the allotment applicant's use and occupancy and the public nature of the road. The Administrative Law Judge ruled that the road was public and the allotment would be subject to the road. No appeal was filed. This file is being kept open for the purpose of monitoring BLM decision with respect to other allotment conflicts with the Kobuk/Dahl Creek Road." - John Athens[1]

William T. Bryant, US District Court No. A94-301. $14,700. The state has filed for a judicial review of the IBLA decision that declared the State's right of way conflicting with this allotment is null and void. Awaiting decision from the court.

Jack Craig, IBLA 91-107. $400. The State has appealed to the IBLA to review BLM's decision which declared the State's material site grant A-062220 null and void. Waiting on decision from IBLA.

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[1] According to our Negotiations section, there no more conflicts in the Kobuk/Dahl Creek Road area and this file should now be closed.

William Felix, IBLA 88-675. $300. This native allotment conflict case is currently considered inactive, but the Attorney General's Office is monitoring should action become necessary. No significant work is anticipated.

Evelyn Foster, Ninth Circuit Court of Appeals No. 94-35677. $9,500 "The State filed an action for judicial review of an IBLA decision which held that the part of the Parks Highway right-of-way in conflict with her allotment claim was null and void. The lower court held the sovereign immunity of the federal government barred the State's action for judicial review. The State appealed. Briefing is complete and oral argument on the appeal is scheduled for August 1995." - John Athens

Joe Goodlataw, IBLA 92-566. $4,200. "This is an appeal by the State of a BLM decision which declared the channel change grant A-064033 null and void where it conflicted with the allotment claim. Upon the appeal being filed, the Solicitor's office requested that the BLM decision be vacated and the matter remanded to the BLM for a new decision. The IBLA has neither ruled on this request or the State's appeal." - John Athens

Louie John, IBLA No. 94-416. $5,600. "In 1994 the BLM issued a decision rejecting Louie John's allotment. Louie John appealed that decision to the IBLA. The State and Louie John reached a settlement that preserves the Steese Highway and the material site if John wins his dispute with BLM. When we submitted the Stipulation for Settlement and moved for issuance of an order from the IBLA effecting the settlement, BLM filed an opposition and claimed that the IBLA was without authority to permit the settlement. The State and Mr. John filed a joint reply in April 1995. We are awaiting a decision from the Board." - John Athens.

Irene Johnson, IBLA 91-89. $5,600. The State has appealed the BLM decision that the State's grant for material site A-062220 is null and void. Decision from IBLA is expected soon.

Maureen T. Lewis, IBLA 90-221. $6,200. "The State appealed a BLM decision which held that the parts of rights-of-way F-21630 and F-37579 in conflict with the allotment claim were null and void. The IBLA reversed and ordered a government (BLM) contest on the land in conflict. This has not yet been done. The State will need to participate in the hearing when it is scheduled." - John Athens

Vern Miller, F-31921. $600. Vern Miller was issued a Certificate of Allotment on 6/10/85. In January 1988, he wrote a letter to Northern Region Right of Way to notify the State that the Chena Ridge widening project had exceeded the boundaries of the right of way. Mr. Miller claimed that a BLM decision in 1984 had declared null and void the expansion of Chena Ridge Road. The need for reacquisition became evident and was accomplished under the Northern Region Guardrail project. This case is closed.

Olga Mohamad, IBLA 90-230. <$100[2] IBLA decided that the State's right of way on the Tok Cutoff was declared null and void since Mohamad's "use and occupancy" began prior to the grant the state received from BLM. John Athens petitioned for reconsideration but this motion was denied. In reference to this and Alex Sinyon's case, John Athens reports, "As it stands now, the segments of the Tok Cutoff highway right-of-way grant that conflict with these allotment claims are null and void."

Angela Odinzoff, US District Court No. F94-16. $17,500[3] "This case involves a conflict between the Stebbins Airport and the Odinzoff allotment claim. The conflict was caused by a mistake in the property description in the allotment certificate BLM issued to Odinzoff. Because of the Odinzoff's refusal to allow correction, the State sued to required correction of the allotment certificate. No decision has yet been made by the court." - John Athens

Stan Paukan, F-18532. $300. This native allotment is in conflict with the State's interests at St. Mary's Airport and this case is being handled through Central Region's Attorney General's Office. Mr. Paukan's application was amended by his wife after his death, but she was only named as trustee for the land and did not inherit it herself. Their children, who are now of majority age, need to consent to the amendment. Then the amendment needs to be accepted by BLM.

David Salmon, F-025759. $1,400. This native allotment conflict case is currently considered inactive, but the Attorney General's Office is monitoring should action become necessary. No significant work is anticipated.

Mary Sanford, IBLA 90-321. $5,200. This native allotment conflict case is currently considered inactive, but the Attorney General's Office is monitoring should action become necessary. No significant work is anticipated.

Franklin Silas, US District Court No. A93-35. $18,300. "In this case Franklin Silas filed an action for judicial review of an IBLA decision which affirmed the BLM's denial of his request to reinstate his allotment application. The State is named as a defendant because the property Silas is claiming includes a segment of the road to Minto. A decision from the court is expected at any time." - John Athens

Alex H. Sinyon, IBLA 90-176. $4,900. IBLA decided that the State's right of way on the Tok Cutoff was declared null and void since Sinyon's "use and occupancy" began prior to the grant the state received from BLM. John Athens petitioned for reconsideration but was denied, therefore the State's right of way is currently considered to be null and void.

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[2] Right of Way files show that a considerable amount of work was performed on this case and that this is probably not an accurate reflection of costs for this case. Perhaps other lawbills may have been charged against a Tok Cutoff project that had funds available at the time

[3] Due to current activity and availability of funds, these lawbills are currently being charged to Project #65858 Stebbins Airport Improvements

Alex T. Solomon, IBLA 85-626. <$100. "The allottee sought reinstatement of a denied allotment application, which if reinstated would conflict with Kaltag Airport grant. The IBLA ordered an evidentiary hearing on the reinstatement. The BLM then lost the file and has not attempted to schedule a hearing. A file on the matter is kept open in the Attorney General's Office merely to monitor BLM activity in this case so the State can participate in a hearing if one is ever scheduled." - John Athens

Willie Takak, IBLA No. 95-296. $1,100. "Takak's allotment application was filed in 1959 and rejected in 1965 when he failed to provide evidence of use and occupancy. Approximately one-half [the village of] Shaktoolik is located within the area covered by Takak's application. In 1981 and 1982 the State constructed the New Shaktoolik Airport and re-routed and upgraded the main road through the village to provide access to the airport. In 1986 Takak filed a request for reinstatement of his rejected allotment application. BLM reinstated the application and scheduled a hearing to determine whether it should proceed with title recovery. The State appealed to the IBLA. A decision is not expected for several years." - John Athens

Vera Thompson AA-53512. $3,700. Native allotment conflict at St. Mary's Airport. This case is being handled through Central Region's Attorney General's Office. Will be a long-lasting, difficult and costly case to settle. Ms. Thompson's proof of "use and occupancy" is questionable and there are many complicated probate issues.

Lucy Williams, US Supreme Court No. 94-1523. $100. This material site is a portion of the BLM pit involved in the infamous Weaver problem. According to John Athens, "The State has filed a petition with the US Supreme Court to review a decision by the Ninth Circuit upholding a US District Court decision that sovereign immunity barred an action by the State for judicial review of an IBLA decision. The IBLA decision affirmed BLM's declaration that a material site grant to the State was null and void where it conflicted with the allotment claim of Lucy Williams."

Overhead Lawbills
Summary FY90-95

Case	Case Number	FY90	FY91	FY92	FY93	FY94	FY95	TOTALS
Albert, Dinah (heirs of)	F90006	$1,220.30	$3,169.20	$24,181.81	$8,674.99			$37,246.30
Beck	F17165		$121.00					$121.00
Bell, Emma	225910093		$447.70	$40.50				$488.20
Billum, John	IBLA 89-614	$33.00	$1,766.60					$1,799.60
Brown, Mabel	IBLA 88-481			$202.50	$220.40			$422.90
Bryant, William T.	A94-301	$4,026.00	$1,545.50	$6,718.20	$2,380.00			$14,669.70
Craig, Jack	IBLA 91-107		$339.30					$339.30
Felix, William	IBLA 88-675	$165.00	$145.20					$310.20
Foster, Evelyn	94-35677	$2,441.00	$399.30	$348.80	$40.20	$6,241.40		$9,470.70
Goodlataw, Joe	IBLA 92-566/'4FA-92-566				$3,939.20	$254.60		$4,193.80
John, Lester	4FA-86-1671	$1,060.57						$1,060.5
John, Louie	IBLA 94-416/4FA-92-596				$2,992.80	$122.20	$2,503.50	$5,618.5
Johnson, Irene	IBLA 91-89		$2,129.60	$3,483.00				$5,612.60
Jonas, Florence	225850173	$307.20						$307.20
Lewis, Maureen Teresa	IBLA 90-221		$6,219.40					$6,219.40
Miller	665980010	$638.00						$638.00
Mohamad, Olga	IBLA 90-230				$26.80			$26.80
Newlin	4FA-86-2640	$96.00						$96.00
Odinzoff, Angela	F94-16					$1,955.90	$15,497.00	$17,452.90
Salmon, David	F-025759				$1,428.60			$1,428.60
Sanford, Mary J.	IBLA 90-321		$1,137.40	$3,320.10	$777.20			$5,234.70
Silas, Franklin	A93-35					$10,245.70	$8,014.70	$18,260.40
Sinyon, Alex	IBLA 90-176	$3,922.40	$1,016.40					$4,938.80
Solomon, Alex T.	IBLA 85-626			$27.00				$27.00
St. Mary's	661890336						$284.20	$284.20
Stevens	IBLA88656		$36.30					$36.30
Stickivan, Nome	2259000036	$22.00						$22.00
Takak, Willie	IBLA 95-295						$1,137.80	$1,137.8
Thompson, Vera (St. Mary's)							$3,661.70	$3,661.7
Williams, Lucy	94-1523		$121.00					$121.00
Encroachments			$20.40	$117.00				$137.40
GVEA v Fuiten, SOA	4FA-95-545						$519.40	$519.40
Legislative Audit	665900093		$387.20					$387.20
OTHER, MISC ADVICE		$307.20	$642.40	$1,520.20		$46.80		$2,516.60
Parks Highway-Camping							$498.20	$498.20
Tsaina Hazardous Waste	665910082		$438.60		$1,296.80			$1,735.40
		$14,238.67	$20,082.50	$39,959.11	$21,776.99	$18,866.60	$32,116.50	$147,040.37

MEMORANDUM State of Alaska

Department of Law

TO: John Miller, PE
Chief, Right-of-Way Section
DOT/PF, Northern Region

DATE: June 23, 1995

FILE NO:

TEL. NO.: 451-2811

SUBJECT: See Below

FROM: John Athens
Assistant Attorney General

PENDING NON-PROJECT RELATED CASES
CONCERNING NATIVE ALLOTMENT RIGHT-OF-WAY CONFLICTS

Pursuant to the request of your office, the following is a list of non-project related cases in this office involving Native allotments. Only a simplified statement of the nature of each case is provided at this time. However, if you require more specific information, we will be happy to provide it.

1. Alex T. Solomon, IBLA 85-626. The allottee sought reinstatement of a denied allotment application, which if reinstated would conflict with Kaltag Airport right-of-way F-022517. The IBLA ordered an evidentiary hearing on the reinstatement. The BLM then lost the file and has not attempted to schedule a hearing. A file on the matter is kept open in the Attorney General's Office merely to monitor BLM activity in this case so the State can participate in a hearing if one is ever scheduled.

2. Maureen T. Lewis, IBLA 90-221. The State appealed a BLM decision which held that the parts of rights-of-way F-21630 and F-37579 in conflict with the allotment claim were null and void. The IBLA reversed and ordered a government (BLM) contest on the land in conflict. This has not yet been done. The State will need to participate in the hearing when it is scheduled.

3. Evelyn Foster, Ninth Circuit Court of Appeals No. 94-35677. The State filed an action for judicial review of an IBLA decision which held that the part of the Parks Highway right-of-way in conflict with her allotment claim was null and void. The lower court held the sovereign immunity of the federal government barred the State's action for judicial review. The State appealed. Briefing is complete and oral argument on the appeal is scheduled for August 1995.

4. William T. Bryant, U. S. District Court No. A94-301. As with Foster, the State filed an action for judicial review of an IBLA decision which held that the part of the Parks Highway right-of-way in conflict with the allotment claim was null and void. However, there are significant distinctions with the

Foster case. The parties are now awaiting a decision from the court.

5. Lucy Williams, U.S. Supreme Court No. 94-1523. The State has filed a petition with the U.S. Supreme Court to review a decision by the Ninth Circuit upholding a district court decision that sovereign immunity barred an action by the State for judicial review of an IBLA decision. The IBLA decision affirmed BLM's declaration that a material site grant to the State was null and void where it conflicted with the allotment claim of Lucy Williams.

6. Angela Odinzoff, U.S. District Court No. F94-16. This case involves a conflict between the Stebbins Airport and the Odinzoff allotment claim. The conflict was caused by a mistake in the property description in the allotment certificate BLM issued to Odinzoff. Because of Odinzoff's refusal to allow correction, the State sued to require correction of the allotment certificate. No decision has yet been made by the court.

7. Franklin Silas, U.S. District Court No. A93-35. In this case Franklin Silas filed an action for judicial review of an IBLA decision which affirmed the BLM's denial of his request to reinstate his allotment application. The State is named as a defendant because the property Silas is claiming includes a segment of the road to Minto. A decision from the court is expected at any time.

8. Mabel Brown, IBLA 88-481. This case involves a conflict between an allotment claim and the Kobuk/Dahl Creek road. Last summer an evidentiary hearing was held on the question of the allotment applicant's use and occupancy and the public nature of the road. The Administrative Law Judge ruled that the road was public and the allotment would be subject to the road. No appeal was filed. This file is being kept open for the purpose of monitoring BLM decisions with respect to other allotment conflicts with the Kobuk/Dahl Creek Road.

9. Irene Johnson, IBLA 91-89. This is an appeal by the State of a BLM decision which declared part of the State's material site grant A-062220 null and void where it conflicts with the allotment claim. A decision from the IBLA is expected at any time.

10. Jack Craig, IBLA 91-107. This case also involves material site grant A-062220. The issues are nearly identical to the issues in Irene Johnson.

11. Joe Goodlataw, IBLA 92-566. This is an appeal by the State of a BLM decision which declared the channel change grant A-064033 null and void where it conflicted with the allotment claim. Upon the appeal being filed, the solicitor's office requested that the BLM decision be vacated and the matter remanded to the BLM for a new decision. The IBLA has neither ruled on this request nor the State's appeal.

12. Louie John, IBLA No. 94-416. In 1994 the BLM issued a decision rejecting Louie John's allotment. Louie John appealed that decision to the IBLA. The State and Louie John reached a settlement that preserves the Steese Highway and the material site if John wins his dispute with BLM. When we submitted the stipulation for settlement and moved for issuance of an order from the IBLA effecting the settlement, BLM filed an opposition and claimed that the IBLA was without authority to permit the settlement. The State and Mr. John filed a joint reply in April 1995. We are awaiting a decision from the Board.

13. Willie Takak, IBLA No. 95-295. Takak's allotment application was filed in 1959 and rejected in 1965 when he failed to provide evidence of use and occupancy. Approximately one-half of Shaktoolik is located within the area covered by Takak's application. In 1981 and 1982 the State constructed the New Shaktoolik Airport and re-routed and upgraded the main road through the village to provide access to the airport. In 1986 Takak filed a request for reinstatement of his rejected allotment application. BLM reinstated the application and scheduled a hearing to determine whether it should proceed with title recovery. The State appealed to the IBLA. A decision is not expected for several years.

In addition to the foregoing active cases, there are a number of inactive cases which this office is monitoring. The files are being kept open, but significant work is not anticipated. All of these cases involve conflicts between native allotments and State interests (airport, right-of-way, or material site). These cases are:

1) William Felix, IBLA 88-675
2) John Billum, IBLA 89-614
3) Alex Sinyon, IBLA 90-176
4) Olga Mohamad, IBLA 90-230
5) David Salmon, F-025759
6) Mary Sanford, IBLA 90-321

EJA:amm
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MEMORANDUM State of Alaska

Department of Law

TO: John Miller, P.E.
Chief, Right-of-Way Section
DOT/PF, Northern Region

DATE: June 27, 1995

FILE NO:

TEL. NO.: 451-2811

FROM: E. John Athens, Jr.
Assistant Attorney General

SUBJECT: Addendum to Memo of June 23, 1995

Your office has requested information on three additional Native allotment conflicts with State interests. With respect to two of these (Stan Paukan, F-18532; Vera Thompson, AA-53512) I could find no record of a file in the Fairbanks Attorney General's Office. Do you have a record that they were referred to the AGO, and if so, which office and to whom?

With respect to the third, Dinah Albert, U.S. District Court No. F90-006, this case was handled by John Baker of the Anchorage Attorney General's Office. In its decision the district court held that the IBLA decision affirming that the State's rights-of-way were null and void where they conflicted with the allotment claim could not be judicially reviewed because of the sovereign immunity of the United States. This district court decision was affirmed by the Ninth Circuit Court of Appeals. There are no other proceedings pending.

You also requested further information regarding Olga Mohamad, IBLA 90-230 and Alex Sinyon, IBLA 90-176. The State's petition for reconsideration of the IBLA decision was denied. No further administrative or judicial proceedings in these cases are contemplated. As it stands now, the segments of the Tok-cutoff highway right-of-way grant that conflict with these allotment claims are null and void.

This memorandum and the June 23, 1995 memorandum concern only open files in the Fairbanks AGO (except for Dinah Albert). If you wish further information concerning closed files or files in other AGO offices, please let me know.

EJA/amm
eja\natallot.mm2

MEMORANDUM State of Alaska

Department of Law

RECEIVED R/W

JUN 29 1995

Northern Region DOT & PF

TO: John Miller, P.E.
Chief, Right-of-Way Section
DOT/PF, Northern Region

DATE: June 27, 1995

FILE NO:

TEL. NO.: 451-2811

FROM: E. John Athens, Jr.
Assistant Attorney General

SUBJECT: Addendum to Memo of June 23, 1995

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This memorandum and the June 23, 1995 memorandum concern only open files in the Fairbanks AGO (except for Dinah Albert). If you wish further information concerning closed files or files in other AGO offices, please let me know.

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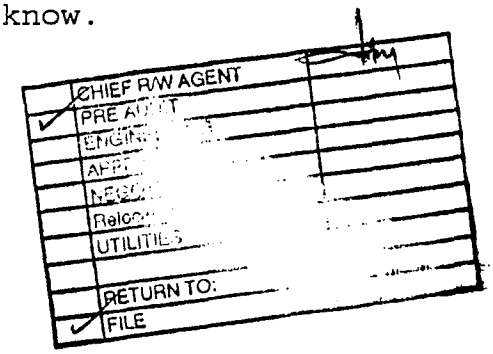

MEMORANDUM

State of Alaska
Department of Law

TO: Anton Johansen
Regional Director
DOT/PF, Northern Region

08-12-97P02:47 RCVD

DATE: August 11, 1997

FILE NO:

RECEIVED
AUG 27 1997

TEL. NO.: 451-2905

FROM: E. John Athens, Jr.
Assistant Attorney General
AGO, Fairbanks

SUBJECT: DOT/PF Funding of Native Allotment Litigation

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

This litigation, both administrative and judicial, arises out of the BLM's cancellation of 23 U.S.C. § 317 right-of-way grants and other interests issued to the state in the 1960's. The BLM cancels the grants and interests where they conflict with a later filed Native allotment application. These grants and interests are actual highway rights-of-way, material sites used to construct and maintain the highways, or airports.

The cancellations impact the State Highway System because they effectively sever many of the major highways in the state. DOT/PF is put in the position by the BLM where the state must defend the highways it has constructed and the public has used and relied on for over twenty years. Examples of the highways involved in the litigation are as follows:

1. Parks Highway (*Albert*, *Foster*, and *Bryant*)
2. Edgerton Highway (*Williams*)
3. Glenn Highway "Tok Cutoff" (*Johnson*, *Craig*, *Sinyon*, and *Mohamad*)
4. Chitina-McCarthy Road (*Billum*)
5. Elliott Highway (*Lewis*)
6. Kobuk-Dahl Creek Road (*Brown*, *Weisner*)
7. Mentasta Spur Road (*Sanford*)

ROUTE	COPY	Northern Region DOT/PF	INITIAL
	C	Regional Director	
		M & O Director	
		Planning/ADM. CHIEF	
		Design	
		Const.	
	C	Row	
		Project Control	
		Safety Officer	
		F.I.A. Manager	
		Return to Reg. Dir Sec.	
		File	

8. Minto Road (*Silas*)

9. Steese Highway (*Felix*)

10. Denali Highway (*Carlson*)

There have been many more such cases affecting these and other roads. Allotment claims even occasionally affect urban areas. DOT/PF had to defend its rights-of-way at the Airport Way and University Avenue intersection in Fairbanks (*Dementief*).

There are also a number of cases which impact state airports, e.g. St. Mary's Airport, Stebbins Airport, Kaltag Airport. Examples of such cases are as follows:

1. St. Mary's Airport (*Paukan, Thompson*)

2. Stebbins Airport (*Odinzoff*)

3. Kaltag Airport (*Solomon*)

4. Shismareff Airport (*Takak*)

5. Dillingham Airport (*Paulson*)

6. Chignik Airport road (*Stepanoff*)

7. Tuluksak Airport (*Alexie, Alexie, Peter*)

Although all of the cases are framed in terms of individual allotment claims which conflict with certain state right-of-ways or airports, the bigger picture is that the cases are collectively an attack by the BLM of state interests wherever they conflict with Native allotment claims.

It is this bigger picture that has been the premise of the federal court litigation the state has been involved with respect to some of these cases (*Albert, Williams, Foster*, and *Bryant*). The Attorney General's Office would not have initiated such litigation had there

been no overriding interest to resolve a state-wide problem. The alternative to defending the state's interests is to acquire by purchase or condemnation the needed interests. Abandoning the defense of the state's interests would also likely lead to trespass claims against the state for past use of the land. Such a claim in the form of a demand letter from the BIA has already been made with respect to the state's use of the material site located on the land now claimed by Lucy Williams (*Williams*) as her allotment.

It is hoped that the above information will assist you in developing a plan for DOT/PF to fund this litigation. If you need further information, please give me a call.

EJA/arp

I:\ATHENSJ\MISC\ALLOTMEN.MMN

July 22, 1997

Re: DOT/PF funding of Native allotment litigation

This litigation, both administrative and judicial, arises out of the BLM's cancellation of 23 U.S.C. § 317 right-of-way grants issued to the state in the 1960's. The BLM cancels the grant where they conflict with a later filed Native allotment application. These grants are either actual highway rights-of-way or material sites used to construct and maintain the highways.

The cancellations impact the State Highway System because they effectively sever many of the major highways in the state. DOT/PF is put in the position by the BLM where it must defend the highways it has constructed and the public has used and relied on for over twenty years. Examples of the highways involved in the litigation are as follows:

1. Parks Highway (Albert, Foster, and Bryant)
2. Edgerton Highway (Williams)
3. Glenn Highway "Tok Cutoff" (Johnson, Craig, Sinyon, and Mohamad)
4. Chitina-McCarthy Road (Billum)
5. Eliot Highway (Lewis)
6. Kobuk-Dahl Creek Road (Brown, Weisner)
7. Mentasta Spur Road (Sanford)
8. Minto Road (Silas)
9. Steese Highway (Felix)

There have been many more such cases affecting these and other roads. There are also a number of cases which impact state airports, e.g. St. Mary's Airport, Stebbins Airport, Kaltag Airport. Allotment claims even occasionally affect urban areas. DOT/PF had to defend its rights-of-way at the Airport Way and University Avenue intersection in Fairbanks (Dementief).

Although all of the cases are framed in terms of individual allotment claims which conflict with certain state right-of-ways, the bigger picture is that the cases are collectively an attack by the BLM of state rights-of-ways wherever they conflict with Native allotment claims. It is this bigger picture that has been the premise of the federal court litigation the state has been involved with respect to some of these cases (Albert, Williams, Foster, and Bryant). The Attorney General's Office would not have initiated such litigation had there been no overriding interest to resolve a state-wide problem.

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