

MEMORANDUM

State of Alaska
Department of Transportation & Public Facilities
Northern Region Design & Engineering Services

TO: Tim Woster, PE
Design Project Manager
Northern Region

DATE: 5/8/03

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FROM: John F. Bennett, PLS, SR/WA
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SUBJECT: Taylor Hwy. Right of Way
Walker Fork to Canada Border
STP -0785(11)/66446
Section 4(f) – ROW Impact

The purpose of this memo is to review the basis of the existing right of way for the Taylor Highway and its relationship with the Section 4(f) evaluation that is required due to the Wild and Scenic River land classifications along the project corridor.

The Walker Fork to Canada Border portion of the project commences at milepost 82 and extends 26.5 miles in an easterly direction to the Canada Border. More than half of the segment from Walker Fork to Jack Wade Junction is subject to federal mining claims. This memo will focus on the section of existing highway right of way that passes through lands that are both subject to existing federal mining claims and Wild and Scenic River classifications (PL 96-487). With respect to the rectangular system, this includes Sections 19, 18, 17, 8, 9, 4, 3, & 2 within Township 27 North, Range 20 East and Sections 35 & 36 within Township 28 North, Range 20 East, Copper River Meridian. The land status includes the following elements: The townships in question have been tentatively approved (TA'd) for conveyance to the State of Alaska excluding those lands subject to valid federal mining claims. The mining claims constitute a private interest with the potential of going to patent and conveyance of fee title. Until patent is issued, the fee estate underlying the claims is retained by the federal government. A right-of-way easement interest for the Taylor highway is held by the State of Alaska.

The Fortymile Mining District is the second oldest district in Alaska with gold first being discovered in the district in 1886. Alaska Road Commission Maps of the Eagle District dating from 1925 indicate a road/trail network throughout the Fortymile mining area. Routes and work performed are noted beginning in the 1926 ARC Annual Report. Locations route survey maps dating between 1947-1949 provide plan & profile data for the proposed Tok-Eagle road. The DOT&PF 1977 EIS for the Taylor Highway - Tetlin Junction to Canadian Border states that "the Taylor Highway was constructed from June 1946 to October 1953." It evolved from the trail system connecting Chicken, Eagle and the gold placers of the Fortymile region to the Alaska Highway.

Much of the existing right of way for the Taylor Highway is based upon federal Public Land Orders. These rights of way for highway purposes were established across unreserved federal lands under the authority of the Departments of the Interior and Commerce between 1942 and 1958. The PLO right of way constitutes the majority of varying interests in the DOT&PF inventory. At statehood, the federal government transferred 5,400 miles of these rights of way to

the State of Alaska¹. Although most of these rights of way were initially established as withdrawals, subsequent PLO's converted them to easement status². PLO 601, dated August 10, 1949, withdrew certain lands for highway purposes. Among these was the Tok-Eagle Road that was classified as a "feeder road" with a width of 200 feet. Prior to PLO 601 the only basis for a public right of way across the unreserved public lands would have been under the federal RS-2477 law. Where applicable, the width of an RS-2477 trail right of way would have been limited to "ditch to ditch" or that area necessary to construct and operate the road. PLO 757 and Secretarial Order 2665, both dated October 16, 1951 revoked prior highway withdrawals (including PLO 601) and established easements for certain "through, feeder and local" roads. The Taylor highway was specifically named as a "feeder" road in SO 2665 with an easement width of 100 feet on each side of centerline.

As of August 10, 1949, those portions of the Taylor (Tok-Eagle) road which had been surveyed or constructed across unreserved, unappropriated federal lands were subject to a 200-foot wide right of way. However, valid existing federal mining claims would not have been considered "unreserved" federal lands and PLO 601 and its subsequent modifications would have been subject to those claims unless they were relinquished and the lands returned to the public domain. The effect of the 200-foot wide PLO reservation for the Taylor Highway would depend upon the ultimate disposition of the federal mining claims. There are two possible scenarios:

1. Mining claimants successfully receive patent: In this scenario, the claimants eventually receive fee title to their claim. If the mining location that led to patent preceded PLO 601 in time, it would not be subject to the highway right of way. After patent, the state would only be able to claim a "ditch to ditch" width right of way either by prescription (adverse possession against the private interest) or under the RS-2477 grant.
2. The mining claims are relinquished or invalidated: In this scenario, the claimant never obtains a patent and the claims return to the public domain. In this case, the PLO reserving the highway right of way no longer is subject to the prior existing claims and may be fully asserted.

However, while the underlying federal and the mining claim interests co-exist, the State would assert the proposition that PLO 601 was not defeated on August 10, 1949 where

¹ On June 30, 1959, pursuant to section 21(a) of the Alaska Omnibus Act, the Secretary of Commerce issued a quitclaim deed to the State of Alaska in which all rights, title and interest in the real properties owned and administered by the Department of Commerce in connection with the activities of the Bureau of Public Roads were conveyed to the State of Alaska. The Taylor Highway was designated as Federal Aid Secondary Class "A" Route 785 and described as follows:

From FAP Route 62 (Alaska Hwy.) at Tetlin Junction approximately 80 miles west of Alaska-Canada Border; thence northeasterly to the Yukon River at Eagle.
Constructed mileage - 161.0 miles.

² Whether or not the State received a fee or easement interest had been a subject of debate for several years. On February 19, 1993 the Attorney General's Office issued an opinion concluding that "under the Alaska Omnibus Act and resulting Quitclaim Deed, the State of Alaska received, in general, easements for its roads at statehood."

federal lands were reserved by mining claims. We assert that PLO 601 and subsequent PLOs were impressed on the lands along the Taylor highway commencing in 1949. They do however, lie dormant with regard to the private mining interest that preceded them. On the other hand, we believe that the PLO's are effective against the underlying federal interest both today and in the future should the claims be relinquished.

A 1998 U.S. District Court case State of Alaska vs. David B. Harrison, et al.³ supports the proposition that PLO 601 survived the reserved land status across the Taylor highway mining claims when it was enacted in 1949. This case involved the Chickaloon River Road and lands that were reserved by a railroad townsite in 1917 and subsequently claimed under a native allotment. With regard to the road right of way, the court found the following:

“ The State of Alaska asserts that it possesses a right-of-way for Chickaloon River Road. According to the State of Alaska, this right-of-way was first created for the benefit of the United States in 1949 by Public Land Order 601 which withdrew and reserved fifty feet on each side of the centerline of all ‘local roads’ including the Chickaloon River Road. The United States then quitclaimed the right-of-way to the State of Alaska in 1959 as part of the Alaska Omnibus Act.

The Harrison defendants contend that the reservation under PLO 601 did not apply to Chickaloon River Road because the land which it traverses was land withdrawn from the public domain as part of the 1917 railroad townsite withdrawal. Thus it could not also be reserved as a ‘local road’ under Public Land Order 601.

There is no inconsistency or conflict between the railroad townsite withdrawal and Public Land Order 601. The latter was expressly made subject to the former. When in 1955, the Department of the Interior revoked the 1917 railroad townsite withdrawal, the Department of Interior did so without purporting to affect the right-of-way created by Public Land Order 601.....Therefore, the court finds that a right-of-way for Chickaloon River Road was first created for the benefit of the United States in 1949 and was later quitclaimed to the State of Alaska in 1959.”

The 200-foot wide right of way created by PLO continues to exist with respect to the remaining federal interest underlying the Taylor Highway mining claims. It is my understanding that 4(f) impacts would not be considered over private land interests and that they need not be considered to the extent that the proposed project would be located within the existing right of way for the Taylor Highway. For the purpose of evaluating the 4(f) impacts across these mining claims, the existing right of way corridor should be held as being 200 feet in width, 100 feet on each side of the road centerline. Therefore, project use of land within the 200-foot right of way corridor is not subject to 4(f).

³ Case No. A94-0464-CV Order on Motion for Partial Summary Judgment dated October 28, 1998.