

John Bennett

From: John Bennett
Sent: Sunday, February 28, 2021 11:59 AM
To: 'Shook, Cora V (DOT)'
Subject: RE: Dalton 0-9 and Sullivan Creek - Road To Tanana
Attachments: 6.25.13 State Mining Claims.pdf; RE: Road to Tanana DNR ROW Permits; RE: Road to Tanana

Cora – my first note was to AJ’s comment about DOT past practice and what is typical for requesting an MCO. One thing I learned in my years is that there is little that is typical or consistent in DNR/DOT practice. And when you consider that there are three regions for each agency, the odds that you can find any process performed exactly the same way twice is slim to none. All of the manuals, regulations and P&Ps don’t seem to do anything to fix that. But it is what it is and somehow we still manage to get things done although not always efficiently or fast.

One thing that makes this scenario rare is that first, we don’t have a history of building that many brand new roads in the last several decades. Most of our projects are rehabs of old existing roads. Secondly, we have learned that it is not good practice to purchase gold mines or acquire native allotments so we tend to avoid both of them to the extent possible. On the mining side, when it is not possible to avoid, I would always recommend some pre-negotiation that would drive the engineering and not the other way around. For example, has the claimant already mined through some portion of the claim or has concluded that a portion of the claim has little gold value. If so, you would look to see if the alignment could lean toward those areas and away from the areas that the miner intends to excavate. We have in the past entered into agreements where we could not avoid the claims such as for the Parks highway through Ester. There we negotiated with the Alaska Gold Co. predecessor (Pete’s old employer). We obtained an easement subject to the right of the miner to mine through the road if they saw fit and subject to the cost of the State to replace the road after the mining. The only good thing about that agreement is that it had a time limit on it which may have been 10 or 20 years, but that time has passed. But to acquire the mining rights, by condemnation or negotiation, the appraisal would have required an assessment of the gold values which means an extensive and expensive drilling program to see how much gold might be there. So although the investment in the Parks highway was at risk during those 10 or 20 years, it may have been considered to be cheaper than buying a gold mine.

AJ’s memo also brings up an issue of FHWA vs. non FHWA funded projects. While the State of Alaska absolutely hates to spend a dime of their own money on a project where they can spend someone else’s...we have the occasional totally state funded project such as the Road to Tanana. When our ROW manual was undergoing a rewrite there was pressure to loosen the rules on state only funded projects to the extent possible in comparison to federally funded projects. That was successfully resisted for two reasons because the reality is that you never know when the state might want to use federal funds on that stretch of road in the future and if it appears that the initial state funding was for the purpose of circumventing federal procedures (Uniform Act and NEPA), the feds might refuse to participate in future funding. The second reason is that you create two separate compensation and relocation systems which had the possibility of treating two separate groups of Alaska citizens in a different manner depending on the funding source. That would be hard to explain to the public. So other than a couple of minor differences outlined in our manual for state funded vs federal funded project, I would say that there are not two separate fact patterns. The state wants to acquire new ROW in a manner that is fair to the land owner and does not place the public’s investment at risk.

With regard to the AMA letter...I get that. Miner’s view MCOs as opportunities by left leaning greenies to shut down or at least to make mining in Alaska as difficult as possible. And the more State lands restricted from mining, the better. So by nature, the AMA would contest virtually every MCO that is proposed as potentially limiting their member’s livelihood. Now the AMA is correct that DOT (at least during my time) has not had a general practice of requesting an MCO over every ROW permit we received from DNR to realign or widen a road. Remember, for the most part that is all we have done for the last several decades. As the road presumably exists without active mining operations running

down centerline, the highway rights would trump any subsequent location of a mining claim within the highway permit. Actually, while the mining location might be valid (Assuming no MCO) the cost to the miner of mining across an existing road would be prohibitive because they would first have to provide the public with a bypass road that met DOT specs and then rebuild the highway to DOT specs back in its original alignment. That is pretty much never gonna happen. I'm not going to get into the legal argument that AMA is making because when you have a third party suggesting to two State agencies what the law is, that suggests to me that DOT AG's should be involved. I believe that the Airport files might reflect a more consistent use of MCOs to protect DNR acquired lands (ILMA/ILMT) because mining across an airport would certainly be intolerable, except of course for Nome and it was a bit difficult to avoid that.

Back in 2014 and just before I retired I was working with the Commissioner's Office on new legislation that would establish procedures for land acquisition between DNR & DOT. There was talk at the time of receiving QCDs for ROW from DNR instead of permits or ILMAs and to include the mineral estate in the QCD to ensure protection of DOT facilities. But that never happened. But we did have the discussion of how to protect new highways crossing lands obtained from DNR.

One project I worked on with R&M was to acquire and develop a Veterans Memorial Cemetery site off of Goldstream Road. I think 80 acres to the north of the road was to be acquired but to access it from the northerly ROW of Goldstream we would need to get a DNR ROW over a sliver of land between the tract and the ROW. And that sliver was subject to a State mining claim. Our task involved getting the miner to relinquish his right to the mining claim. But the problem was that as soon as it was relinquished it would be open for any other prospective miner to locate a claim on putting us right back in the same position. Kind of a chicken & egg situation. So we requested and obtained an MCO over the sliver so it would be protected between the relinquishment and the issuance of the DNR ROW.

I've attached a couple of email from 2013 regarding the Road to Tanana. In one, AAG Sean Lynch appears to agree with the AMA position that DOT's interest would be protected under the Parker v. Alaska Power Authority. Maybe so but I think the extent of the protection was a bit unclear and the MCO essentially provided us with both belt and suspenders to protect the DOT interest with little additional cost. Even if the MCO area is already subject to mining claims, once they are relinquished no further locations can take place.

Back to your initial email – I looked through my files and didn't find any reference to letters of non-objection being used for the mining claims on the road to Tanana so I'm not sure how to respond or whether they can be used on the Dalton. Send me a copy and I will take a look. JohnB

From: Shook, Cora V (DOT) [mailto:cora.shook@alaska.gov]
Sent: Friday, February 26, 2021 11:28 AM
To: John Bennett <JBennett@rmconsult.com>
Subject: Dalton 0-9 and Sullivan Creek - Road To Tanana

He John,

I believe Tim already reached out to you about this. What is the best way forward for this crossing at Sullivan Creek? It appears that we used Letters of non-objection for the Road to Tanana. Would a letter of non-objection work in this particular case. Can you also comment on the letter from the AMA attached as it relates to this and the Dalton Hwy 0-9?

I'm over my head as usual.

Thank you!

Cora V. Shook
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