

March 3, 2014

R&M No. 2245.01

Randal Davis, PLS
DOT&FP Southcoast Region – Right of Way
P.O. Box 112506
Juneau, AK 99811-2506

RE: N. Douglas Highway
Boundary Opinion
Project 73651

Dear Mr. Davis:

You have requested an assessment of the existing right-of-way (ROW) adjoining Lot 111 of U.S. Survey No. 3273 located at approximately milepost 5.5 of the North Douglas Highway. Specifically, the question is whether the lot is subject to a ROW of 50-foot offset to the north of centerline as the land owner appears to assert or a ROW that is widened out to 75-foot offset to the north of centerline across the majority of the lot frontage as shown on several Department maps.

The short answer is that the lot is subject at a minimum to the 50-foot from centerline ROW based on the federal Small Tract Act and while the assertion of the 75-foot wide ROW may be valid, we cannot reach that conclusion without a review of the BLM case files relating to the North Douglas Highway right-of-way.

To assist us with our review you provided the following documents:

1. "BPR File #011867.pdf" – ROW Plans Project FH 31-1(1) North Douglas Highway Fish Creek – Outer Pt. Tongass National Forest
2. "BPR Project 31_E_Grading_Plan.pdf" – BPR Plans for Project 31-E Grading & Bridge Douglas Highway Route No. 31 Douglas and Fritz Cove
3. "DOT ROW Map S-959.pdf" – Division of Highways ROW Map Project S-959
4. "Highway Easement Deed AA8443.pdf" – Highway Easement Deed; February 28, 1967; USA/BPR & SOA Department of Highways; Project FH-31-1(1); AA8443
5. "Lot 111 USS 3273 Owners Comments.pdf" - Notes, Patent 1181499 to Loretta Moffett
6. "USS 3273.pdf" – U.S. Survey Plat

The Highway Easement Deed (AA8443) noted in item No. 4 and the plan sheet noted in item No. 1 are for a section of the North Douglas Highway that appears to be between 4 and 7.6 miles beyond the subject parcel and so were not considered.

I supplemented the remaining documents with information easily available on-line such as BLM case file abstracts, master title plats, township plats, U.S. Survey field notes, USGS historical maps, documents available on the Recorder's office website and other historical reference documents in the R&M archives.

Subject Parcel

The property in question is Lot 111 of U.S. Survey No. 3273. The survey was performed in August of 1953 and approved on May 4, 1954. Patent No. 1181499 was issued to Loretta Moffett for Lot 111 on April 22, 1958 under the authority of the Act of June 1, 1938 (52 Stat. 609), otherwise known as the "Small Tract Act". As provided in the Small Tract Act authority, the lot was impressed with "...a right of way not exceeding 50 feet in width, for roadway and public utilities purposes, to be located along the south boundary of said land." Loretta Moffett filed her



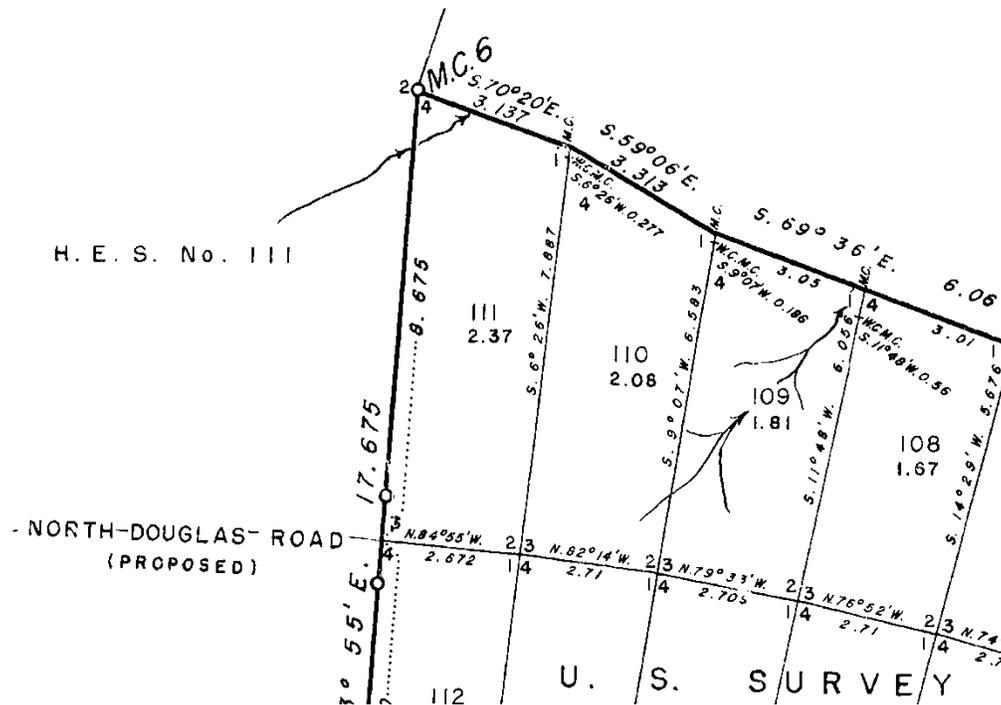
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application for Lot 111 on **February 15, 1958**. This date is key to the ROW analysis as it is the date by which her rights in the parcel were vested. Her claim would be subject to any valid existing rights that preceded that date and any ROW actions that came after that date would be subject to her prior existing rights. One point that the owner appears to assert is that Lot 111 could only be subject to a ROW clearly expressed in the patent. Several Alaska Supreme Court cases have addressed this position and reject it. The State v. Alaska Land Title Association (1983) held that "...by operation of law, land conveyed by the United States is taken subject to previously established rights-of-way where the instrument of conveyance is silent as to the existence of such rights-of-way." This principle would apply both to the Moffett patent and subsequent conveyances of the property.

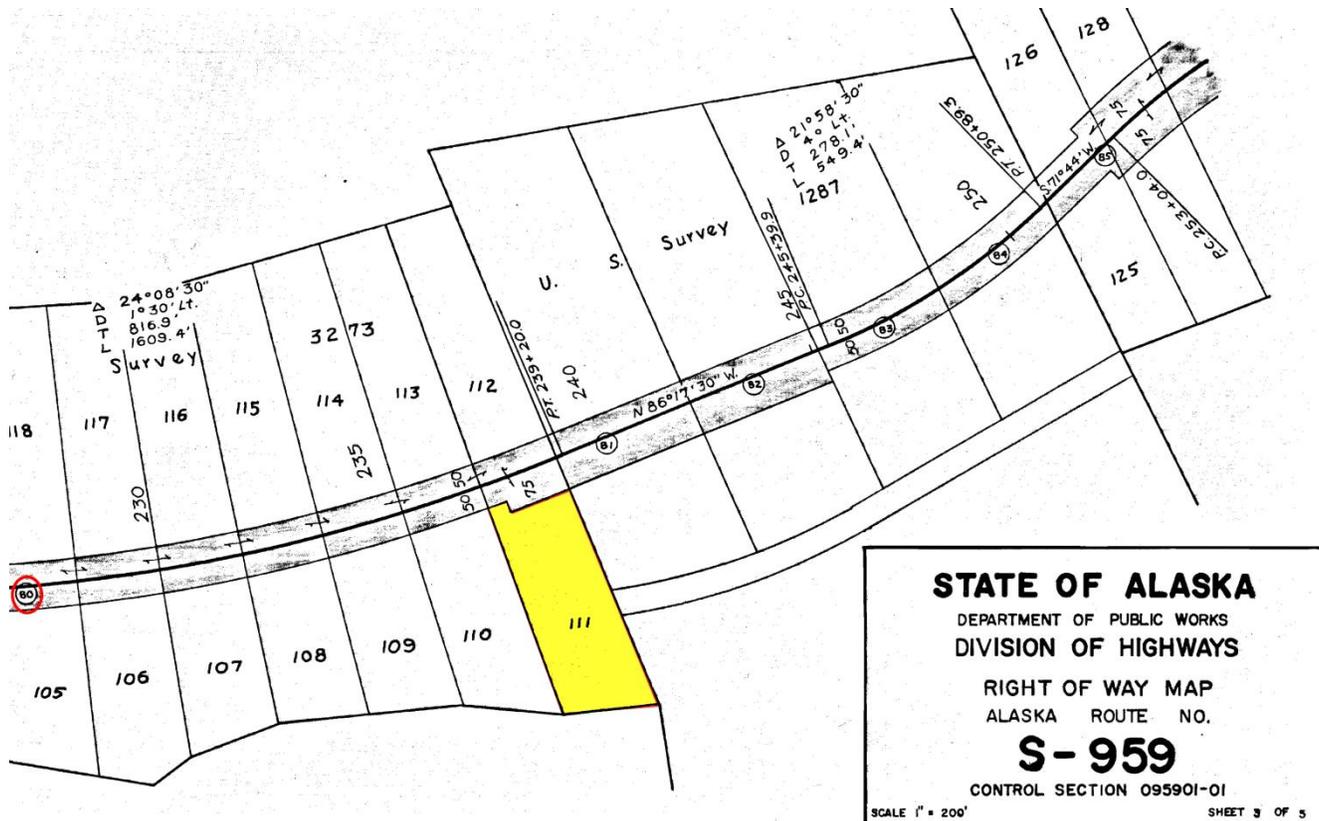
U.S. Survey No. 3273



The northerly and southerly tiers of lots are segregated by the centerline of the North Douglas Highway. To the east, the road centerline within U.S. Survey No. 3272 is labeled "North Douglas Road". To the west the centerline within U.S. Survey No. 1287 is labeled "North Douglas Road (Proposed)". The field notes for the survey state that "The traverse of the center line of the proposed North Douglas Road..." would determine the boundary between certain lots. This statement implies that the proposed road centerline had been staked or is otherwise identifiable. The field notes also state that "The road right-of-way through lots, 99, 100, 123, and 124 has been cleared of all vegetation..." These lots are on the east end of the survey while the subject property is on the west end. The clearing statement coincides with a similar statement in the field notes for U.S. Survey 3272 that was also performed in August of 1953, however, the statement in U.S. Survey No. 3272 was that "The road right-of-way has been cleared of all vegetation;". These statements support a conclusion that construction was in progress as of August 1953 with the centerline staked through both surveys and clearing in progress through U.S. Survey 3273.

North Douglas Highway

Right of Way Map for Project Route No. S-959; Control Section 095901-01; "Juneau-Douglas Bridge to Outer Point dated 12/17/1963.



STATE OF ALASKA

DEPARTMENT OF PUBLIC WORKS
DIVISION OF HIGHWAYS

RIGHT OF WAY MAP
ALASKA ROUTE NO.

S-959

CONTROL SECTION 095901-01

SCALE 1" = 200'

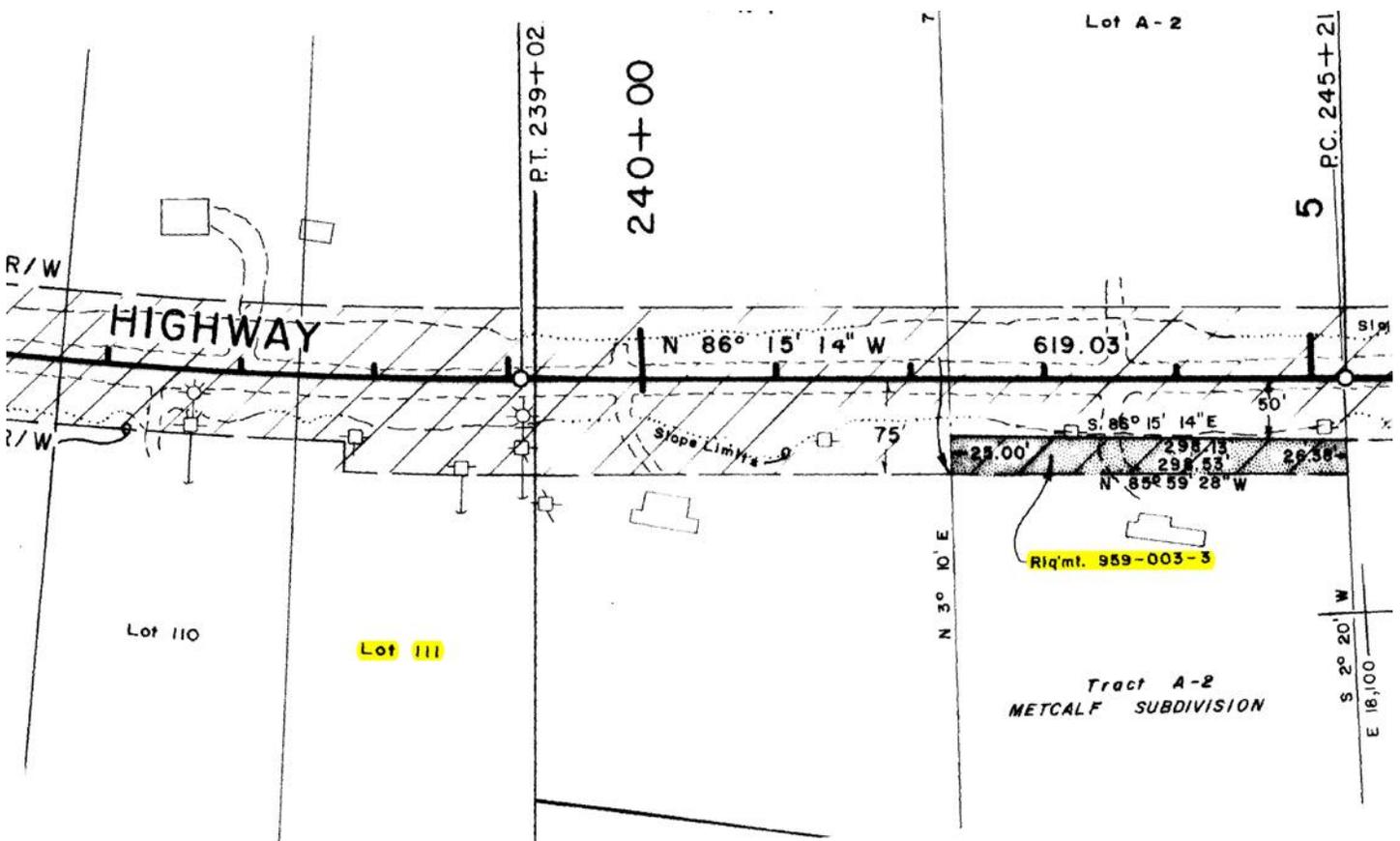
SHEET 3 OF 5

80	Bureau of Land Management			J-011867
81	Arndt + Mary Hendrickson		0.88	
82	Gordon + Joan Potolicchio		0.89	

The subject parcel is highlighted and the acquisition parcel number (80) is circled in red. The owner for parcel 80 is listed as the Bureau of Land Management. The remarks column lists "J-011867" for a reference to the BLM case file. Note that the ROW acquisition is widened to 75-feet through a portion of Lot 111 and continues at this width through parcel 81 and 82 within U.S. Survey No. 1287.

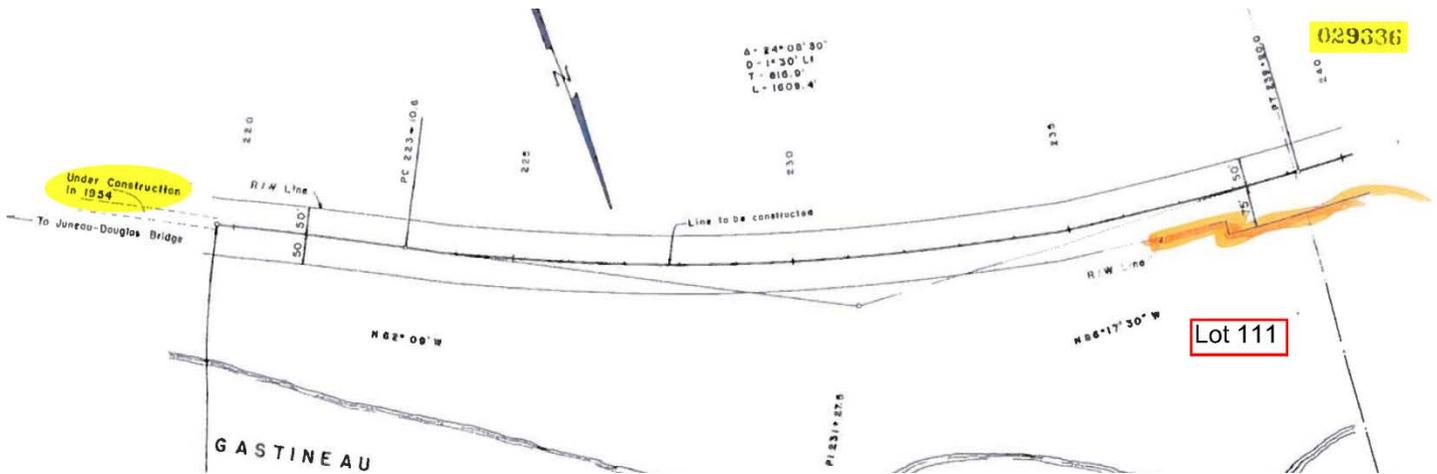
Right of Way Map for Project S-0959(4) North Douglas Highway dated January 26, 1971 and filed as Plat 77-27 (Instrument No. 1977-002967-0 on 6/8/77). This map cross hatches the North Douglas ROW to indicate that it is "existing" unlike the previously mentioned "acquisition" plans. These plans provide a better indication of the reason for the ROW widening out to 75-feet. The widening starts in Lot 111 apparently to include several existing power poles. As the widening proceeds to the west it is clear that it is necessary to accommodate slope limits within Parcel No. 81 (Lot A-

1 of Metcalf Subdivision 76-38W). The continued 75-foot widening through Parcel No. 82 (Lot A-2 of Metcalf Subdivision) appears to be more of a transition than a requirement as the slope limits appear to run along the 50-foot offset line. In fact as the property owner mentions in his notes, the outer 25-feet of the ROW across Lot A-2 was relinquished in 1977. (See Relinquishment 959-003-3, Commissioner's Quitclaim Deed recorded in Book 133, Page 333, JRD on July 14, 1977) As the relinquishment document was a quitclaim deed as opposed to a deed of vacation, this implies that the ROW acquired for Parcel 82 was acquired in fee although this cannot be verified without a review of the acquisition document. The owner of the subject property makes several comments asserting that the ROW across Lot 111 is an easement interest. This is likely the case. Most highway rights-of-way in Alaska are considered to be highway easements unless the acquisition document indicates that the ROW was acquired in fee. At a minimum, the Small Tract Act ROW noted in the Lot 111 patent would be considered an easement interest. The other mechanisms that would have served to widen the ROW to 75-feet would have also likely to have been limited to an easement interest.



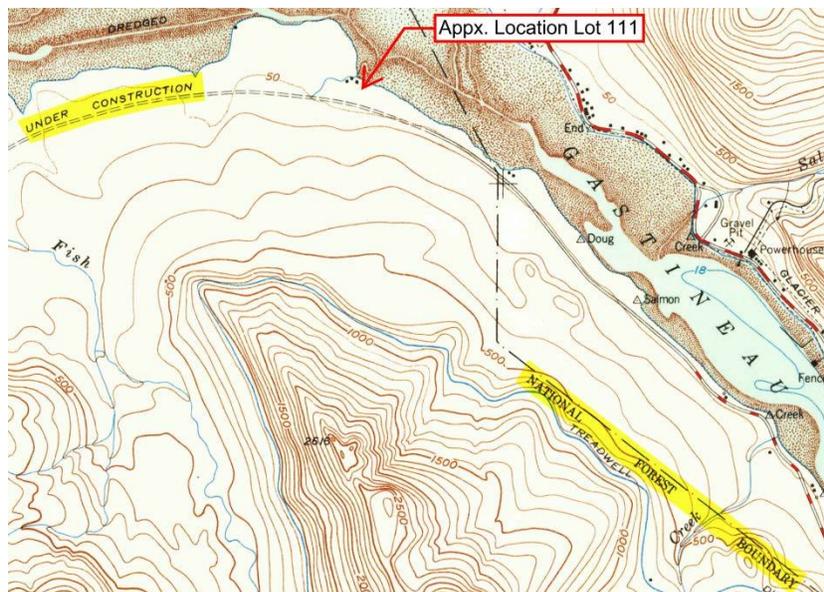
The above noted "existing" ROW plans appear to have been prepared as a part of a reconstruction effort for Project S-0959(6) North Douglas Highway – Grading, Drainage & Paving. Construction was commenced in January of 1972 and completed in June of 1973. Construction included the section of the highway fronting Lot 111.

Plans for Proposed Project 31-E, Grading & Bridge, Douglas Highway: These plans were issued by the Bureau of Public Roads, Division 8 and relate to Route 31 of the Alaska Forest Highway System, Tongass National Forest. The cover sheet for these plans appears to be very old but a date cannot be read. They are stamped with the number 029336 which is a BLM case file. The east end of U.S. Survey No. 3273 is labeled as being "Under Construction in 1954".

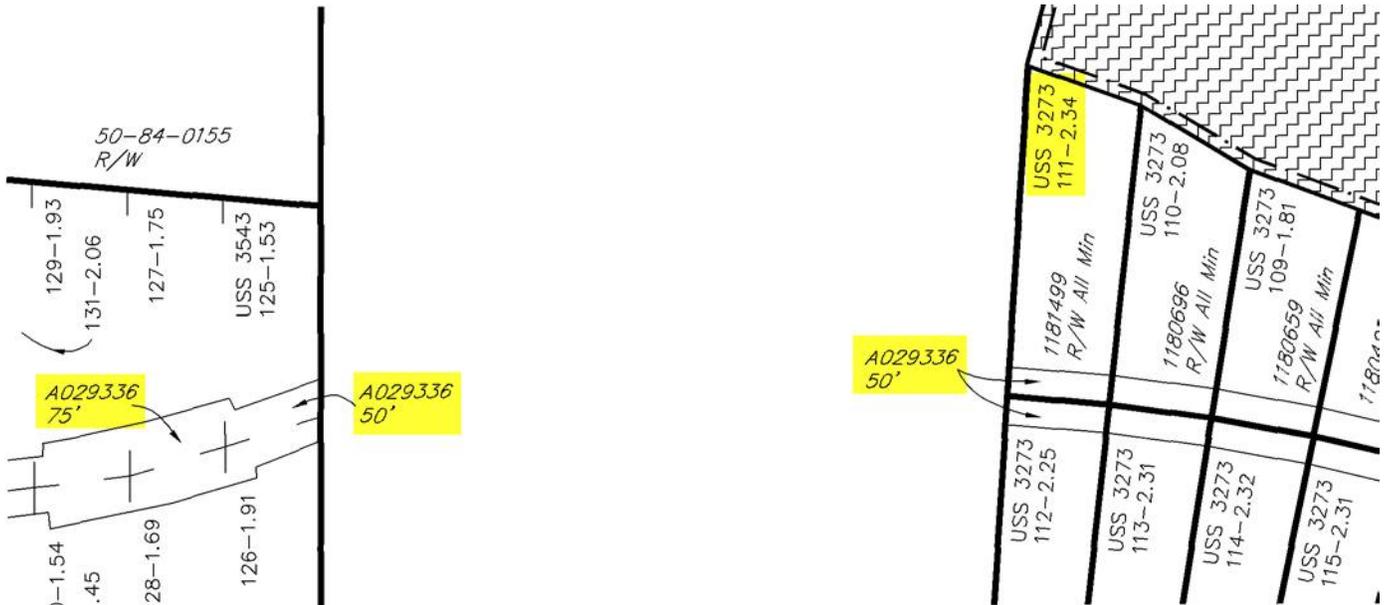


USGS Quadrangle Maps

The 1949 edition of the Juneau B-2 Quad map does not indicate that Douglas Highway construction had reached the subject property by that date. A later version of the 1949 edition with minor corrections made in 1955 shows the North Douglas Highway labeled as "Under Construction" in the vicinity of the subject parcel and beyond to Fritz Cove. (See below) The road classification symbol used was that of an "Unimproved dirt" road. The 1962 edition of the Juneau B-2 Quad map indicates a "light duty" road in the vicinity of U.S. Survey No. 3273 and beyond to Fritz Cove.



BLM Master Title Plat



The BLM MTP labels the North Douglas Highway ROW with the case file number A029336 that was called out on the Douglas Highway Project 31-E plans. What is interesting on the MTP is that while portions of the ROW area called out as 75-feet each side of centerline, the portion in the vicinity of Lot 111 is only labeled as 50-feet each side of centerline. The empty space between the two rights-of-way is U.S. Survey No. 1287. As this survey was entered for a homestead in December of 1919, there would be no opportunity to impress a later ROW by federal action. This is why the parcels within this survey (81 & 82 of acquisition plans for Project S-959) had to be acquired by purchase.

BLM Case File Abstracts

The ROW plans for Project S-959 reference a case file number of J11867 for the acquisition parcel no. 80 that encompasses Lot 111. The case file notes that the customer was the Bureau of Public Roads who filed an application for a 44LD513 ROW in September of 1954. The case file was closed without action in March of 1964 and notes that the file was reactivated as A029336, the case file noted on the above reference Project 31-E plans.

The customer for case file A029336 is listed as the Federal Highway Administration. Under case type the file is noted as a 44LD513 ROW. The administrative status section notes the following:

- August 12, 1954 – Application received
- September 9, 1954 – Amendment/Correction Application Received
- November 2, 1955 – Appropriation Noted (44LD513 Notation)
- June 6, 1960 – Amendment/Correction Application Received
- June 9, 1960 – Appropriation Noted

It is this chain of events that leads us to the conclusion that a review of the case file might shed some light on what happened with this ROW. Remember that Lot III was entered on February 15, 1958. The combination of the ROW representation on the BLM Master Title Plat adjoining Lot 111 (50-feet) and the amendment/corrections both before

Randal Davis, PLS

4/1/13

Page 7

and after the Lot 111 entry date suggest that the ROW appropriation for that lot may have been reduced. This is not an entirely unreasonable assumption given that this appears to be the only lot within the U.S. Survey No. 3272 and 3273 Small Tracts subdivisions that is identified with a ROW greater than 50-feet each side of centerline. There may have been a conscious decision to maintain a constant ROW width through these Small Tract U.S. Surveys.

With the case file in hand, this review would next lead into a discussion of the 44LD513 notations referenced in the case files and what they mean in the context of an appropriation of federal public domain lands for highway rights-of-way. It would be a lengthy discussion and one that affects many of the Southcoast Region's highway rights-of-way as a result of several of the current state highway rights-of-way being rooted in the National Forest Highway system.

If the backup plan in this individual case is to vacate the outer 25-feet of the ROW adjoining Lot 111 as a result of it being excess to the Department's needs, then you may not want to pursue this review any further.

Summary

At a minimum, Lot 111 is subject to the 50-foot wide ROW impressed by the Small Tract Act. There may be a case for the wider 75-foot ROW based on an appropriation of federal public domain lands prior to the entry that led to the patent for Lot 111. The map history indicates that the road was under construction and substantially complete before the Lot 111 entry date of 2/15/58. The BLM case file abstract evidence also indicates that an application was received and a 44LD513 notation was made to records prior to the Lot 111 entry date. This combination of events could have resulted in a valid appropriation for the additional 25-feet of ROW. This can only be confirmed with a review of the entire case file. A 44LD513 notation does not actually create the ROW, but there is strong support that an application to BLM with appropriate maps identifying the wider ROW would do so. There is also a possibility that a review of the case file would conclude that the 75-foot wide proposed ROW was amended to be no greater than 50-feet in width.

Although we were not able to reach a more concrete conclusion as to the full ROW width, I hope you will find this review useful. I look forward to working with you again in the future.

Sincerely,

R&M CONSULTANTS, INC.



John F. Bennett, PLS, SR/WA
Senior Land Surveyor