

## John Bennett

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**From:** John Bennett  
**Sent:** Tuesday, October 13, 2020 11:19 AM  
**To:** 'Sprout, Timothy L (DOT)'  
**Subject:** RE: Elliott Hwy, ~20 mile, Cushman Creek Material Site, David Gabet

Tim – I see that this is not a new issue and that it blew up back in 2007 when a contractor was using it. Back then the AG's were involved because the land owner had then also retained an attorney. They claimed \$1.5 million for pain and suffering and asserted that DOT had settled with him as a result of prior conflicts. No written settlement was found. May have been something verbal with M&O.

Most land claims from the federal government cannot include "mineral" lands. We had an allotment on the Tok Cutoff (Jack Craig) where the allotment straddled a granted material source. Even though the use and occupancy preceded the material site, the allotment was to only include lands that were "non-mineral" in character so I believe the allotment was adjusted and the material site boundary took precedence. (See 133 IBLA 281 SOA DOT&PF – Irene Johnson and Jack Craig)

Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Alaska National Interest Lands Conservation Act: Valid Existing Rights--Rights-of-Way: Federal Highway Act

A materials site right-of-way will be considered a valid existing right within the meaning of sec. 905(a)(1) of ANILCA, and thus not subject to legislative approval, where the land was mineral- in-character during the period of use and occupancy by the Native prior to the creation of the right-of-way, and thus not available for allotment.

Also see IBLA 81-580 (attached) – it states that Public land may be "appropriated to a public project if there is a physical devotion of the land to such use on the ground. This suggests that if the land was cleared or opened for a material site prior to the homestead location date, it may take precedence due to the physical appropriation. It is also possible that Dept. of Highways/Alaska Road Commission operated a material site at this location under the old Free Use permit program. The F-150 grant may have been just an extension of that original free-use permit.

So the potential reasons that BLM included the reservation in the homestead patent is that

- A portion of the homestead was mineral in character and so should not have been included in the homestead claim.
- A physical use of the land prior to homestead entry appropriated the land for public use.
- A prior Free Use Permit meant the homestead was taken subject to a prior existing right.

I think to interpret the BLM reservations you will need to order the homestead case file from the National Archives and possibly the F-150 file also. You can order those on-line these days and they can take a little while if they have never been previously scanned. If they are lawyering up and getting ready for a battle, those will be necessary pieces of evidence to determine whether DOT will be successful in its defense of the material site. Have fun! JohnB

**John F. Bennett, PLS, SR/WA** Senior Land Surveyor – Right of Way Services

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**From:** Sprout, Timothy L (DOT) [mailto:tim.sprout@alaska.gov]  
**Sent:** Monday, October 12, 2020 3:11 PM  
**To:** John Bennett <JBennett@rmconsult.com>  
**Subject:** FW: Elliott Hwy, ~20 mile, Cushman Creek Material Site, David Gabet

John –

I wondered if you would take a look at this.

A homestead patent at Elliott Highway MP 20 expressly states that the homestead is subject to a material site grant.

The Notice of Location for this homestead appears to predate our BLM material site grant.

The homestead owner contends his homestead is not subject to the material site and is building within the material site.

Should DOT&PF accept the federal decision that the homestead is subject to the material site grant, assuming that the feds had a valid unknown reason to do so?

The homestead owner has retained legal counsel.

Thank you.

Tim Sprout, PLS, SR/WA  
ROW Engineering Supervisor  
DOT&PF Northern Region  
907-451-5465  
[tim.sprout@alaska.gov](mailto:tim.sprout@alaska.gov)

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**From:** Sprout, Timothy L (DOT)  
**Sent:** Tuesday, October 6, 2020 12:48 PM  
**To:** Jordan, Daniel H (DOT) <[dan.jordan@alaska.gov](mailto:dan.jordan@alaska.gov)>  
**Cc:** Wilson, Kahlil A (DOT) <[kahlil.wilson@alaska.gov](mailto:kahlil.wilson@alaska.gov)>; Carter, Garrett D (DOT) <[garrett.carter@alaska.gov](mailto:garrett.carter@alaska.gov)>; Schacher, Sarah E (DOT) <[sarah.schacher@alaska.gov](mailto:sarah.schacher@alaska.gov)>; Hooper, Barry L (DOT) <[barry.hooper@alaska.gov](mailto:barry.hooper@alaska.gov)>  
**Subject:** RE: Elliott Hwy, ~20 mile, Cushman Creek Material Site, David Gabet

Dan –

ROWE has adopted a homestead entry date policy as outlined by John Bennett in his Alaska Highway Rights-of-Way and Homestead Entries paper dated 2018. See his summary on page 6 of 54.

Entry on Surveyed lands: segregation from the public domain occurs on the date of the Homestead application filed.

Entry on Un-surveyed lands: segregation from the public domain occurs on the date of the Notice of Location filed.

The Township this homestead lies within was surveyed in 1976.

The BLM ACRES report dated 2020 shows an application filed in 1964, and a second application filed in 1967.

The BLM ACRES report dated 1990 appears to clarify this by identifying the first application filed in 1964 as being a Notice of Location.

This implies that the Homestead had prior entry rights to the BLM Material Site Grant dated 1966.

However, BLM determined at patent that the homestead was expressly subject to the material site grant. It appears that through the years DOT&PF has accepted and perpetuated this assertion. There may be something in the BLM case files that would confirm BLM's assertion. It is not uncommon for the clock to restart in the homestead application process due to non-compliance or other issue.

Tim Sprout, PLS, SR/WA  
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**From:** Jordan, Daniel H (DOT) <[dan.jordan@alaska.gov](mailto:dan.jordan@alaska.gov)>  
**Sent:** Tuesday, October 6, 2020 11:35 AM  
**To:** Sprout, Timothy L (DOT) <[tim.sprout@alaska.gov](mailto:tim.sprout@alaska.gov)>  
**Subject:** FW: Elliott Hwy, ~20 mile, Cushman Creek Material Site, David Gabet

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**From:** Schacher, Sarah E (DOT) <[sarah.schacher@alaska.gov](mailto:sarah.schacher@alaska.gov)>  
**Sent:** Tuesday, October 6, 2020 8:48 AM  
**To:** Jordan, Daniel H (DOT) <[dan.jordan@alaska.gov](mailto:dan.jordan@alaska.gov)>; Wilson, Kahlil A (DOT) <[kahlil.wilson@alaska.gov](mailto:kahlil.wilson@alaska.gov)>  
**Cc:** Carter, Garrett D (DOT) <[garrett.carter@alaska.gov](mailto:garrett.carter@alaska.gov)>; Hooper, Barry L (DOT) <[barry.hooper@alaska.gov](mailto:barry.hooper@alaska.gov)>  
**Subject:** FW: Elliott Hwy, ~20 mile, Cushman Creek Material Site, David Gabet

Dan, sorry it's taken me so long to get back to you on this. A few questions.

1. What do you view as the next steps to fully assert our claim (or not) that we have rights to the material site? Looks as though you've done some good research, but as with many things title related, it's not super clear. Do we need to get ROWE involved—or what steps/determination can we make to take a position one way or another?
2. Is this shared with Alyeska, and what is their interest in this matter? Have there been communications with them on this?
3. If we opt to "stand down" on the material site issue because ownership/rights are not clear
  - a. Does this mean we don't have rights to the material site, period, or does this mean we just don't have exclusive rights to kick Mr. Gabet out?
  - b. What is within the Elliott Hwy ROW that clearly must be addressed? I'll work on getting a sat photo if possible of this area that may show extents of encroachment.

Thanks for sticking with this, this is a tricky one!

Sarah

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**From:** Carter, Garrett D (DOT) <[garrett.carter@alaska.gov](mailto:garrett.carter@alaska.gov)>  
**Sent:** Monday, September 14, 2020 9:39 AM

**To:** Schacher, Sarah E (DOT) <[sarah.schacher@alaska.gov](mailto:sarah.schacher@alaska.gov)>

**Subject:** FW: Elliott Hwy, ~20 mile, Cushman Creek Material Site, David Gabet

Hey Sarah,

I had typed this email and forgot to press send, opps. Here Dan's summary of the Elliott Hwy, 20 mile, Cushman Creek Material Site. Let me know if you have any questions or comments.

Thanks,  
Garrett

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**From:** Jordan, Daniel H (DOT) <[dan.jordan@alaska.gov](mailto:dan.jordan@alaska.gov)>

**Sent:** Thursday, September 10, 2020 1:18 PM

**To:** Carter, Garrett D (DOT) <[garrett.carter@alaska.gov](mailto:garrett.carter@alaska.gov)>; Eagan, Pete (DOT) <[pete.eagan@alaska.gov](mailto:pete.eagan@alaska.gov)>

**Cc:** Rainey, Evan E (DOT) <[evan.rainey@alaska.gov](mailto:evan.rainey@alaska.gov)>

**Subject:** Elliott Hwy, ~20 mile, Cushman Creek Material Site, David Gabet

Hello Garrett,

Here's the summary.

- Dan