

From: [Smith, Kevin L \(DOT\)](#)
To: [Martellgreenblatt, Rose \(DOT\)](#); [Bennett, John F \(DOT\)](#)
Subject: FW: Tofty Mining Claims
Date: Thursday, April 25, 2013 4:03:53 PM

Just curious if either of you have had a chance to read the Parker v. APA opinion...I think that's gold unless something has come down since then and I'd be real curious what Gene and the DNR AG's think about it. What I'm reading (pretty clearly) in this opinion is that:

- The fundamental principle is we as the State own the land and even though we allowed a claim on the property the State Mining Claims are subject to "reasonable concurrent uses"
- I will argue that not only is a road connecting to the AHS is a concurrent use, it's actually a supporting/augmenting use that allows the miners to develop their claim in a more practicable, economical and profitable way than they would have to otherwise.
- Unlike what the DNR AG's were saying the other day, the miners are not holding a huge bundle of sticks – the mining claims appear to be very subservient and are only given reasonable surface access to extract the minerals out of the ground....in fact the miner is responsible for payment of surfaces damages to the owner – in this case the Great State of Alaska.
- If we were to go down this path it would appear to me that inverse condemnation would be our biggest worry based on the court opinion. But I also think we could through permitting, bonding, replacement of the road bed (at the miner's expense) show a good faith effort to not preclude them from access to any minerals. Combine that with Kerwin's original thoughts about advanced notice to mine and I think we could make a very solid defense if anyone ever wanted to try and assert inverse condemnation that we are not prohibiting it from happening.

That will conclude my unsolicited thoughts for the afternoon but I'll be curious where you all take this from here. --Kev

From: Krause, Kerwin J (DNR)
Sent: Tuesday, April 23, 2013 12:21 PM
To: Martellgreenblatt, Rose (DOT)
Cc: Bennett, John F (DOT); Smith, Kevin L (DOT); Pexton, Scott R (DNR); Brown, Ashley C (LAW)
Subject: RE: Tofty Mining Claims

Rose,

I have attached some our file records for a previous DOT project at Bird Point on the Seward Highway. DOT requested from DNR to remove a million cubic yards of road building material (rock) in 1964. In 1967, the father of a geologist working for DNR located two mining claims north of the Seward Highway within Chugach State Park at Bird Point. Surprisingly, they are still active. The

owners (formerly John Nesheim and now his son Ty Nesheim) indicate they were initially located to create a recreational mining business in the Park, however this was illegal without DPOR approval.

It could be that these claims were located because Ty had inside knowledge about DOT's plans. I think you will find these records helpful. The attached PDF has these documents in date order – oldest first and latest last. Also, I have attached an Alaska Supreme Court Decision (#S-6350) regarding frivolous staking in order to hold up public projects and acquire compensation (Parker vs. APA). Keep in mind, I do not consider the claims located within the Tofty ROW as frivolous claims, however I do think the Tofty claims could be handled similar to how we proposed handling the Bird Point claims.

Good Luck on the project.

Kerwin J. Krause

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From: Martellgreenblatt, Rose (DOT)
Sent: Tuesday, April 23, 2013 9:30 AM
To: Krause, Kerwin J (DNR)
Cc: Bennett, John F (DOT); Smith, Kevin L (DOT); Pexton, Scott R (DNR)
Subject: RE: Tofty Mining Claims

Kerwin, thank you for the response. It seems very logical and in line with the current regulations that DNR does in fact have authority to continue to manage these lands for public purposes.

Can you provide me an example of what project or who you dealt with at DOT on the highway projects you reference ? We would appreciate not recreating the wheel.....thanks again.....

From: Krause, Kerwin J (DNR)
Sent: Monday, April 22, 2013 4:46 PM
To: Martellgreenblatt, Rose (DOT)
Cc: Bennett, John F (DOT); Smith, Kevin L (DOT); Pexton, Scott R (DNR)

Subject: RE: Tofty Mining Claims

Rose,

State of Alaska acquired and maintained mineral rights (under AS 38.05.185 and 38.05.195) are self initiated and self maintained through posting, timely recording and timely payment of rental and recording of labor annually. These locatable mineral rights only apply to base and precious metals and certain industrial minerals. The use of the surface to mine these mineral rights are subject to bonding under AS 38.05.130. In the past where DOT has had highway projects and ROW adjustments that overlap existing mining claims, DOT has either purchased the mineral rights or asked us to intercede with the mining claimants. When I have helped DOT with these situations, I have written and sent the mining claimants a 'Notice' letter regarding the proposed project, and asked them to consider mining their claims if they had future plans to do so because once the planned road project was complete, they would have to bond under AS 38.05.130 for any damage they may cause within the DOT ROW. If DNR never allowed any future surface interests on its lands where mining claims had been located, things such as ROWs and easements could be blocked indefinitely. Furthermore frivolous claim staking has occurred in the past in areas where public projects have been planned and announced. If the State of Alaska had to purchase mineral rights or change every public project simply because of frivolous staking it would be costly or the project location would have to be changed. As DOT is aware, the DNR can issue a public mineral closing order (MCO) for up to 640 acres without legislative approval. Generally, when these large MCOs are publically noticed, frivolous staking occurs. If DNR and DOT were to adhere only to eminent domain, public projects would be subject to extortion in having to buy back the mineral rights or relocate the project and incur additional expense.

Kerwin J. Krause

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From: Martellgreenblatt, Rose (DOT)
Sent: Monday, April 22, 2013 2:08 PM
To: Krause, Kerwin J (DNR)

Cc: Bennett, John F (DOT); Smith, Kevin L (DOT)
Subject: Tofty Mining Claims

Just a note to follow up on our last correspondence with you regarding notice letter to miners of the upcoming road project.

We just got off the phone with our Assistant AG, Gene Gustafson and Colleen Moore and Ashley Brown. The DNR attorneys made the statement that DNR would have no authority to write such a letter.

They insisted that the mining right is superior title to any other. They also said that DNR may give DOT a Right of Way for the road project, DOT would have to acquire the mining interest through eminent domain if they wanted it. DNR would only allow a 3rd party interest if there was no interference with the miner or the mining operation.

This isn't what we were led to believe in our meeting with you and the Northern Region folks. Do you have any history of such notices being given to miners in other places ? Can you site any specifics for us of when this was done before ?

Difficult for me to believe that any 3rd party interest is always going to be rejected or dismissed because of a mining claim. Can you offer any insight ?