SB

141

File 2

Alaska State Legislature

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POUCH V
JUNEAU, ALASKA 99811
(907) 465-4921

Senate Committee on Transportation

M E M O R A N D U M

To: Committee members
From: Chairman Coghill
Date: February 19, 1985
Re: SB 141, Relinquishment of rights-of-way

As the attached background information will show, SB 141 is intended to release the State's claim to certain portions of highway rights-of-way which were not clearly identified in land patents. This has given rise to the problem faced by many landowners who live or hold land adjacent to highways the State now wishes to upgrade, straighten or expand and who have been or could be abruptly and without compensation deprived of land they assumed was theirs, and which their legal documents have not identified as belonging to the government.

These rights-of-way were withdrawn by the federal government through public land orders or as a result of various Acts of Congress during territorial days, and did not necessarily make their way either to the homesteaders' patents or the district recorders' offices. This has subsequently caused heavy liabilities for the state's title insurance companies, who traditionally insure property based upon what has been recorded at the recorder's office, not upon what has been published in the Federal Register.

As this problem has evolved, the State Supreme Court has ruled that the State's claims to the rights-of-way are valid, and therefore, title insurers are liable for any claims by the insured for takings for which the State has declined to compensate the property-owner. Of course, this presumes that the property-owner has title insurance. In the many instances where the property-owner does not, he or she is simply out of luck, and has no recourse to gain compensation.

The background material will more completely go into the history of the problem, however, a brief explanation of the enormous fiscal note may be in order. We are not sure how DOT/PF generated this much fiscal impact, but assume they have figured the repurchase price at top market value, and of the entire width of right-of-way (in other words, the entire 300 or 500 feet, not just the portion they will actually need to expand a road).

Memo - short history

Introduced: 2/8/85
Referred: Transportation and Resources

IN THE SENATE BY COGHILL

SENATE BILL NO. 141

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act releasing claims of the state to land within certain rights-of-way; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. LEGISLATIVE PURPOSE AND FINDING. The purpose of this Act is to release certain highway rights-of-way claimed by the state that are causing economic hardship and physical and mental distress to persons who hold title to land under a reservation to the state by virtue of 33 Stat. 616 (Act of January 27, 1905); 47 Stat. 446 (Act of June 30, 1932); 48 U.S.C. secs. 321(a) - 327 (Act of July 24, 1947); Public Land Order 601, 14 Fed. Reg. 5048 (1949); Public Land Order 757, 16 Fed. Reg. 10, 749 (1951); Public Land Order 1613, 23 Fed. Reg. 2376, 2378 (1958); or Departmental Order 2665, 16 Fed. Reg. 10, 752 (1951).

* Sec. 2. RELINQUISHMENT OF RIGHT-OF-WAY. The commissioner of transportation and public facilities shall vacate and relinquish to the adjoining property owners any and all rights-of-way for a road, roadway, highway, tramway, trail, bridge, or appurtenant structure created, withdrawn or reserved under 33 Stat. 616 (Act of January 27, 1905); 47 Stat. 446 (Act of June 30, 1932); 48 U.S.C. secs. 321(a) - 327 (Act of July 24, 1947); Public Land Order 601, 14 Fed. Reg. 5048 (1949); Public Land Order 757, 16 Fed. Reg. 10, 749 (1951); Public Land Order 1613, 23 Fed. Reg. 2376, 2378 (1958); or Departmental Order 2665, 16 Fed. Reg. 10, 752 (1951) if the right-of-way on the effective date of this Act is not physically occupied by a road, roadway, highway, tramway, trail, bridge, or appurtenant

structure.

* Sec. 3. TAKING OF RIGHT-OF-WAY WITHOUT JUST COMPENSATION VOID. The vacated and relinquished right-of-way under sec. 2 of this Act may not be taken, claimed, asserted, or used by the state without the payment of just compensation.

* Sec. 4. PHYSICAL OCCUPATION OF RIGHT-OF-WAY. (a) The provisions of this Act do not divest the state of its interest in a right-of-way to land or require compensation by the state for land physically occupied on the effective date of this Act by a road, roadway, highway, tramway, trail, bridge, or appurtenant structure then constructed within the right-of-way created, withdrawn, or reserved under the Acts of Congress and the orders described in sec. 2 of this Act; nor do the provisions of this Act divest the state of an interest in an easement of specific width set out in the original patent from the state or federal government.

(b) Expansion beyond an existing road, roadway, highway, tramway, trail, bridge, or appurtenant structure requires the payment of just compensation to the owner of the land and no other acts or actions by the state constitute a physical occupation within the meaning of this section. The state has the burden of proof to show by clear and convincing evidence that the physical occupation occurred before the effective date of this Act.

* Sec. 5. APPLICATION TO FEDERAL LAND. The provisions of this Act do not divest the state of its interest in a right-of-way that affects land in which fee title is, on the effective date of this Act, vested in the United States of America.

* Sec. 6. DEFINITION. As used in this Act, "physically occupied" means the construction of the actual roadway, including its shoulders and ditching, highway, tramway, trail, bridge, or appurtenant structures, before the effective date of this Act.

* Sec. 7. RETROACTIVE APPLICATION. This Act does not relieve, alter, or void a voluntary conveyance of an easement including an easement dedicated by plat.

* Sec. 8. EFFECTIVE DATE. This Act takes effect immediately in accordance with AS 01.10.070(c).

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: SB 141

Title: An Act releasing claims of State land within certain rights of way

Sponsor: Coghill

Requestor:

Date of Request: February 15, 1985

FISCAL DETAIL

Agency Affected: Transportation & Public Facilit

Program Category Affected: Design and Construction

BRU, Program or Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES		75	75	75	75	75
200 TRAVEL		15	15	15	15	15
300 CONTRACTUAL		1,750	1,750	1,750	1,750	1,750
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES		225,500	225,500	225,500	225,500	225,500
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		227,340	227,340	227,340	227,340	227,340
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		227,340	227,340	227,340	227,340	227,340
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

See attached Analysis

Prepared By: Milton H. Lentz

Phone: 465-2985

Division: Standards & Technical Services HQ

Date: February 14, 1985

Approved by Commissioner:

Date: 2/15/85

Agency: Department of Transportation & Public Facilities

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Fiscal Note

Dept. of Transportation & Public Facilities

Position Paper

BILL NO: Senate Bill No. 141

TITLE: An Act releasing claims of the State to land within certain rights of way

APPROVED: R. J. Knapp
Commissioner

DATE: 2-15-85

The Department of Transportation and Public Facilities opposes Senate Bill 141. This bill would have a major negative impact on the State of Alaska. It could restrict our ability to serve the public effectively and create a heavy financial burden for the State. In addition, there is a concern that, if this bill is enacted into law, it will jeopardize present or future federal-aid participation in highway rights of way.

The validity of these easements has been reviewed by the U.S. Supreme Court and the passage of this bill would reverse any legal grounds already established through the judicial system.

DOT Position Paper

For further information call Susan Fleischhauer at 465-3900.

ANALYSIS OF FISCAL NOTE FOR SENATE BILL 141

This bill would relinquish highway easements created by the federal government under several laws and land orders. Most of the highway rights of way in the State would be affected. This bill would relinquish or vacate all those rights of way except those portions which are physically occupied on the effective date of the Act. Under this Act, the adjacent landowners would immediately become owners of the affected rights of way except those portions between slopes and ditches.

The enactment of this bill would put the Department in the position of having to purchase any rights of way needed for planned expansion, maintenance (brush cutting and snow storage), protection of utility permit areas, permitted encroachments, etc.

The cost of almost all future upgrading or widening of existing highways and the building of planned highways would be increased drastically because of the expense of acquiring additional right of way. This bill would also affect federal funding on federal-aid projects. It is the Federal Highway Administration's position that there can be no federal reimbursement for funds expended by the State of Alaska for the acquisition of right of way from lands subject to the reservation contained in the 1947 Act.

This fiscal note is based on the following assumptions:

1. Primary highways normally control 300-foot rights of way in general but physically occupy 100 feet for the actual roadway.

2. Secondary highways normally control 200-foot rights of way but physically occupy 60 feet for the actual roadway.

3. The State would have to reacquire approximately one half the relinquished rights of way for planned expansion, maintenance, clear zones, utility permits, etc. This would have to be done as expeditiously as possible to satisfy maintenance agreement obligations with the federal government on federal-aid highways.

DOT Fiscal Note Summary

Introduced: 4/29/85
Referred: Transportation

IN THE SENATE BY COGHILL

SENATE JOINT RESOLUTION NO. 26

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

Relating to the payment of just compensation to landowners for certain rights-of-way across land in Alaska.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS the Federal Government created certain rights-of-way for highway purposes across land in the state under Public Land Order 601, Public Land Order 757, Department Order 2665, and Public Land Order 1613; and

WHEREAS the rights-of-way created by the Federal Government were not identified in the patents issued to Alaska homesteaders nor were the original homesteaders informed as to the location or true width of the rights-of-way claimed for highway purposes by the Federal Government across their land; and

WHEREAS the original homesteaders and their successors in interest have had no knowledge of the claim of the Federal Government to the rights-of-way along or across their properties and have often utilized and improved the portion of the right-of-way claimed by the Federal Government; and

WHEREAS the enforcement of the rights-of-way would be unfair to homesteaders who entered their property between August 1949 and Alaska statehood in 1959; and

WHEREAS the rights-of-way created by the Federal Government were not recorded in any territorial or state recording office for the purpose of public notice; and

WHEREAS the right to utilize the rights-of-way for highway purposes

was conveyed to the state in 1959; and

WHEREAS the United States Department of Transportation has declined to pay federal highway funds to the state to allow the state to pay just compensation to the landowners whose properties are affected by the rights-of-way; and

WHEREAS U.S. Senator Ted Stevens has attempted in the Federal Aid Highway Act of 1970, sec. 138, to require the United States Department of Transportation to compensate the State of Alaska for money paid as just compensation for the taking and utilization of the rights-of-way;

BE IT RESOLVED by the Alaska State Legislature that the Alaska delegation to U.S. Congress is urged to introduce and support legislation to require reimbursement by the United States Department of Transportation to the State of Alaska for money paid by the state as just compensation for the use of any right-of-way created, established, or claimed under Public Land Order 601, Public Land Order 757, Department Order 2665, and Public Land Order 1613.

COPIES of this resolution shall be sent to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress.

UNITED STATES

DEPARTMENT OF THE INTERIOR

GENERAL LAND OFFICE

WASHINGTON

IN REPLY PLEASE REFER TO

☞ 1751330 "F"

JAN 20 1939

The Director,

Division of Territories and Island Possessions.

My dear Dr. Gruening:

Referring to your memorandum under date of December 17, 1938, relative to proposed reservations for the construction of roads, bridges, and trails in the Territory of Alaska, I will be glad to confer with you or your representatives at any time you may so desire.

There is apparently no authority for the issuance of an Executive order for the purpose of imposing a road reservation upon any land in the Territory which may hereafter pass into private ownership, and I am not certain that it would be necessary or advisable to recommend the enactment of legislation for such purpose.

Section 2477, U. S. R. S., provides: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." No action on the part of the Government is deemed necessary to the operation of this statute. This grant becomes effective upon the construction or establishing of the highway in accordance with the State or Territorial laws. No reservation for rights-of-way so acquired is included in the patent when issued for the lands affected. (26 L. D. 446).

The acts of January 27, 1905 (33 Stat. 616), and May 14, 1906 (34 Stat. 192), incorporated in sections 321 to 337 inclusive, of Title 48 U. S. C., provides for the construction and maintenance of roads, trails, and bridges, by the board of road commissioners. A reservation for rights-of-way for roads constructed in pursuance of the provisions of these statutes, may be inserted in patents for the

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Jan. 14-1939

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lands affected, upon the filing of profile maps showing the location of the road in accordance with instructions of the Department of July 8, 1930.

Section 17 of the act of November 9, 1921 (42 Stat. 212), provides for the granting of public lands or reserved lands of the United States for Federal Aid Highways. Grants under this statute may be acquired by the filing of maps in accordance with the regulation thereunder and the approval of such maps by the Secretary of the Interior. A reservation for rights-of-way acquired under this statute is incorporated in the patent issued for the lands affected.

The width of the rights-of-way which may be acquired under the above-mentioned statutes is not specified. The width of rights-of-way established under section 2477 is governed by the laws of the States or Territories (22 L. D. 145). The width of rights-of-way for roads or highways established or constructed under the provisions of the acts of January 27, 1905, and May 14, 1906, or acquired under section 17 of the Federal Aid Highway Act of November 9, 1921, would seem to be a matter of discretion as to what is deemed reasonably necessary for the construction and proper maintenance of the particular road or highway and governed by the width as surveyed and shown on the profile maps, the maps being evidence of the right-of-way and the basis for insertion of the reservation in any subsequent patent for the lands affected.

With respect to the illustrations given in the correspondence accompanying your letter, it appears quite certain that neither an Executive order nor legislation could afford any relief. In other words, a right-of-way over an area which is embraced in an entry, legally initiated and maintained according to law, is either by agreement with the party having the entry or through condemnation proceedings.

The correspondence accompanying your letter indicates that you are familiar with the instructions issued by the Department on July 8, 1930, in regard to the inclusion of reservations for roads constructed by the Government in all cases where rights of persons seeking to acquire title to any of such lands were initiated subsequent to the construction of the road. In order to put into effect those regulations, this Office must be furnished with maps and field notes of all constructed roads as well as those hereafter completed, so prepared as to make it possible to have proper notes placed on the tract books and adequate reservations inserted in patents. As is

also indicated by your correspondence, this matter was called to the attention of the Secretary of War by the Department on September 3, 1930, but up to this time no maps or field notes pertaining to constructed roads or roads hereafter to be constructed have been received in this office.

We shall be glad to go into these matters more fully in the conference that you have proposed.

The enclosure accompanying your letter is returned herewith.

Very truly yours,

Commissioner.

Enclosure.

The President of the Senate,

United States Senate.

a/2.10,1940

Sir:

I enclose a draft of a bill "To amend an act entitled 'An Act providing for the transfer of the duties authorized and authority conferred by law upon the board of road commissioners in the Territory of Alaska to the Department of the Interior, and for other purposes', approved June 30, 1932".

The purpose of the proposed legislation is to protect the interests of the United States in constructing roads in the Territory of Alaska by providing a right-of-way on lands, now public domain, to which patents may in the future be issued.

The Alaska Road Commission, operating under the Department of the Interior by virtue of the Act approved June 30, 1932 (47 Stat. 446), and financed by Federal appropriations, is engaged in the construction and maintenance of roads, roadways, highways, tramways, trails, bridges, and other similar works in that portion of Alaska outside the national forests. The greater part of the area on which the operations of the Alaska Road Commission are conducted is public domain, and the location of rights-of-way on such lands presents no problem growing out of private ownership. For the proper location of the road and in the interest of public service it is necessary in some cases, however, to cross lands to which title has passed from the United States. These instances are becoming more numerous as the population of the Territory increases. Obtaining rights-of-way across privately owned lands has in a number of cases presented difficulties calling for court action and requiring the expenditure of Federal funds.

It is proposed, therefore, that in all patents for lands hereafter taken up in the Territory there shall be inserted a provision reserving to the Government a right-of-way for roads, roadways, highways, tramways, trails, bridges and appurtenant works or structures constructed or to be constructed by the authority of the United States. A provision accomplishing this may, it is thought, be inserted as an amendment to Section 2 of the Act approved June 30, 1932, supra., and the draft of the bill which I transmit has been written

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accordingly. The proposed amendment is similar to the provision of the Act of August 30, 1890 (26 Stat. 391), which reserved rights-of-way for canals on lands west of the one hundredth meridian and is also similar to the provisions of the Act of March 12, 1914 (38 Stat. 305), in which rights-of-way for railroads were reserved to the United States in all patents for lands thereafter taken up in the Territory of Alaska.

The Director of the Bureau of the Budget has informed me that there is no objection to the presentation of the proposed legislation to the Congress.

Very truly yours,

(Sgd.) Harold L. Ickes

Secretary of the Interior.

PWG:abc.

Enclosure 1446881.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
DIVISION OF TERRITORIES AND ISLAND POSSESSIONS
WASHINGTON

February 4, 1943.

MEMORANDUM for Mr. Thoron:

The following is an outline of the background in this matter:

The purpose of the proposed legislation is to protect the interests of the United States in constructing roads in the Territory of Alaska by reserving a right-of-way on lands, now public domain, to which patents may in the future be issued.

The Alaska Road Commission, operating under the Department of the Interior by virtue of the Act approved June 30, 1932 (47 Stat. 446), and financed by Federal appropriations, is engaged in the construction and maintenance of roads, roadways, highways, tramways, trails, bridges, and other similar works in that portion of Alaska outside the national forests. The greater part of the area on which the operations of the Alaska Road Commission are conducted is public domain, and the location of rights-of-way on such lands presents no problem growing out of private ownership. For the proper location of the road, and in the interest of public service, it is necessary in some cases, however, to cross lands to which title has passed from the United States. These instances are becoming more numerous as the population of the Territory increases. Obtaining rights-of-way across privately-owned lands has in a number of cases presented difficulties, calling for court action and requiring the expenditure of Federal funds.

A case of this kind occurred two or three years ago in connection with the construction of a bridge across a stream adjoining a certain privately-owned mining claim. The owner of the land claimed that his property was very valuable because of a placer gold mine, and asked an exorbitant price for the right-of-way necessary in connection with the construction of the bridge. This resulted in considerable delay and expense. As a consequence of this and other like instances, the Alaska Road Commission, the Governor of Alaska, and Mr. Parks, the Cadastral Engineer of the Land Office, became convinced that legislation to reserve rights-of-way in future patents of land taken from the public domain, is desirable.

In response to a request from the Road Commission, the proposed legislation was drafted in this Division and submitted to the Department for consideration. It was discussed at a meeting of the Department Legislative Committee, which did not approve favorable action on the bill, presumably because of questions raised in the meeting as to whether legislation of this kind would not have a tendency to retard settlement in Alaska. Suggestion was also made that the bill should provide for payment of damages to crops and improvements on rights-of-way when

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utilized by the United States. Such a provision is included in the most recent draft of the bill. As stated in Mr. Page's memorandum of September 18, apparently it was the opinion of the Legislative Committee that the bill was not of sufficient importance to justify its submission to Congress at that time, as such action might have resulted in deferring more urgent Alaska legislation which the Department proposed to submit.

In view of the foregoing, the bill was not submitted to the last session of Congress, and apparently it is again up for consideration in connection with the legislative program of the Department for the present session.

Ruth Hampton,
Assistant Director.

Noted
B.M.W.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Anchorage, Alaska

September 19, 1949

Colonel John Noyes
Commissioner of Roads
Alaska Road Commission
Juneau, Alaska

Dear Colonel Noyes:

Reference is made to the letter from Mr. Ike P. Taylor, Chief Engineer, Alaska Road Commission, dated July 28, 1948, in which he states in reference to our memorandum of July 25, that:

> "One print each of the plans of all the new roads we have located in the past few years have been forwarded to your Office. Please advise if it is now necessary for the Alaska Road Commission to submit three additional prints of these maps to the District Land Offices concerned with the written application, as outlined in your memorandum.
>
> "For your information, the plan maps of our road locations are on a scale of 400 feet to the inch and one print to cover a road location such as that, for instance, from the Forest Boundary to Homer on the Kenai Peninsula, 129 miles, would require approximately 320 square feet of blueprinting. The three sets required in your memorandum would total approximately 1,000 square feet."

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An examination has been made of the more recent maps of highways filed by the Alaska Road Commission, namely, those of the Fairbanks-Chena Hot Springs, Paxson-McKinley Park, and the Forty Mile roads. These maps are excellent for general information, but they do not show the width or the lateral limits of the right-of-way with relation to the legal subdivisions of the public lands where surveyed. The maps are therefore incomplete for the purpose of notation of the tract book records under departmental instructions of January 13, 1916 (44 L.D. 513), as contemplated by our memorandum of July 25, 1949. Unless the lateral limits are shown, where the lands are surveyed, it cannot be definitely determined, for the purpose of posting, what subdivisions are affected.

As stated by Mr. Taylor, the maps in question are prepared on a scale of 400 feet to the inch. For your purposes these are excellent work scale maps, but for use in district land offices they pose a difficult problem of filing and handling, and the general scale as provided in the Department's rights-of-way

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regulations (43 CFR, Parts 244 and 245) is 1000 and 2000 feet to the inch. If this scale is adopted by the Alaska Road Commission, it would reduce the length and size of the maps and effect a considerable saving in filing space.

We greatly appreciate your sending some of your work maps which have been used in connection with land classification work. These, we believe, are not in the form that can be efficiently used for filing in the District Land Offices.

In connection herewith, attention is called to the act of June 30, 1932 (47 Stat. 446, 48 U.S.C. Sec. 321a, seq.), under which the Alaska Road Commission is authorized to construct roads and highways over public lands in Alaska. This act contemplates that maps of definite location of roads so constructed shall be filed with the Bureau of Land Management. Obviously, the authority to construct roads as provided by the act, necessarily, by implication if not otherwise, authorizes the right to appropriate the rights-of-way for such roads. It is therefore believed that if the maps of the rights-of-way for the roads and highways constructed or established under authority of the 1932 act, showing the width of the rights-of-way appropriated, were filed and recorded in the District Land Office, in accordance with instructions of January 13, 1916 (44 L.D. 513), that the Government's rights in and to the roads and rights-of-way would be amply protected under the act as well as R.S. 2477 (43 U.S.C. Sec. 932), without the necessity of any withdrawals.

Very truly yours,

Lowell M. Puckett

Lowell M. Puckett
Regional Administrator

AB/fp

UNITED STATES
DEPARTMENT OF THE INTERIOR
ALASKA ROAD COMMISSION
JUNEAU, ALASKA

December 1, 1949

Mr. James P. Davis, Director
Division of Territories and Island Possessions
Department of the Interior
Washington 25, D. C.

My dear Mr. Davis:

At a recent meeting with Mr. Lowell Puckett, Regional Administrator, Bureau of Land Management, the method of handling withdrawals or reservations for roads rights-of-way was fully discussed.

The immediate problem is our deficiency in accurate maps of old roads which are required by the District Land Offices in connection with locating entrymen and in issuance of patents.

It was brought out by Mr. Puckett that because of the language of Public Land Order 601, all entries in surveyed areas affected by a road must be limited to one side only of the existing road. This is because the order used the word "withdrawn" and the Bureau of Land Management has ruled that no new entry can be made covering noncontiguous areas. One solution of the problem has been proposed by Mr. Puckett to his Washington office. Under Land Decisions Volume 43, page 551, it was held that a right-of-way withdrawal did not render the tracts lying on opposite sides of the withdrawn strip non-contiguous, and an entry embracing both sides of such strip should be allowed. I desire to strongly support Mr. Puckett's request and urge favorable consideration. Application of this decision would avoid much present confusion. By the time entrymen apply for patents in future, it is planned to have available in the District Land Offices accurate maps of our roads.

We believe the best solution of this problem would be a revision of Public Land Order 601 to change the language to read "are hereby reserved from all forms of appropriation". This language would be in accordance with the act of July 24, 1947 (Pub. Law 229, 80th Cong., 1st Session, 48 U.S.C., 1946 Ed., Supp. 1, 321D). It is our contention that this law was intended to avoid the difficulty of determining for each entry or patent the exact location of the road. The act provides in part:

"In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska, and in all deeds by the United States hereafter conveying any lands to which it may have

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reacquired title in said Territory not included within the limits of any organized municipality, there shall be expressed that there is reserved, from the lands described in said patent or deed, a right-of-way thereon for roads, roadways, highways, tramways, trails, bridges and appurtenant structures constructed or to be constructed by or under the authority of the United States or of any State created out of the Territory of Alaska."

It will be noted the act provides for a blanket reservation for rights-of-way for roads constructed or to be constructed. It is our contention that determination of the exact location of a road now existing through an entry made after the date of approval of the act is not necessary. The history of the bill indicates this was one of the specific difficulties to be corrected. The other was to avoid the necessity of obtaining easements for future roads which obviously could not be described in the patent.

The actual width of right-of-way to be reserved is determined by the class of road. It is believed Public Land Order 601 was primarily intended to establish these widths. With this information in the District Land Offices, entrymen or applicants for patent can be informed of the width of right-of-way in each case. It is probable certain roads will be reclassified in the future, in which case the right-of-way width would be changed. It is recommended favorable consideration be given to a revision of Public Land Order 601 to permit the Alaska Road Commission full latitude of operation under Public Law 229.

Sincerely yours,

John R. Noyes
Commissioner of
Roads for Alaska

cc: Mr. Puckett

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Anchorage, Alaska

April 3, 1952

Mr. Evander C. Smith
Box 2068
Anchorage, Alaska

Dear Mr. Smith:

By letter of March 29, you asked me to define the maximum legal right-of-way to which the Alaska Road Commission is entitled in those instances where entry was made and residence established prior to the construction of the road, and where subsequent patent contains no provision for road right-of-way.

We are unable to determine that there was a definition of the widths of rights-of-way by regulation or statute prior to Public Land Order 601 of August 10, 1949. Any legal settlement upon the land or filing made upon the land prior to August 10, 1949, in which legal occupancy and filing was carried through to consummation, rendered Public Land Order 601 inoperative, and no claim to a width of right-of-way as defined in Public Land Order 601 can be valid, in our opinion.

The act of July 24, 1947, 61 Stat. 418, 48 U.S.C., Sec. 321d, provided for the reservation of right-of-way for roads in patents and deeds on lands, the rights to which were inaugurated after the effective date of the act. This act did not, however, specify the widths of the rights-of-way.

It would appear that the acquiring of road rights-of-way before July 24, 1947, had been done by amicable agreement or condemnation.

Chapter 19, Session Laws of Alaska 1923, Section 1721, reserved a strip between sections 4 rods wide for public highways with the section line being the center of such highway. However, the 1923 law is listed as invalid in the new Alaska Code and we have been advised by the Attorney General that it is considered that this act is in fact invalid. I know of no test case that has been brought to test the validity of the law.

PUCKETT 1952

I understand that the legislature, at its last session, passed a law designating certain section lines on lands owned by the Territory as highway right-of-way. Perhaps you are more familiar with this act than I.

I am uncertain as to the origin of the adoption of 66 feet as the standard width of right-of-way in Alaska prior to the promulgation of Public Land Order 601. Public Land Order 601, which together with Order No. 2665, enclosed, have established widths of rights-of-way for highways in Alaska.

Very truly yours,

Lowell M. Puckett

Lowell M. Puckett
Regional Administrator

Copy to Commissioner
Alaska Road Commission

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF HIGHWAYS

OFFICE OF THE COMMISSIONER / P. O. BOX 1467 — JUNEAU 99801

July 27, 1971

Re: 1947 Act Lands
00-302

Mr. Francis C. Turner
Federal Highway Administrator
Federal Highway Administration
Nassif Building
400 7th Street, S.W.
Washington, D.C. 20591

THROUGH: Mr. H. G. Tipton
Division Engineer

Dear Mr. Turner:

Reference is made to Mr. Tipton's memorandum of February 12, 1971, concerning participation of federal funds in the 1947 Act lands acquired prior to December 31, 1970. Mr. Tipton's memorandum is in response to our appeal of January 23, 1968, appealing your previous decision of June 30, 1967.

Perhaps a brief history of the 1947 Act reservation and how the reservation was exercised by the State of Alaska would help put our position into perspective.

Prior to the years of World War II, the Territory of Alaska experienced little road construction work. Much of the activity of the Alaska Road Commission and its predecessors was conducted across the public domain and required minimal right of way acquisition. A marked increase in population in the years following the war and a related increase in activities designated to reduce public lands to private ownership increased the frequency with which right of way was necessitated over lands to which title had passed from the United States.

In recognition of this trend and in an attept to reduce the expenditure of governmental funds, Congress passed the 1947 Act effective July 24, 1947.

The effect of this Act was to reserve to the United States or to any State created out of the Territory of Alaska a right of way across lands subsequently passing into private ownership and to thus avoid the necessity of re-acquiring lands for future road construction.

CAMPBELL 1971

The 1947 Act was repealed by Congress effective July 1, 1959. Thus, lands entered or patented after that date are not subject to the act. Title of lands entered or patented from July 24, 1947, to July 1, 1959, continued to remain clouded with the prospect of future road construction causing arbitrary transfers of unspecified portions of said land to the government, without due process or compensation, until April 14, 1966.

It is our position that the 1947 Act did in fact entitle the State of Alaska to utilize the right of way reserved by the act. Specific conveyance to the State at the time of statehood was not necessary because Congress specifically prescribed in the act that the reservation was to be extended to the newly created State of Alaska. The rights of the Federal Government in the 1947 Act rights of way passed to the State at the time of statehood.

The fourth session of the Alaska State Legislature, recognizing the inequalities of the 1947 Act, passed legislation effective April 14, 1966, commonly called the Alaska Right of Way Act of 1966, providing that no agency of the State may take privately owned property by the exercise of the 1947 Act reservation. The legislature's stated purpose was as follows, and I quote:

> 'This Act is intended to alleviate the economic hardship and physical and mental distress occasioned by the taking of land, by the State of Alaska, for which no compensation is paid to the person holding title to the land. This practice has resulted in financial difficulties and the deprivation of peace of mind regarding the security of one's possessions to many citizens of the State of Alaska, and which, if not curtailed by law, will continue to adversely affect citizens of this state. Those persons who hold title to land under a deed or patent which contains a reservation to the state by virtue of the Act of June 30, 1932, ch 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418, are subject to the hazard of having the State of Alaska take their property without compensation because all patents or deeds containing the reservation required by that federal act reserve to the United States, or the state created out of the Territory of Alaska, a right of way for roads, roadways, tramways, trails, bridges, and appurtenant structures either constructed or to be constructed. Except for this reservation the State of Alaska, under the Alaska constitution and the constitution of the United State, would be required to pay just compensation for any land taken for a right of way. It is declared to be the purpose of this act to place persons with land so encumbered on a basis of equality with all other property holders in the State of Alaska, thereby preventing the taking of property without payment of just compensation as provided by law, and in the manner provided by law."

Subsequent to the enactment of the Alaska Right of Way Act of 1966 the Bureau of Public Roads advised us "that there can be no federal reimbursement for funds expended by the State of Alaska for the acquisition of right of way from land subject to the reservation contained in the 1947 Act." They also stated it would take federal legislation to effectively repeal the reservation.

In response to that statement the late Senator E. L. Bartlett introduced, (for himself and Senator Gruening) Senate Bill 2483 on September 28, 1967. Senator Bartlett's introductory remarks outlined the position of Alaskans affected by the 1947 Act and I quote his remarks from the Congressional Record of the Senate for September 28, 1967:

> "In 1947 Congress enacted a law -- 48, United States Code 321d -- which reserved an undefined highway right of way in all patents for federal public lands in Alaska. This law, commonly referred to as the 1947 Act, has become notorious in Alaska. While seemingly innocuous, the 1947 Act has worked inequities beyond belief as homesteads and other patented lands fall in the paths of urban development and highway improvement projects.
>
> Although the 1947 act was repealed in 1959, all of those persons who received patent to federal lands between 1947 and 1959 still live under the threat that a portion of their land might be taken for highway right of way purposes at any time without compensation. As a matter of fact, a substantial number of rights of way have already been acquired under the 1947 act without compensation to the landowners and many rights of way over such lands will undoubtedly be acquired in the foreseeable future.
>
> The State of Alaska has found a way to compensate patentees for takings under the right of way provision but the Federal Highway Administration refuses on legal grounds to pay the federal share of such compensation.
>
> Mr. President, it is my firm belief that no one could have foreseen the inequities inherent in passage of the 1947 Act. It is also my belief that corrective action is overdue. Therefore, I introduce today for appropriate reference a bill which would vacate and relinquish the reservation of rights of way authorized by the 1947 Act."

Hearings scheduled on Senator Bartlett's bill were cancelled first because of the assassination of Dr. Martin Luther King, Jr., and second because of the assassination of Senator Robert F. Kennedy.

Senator Bartlett's untimely death and Senator Gruening's unsuccessful bid for re-election made it necessary to reintroduce S. 2483. Senator Stevens graciously did this on February 7, 1969.

Alaska's Right of Way Act of 1966 voided the State's rights to utilize right of way over lands subject to the 1947 Act. Section 138(b) of the Federal Aid Highway Act of 1970 vacated and relinquished reserved rights of way not utilized and provided that the reservation merged with the fee and was forever extinguished. We believe it was the intent of Congress to "clear the federal books" by the "housekeeping" Section 138(b) of the Federal Aid Highway Act of 1970 with their full realization that the State of Alaska had extinguished the 1947 Act reservation on April 14, 1966, as it had every right to do.

Unforeseen tragedies delayed Federal action several years causing State expenditures to climb past a million dollars. It was clearly Senator Bartlett's intent in introducing S. 2483 to allow Federal participation in the acquisition of "47 Act" right of way from the April 14, 1966, date.

Acquisition of right of way by the State of Alaska over lands subject to the 1947 Act subsequent to April 14, 1966, was made in accordance with all of the policies and procedures of the Bureau of Public Roads and subsequently the Federal Highway Administration. The rights of way so acquired were incorporated in federal-aid highway projects and therefore should be eligible for federal participation in their acquisition costs.

We respectfully request your further review of your June 30, 1967, and February 12, 1971, decisions and reversal of those decisions to allow federal participation in the acquisition costs of the lands in question.

Very truly yours,

for B. A. Campbell
Commissioner of Highways

cc: Governor William A. Egan
John Havelock, Attorney General
Senator Ted Stevens
Senator Mike Gravel
Representative Nick Begich

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ROBERT T. PRICE
ROBERT P. OWENS

July 24, 1984

Congressman Don Young
House of Representatives
2331 Rayburn Building
Washington, D.C. 20515

Re: Federal Highway Rights-of-Way

Dear Don:

Enclosed you will find copies of correspondence which I have sent to Senators Stevens and Murkowski concerning an extremely serious problem in Alaska. I believe the informational letter to Senator Murkowski and its attachments are self-explanatory.

Once you have had an opportunity to review this, I will be contacting you to ask your support in stopping the State from harming not only our clients, the title insurance industry, but the thousands of Alaskans Statewide who do not have title insurance, many of whom are the original patentees.

Sincerely,

GROH, EGGERS & PRICE

Clifford J. Groh

Michael W. Price

:hf

Encl.

GROH & PRICE 1984

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July 24, 1984

Via DHL

Senator Frank Murkowski
United States Senate
Washington, D.C. 20510

Attention: John Moseman

Re: Federal Highway Easements in Alaska

Dear John:

Thank you for meeting with us during your visit last week in Alaska. It was a pleasure having the opportunity to meet you and we look forward to our future contact. As we discussed, we are presently embroiled in an extremely serious controversy for which we are seeking the aid of the Alaska Congressional Delegation. This letter and its enclosures will assist you in your preliminary investigation into this matter. At your earliest convenience, we would like to discuss the possibility of the introduction and passage of our proposed federal legislation with you, and the other members of the Alaska Congressional Delegation.

As you may recall from our meeting, the difficulty lies in the interpretation of a series of public land orders (PLOs) and department orders (DOs) which were issued by the Department of Interior in the late 1940's and early 1950's. Up through 1947 there existed two methods by which the Federal Government could create highway rights-of-way in Alaska. The first was a 1932 Act which was codified at 48 U.S.C. §321a through §322.1/ Pursuant to that Act the Department of Interior had the right to build and construct roadways in Alaska. Additionally, under 44 L.D. 513 the Department of Interior determined that the Federal Government had the right to establish a roadway by appropriation. That is,

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1/ A copy of this legislation is attached and identified as Exhibit A. Also attached are the other relevant materials identified as discussed in this letter.

a combination of identifying a potential highway plus the allocation of specific funds from Congress was sufficient to reserve the right in the Federal Government to build the road.

In 1947, Congress, at the urging of the Department of Interior passed an amendment to the 1932 Act which was codified at 48 U.S.C. §321d. (Exhibit B.) Under 48 U.S.C. §321d the Department of Interior was required to place in every patent for land in Alaska taken up thereafter a reservation for a road right-of-way for the Federal Government. It is our opinion that the amendment in 1947 was designed to protect the Federal Government's interest in maintaining the right to build roads into those portions of Alaska which were being taken up by homesteaders and which were not yet subject to a 43 U.S.C. §932 section line dedication or a roadway established by appropriation under 44 L.D. 513. It also served the function of consolidating the power of the Department of Interior under the Act of 1932 by specifically requiring that the reservation be put in the patent so that settlers would be on notice.

In August of 1949, the Department of Interior under PLO 601 withdrew from all forms of appropriation certain rights-of-way for highways in Alaska. (Exhibit C.) Under PLO 601 highway widths of varying amounts were established for through, feeder and local roads. The "local" roads were never identified by name which causes particular problems.

Considerable controversy arose over the fact that PLO 601 was a withdrawal rather than the establishment of an easement or right-of-way. Consequently the Department of Interior published modifications of PLO 601 which culminated in the publication of DO 2665. (Exhibit D.) DO 2665 established easements in lieu of rights-of-way.

In the introductory language of DO 2665 the Secretary of the Interior indicated that he was publishing the order pursuant to 48 U.S.C. §321a. It is our belief that the authority cited by the Secretary deals with only the construction powers under the 1932 Act and must be viewed in the light of the 1947 Amendment which required that such easements and rights-of-way be reserved in the patents. However, it is this one "authority section" which has allowed the Alaska Supreme Court to circumvent both the Alaska and Congressional bills designed to eliminate these easements.

None of the withdrawals and easements created by PLO 601 and its successors including DO 2665 were noted in the patents of homesteaders in Alaska, although, all of the patents which were issued for lands taken up after 1947 contain the reservation required by the 1947 Act and 48 U.S.C. §321d. (Exhibit E, for example.) Further, at least in regard to local roads, there was no identification of the roads or of any record by which a homesteader or other interested individual could determine if his property was effected by such a right-of-way.

In 1959 the United States government quitclaimed its interest in the roads in Alaska to the State. The quitclaim deed does not specifically address the question of whether the Federal Government intended to pass its rights-of-way and reservations under the PLOs and DO 2665. The State of Alaska did not record its quitclaim deed until 1969 and it is impossible by referencing the quitclaim deed to determine whether any given parcel of land in Alaska was affected by the withdrawals or easements for roads.

In the mid 1960's concern over the possibility of the State taking land under the federal easements and rights-of-way surfaced and the State Legislature passed the Right-of-Way Act of 1966 (Exhibit F.) The 1966 Act states that "no agency of the state may take privately-owned property by the election or exercise of a reservation to the state acquired under the Act of June 30, 1932, ch. 320 §5, as added July 24, 1947, ch. 313, 61 Stat 418, and taking of property after the effective date of this Act by the election or exercise of a reservation to the state under that federal act is void."

The Federal Government also attempted to alleviate the unfairness of the federal reservations and easements for rights-of-way in patents issued to Alaskans between 1947 (the date of the Amendment of the 1932 Act) and 1959 (Alaska Statehood). Section 138(b) of the Federal-Aid Highway Act of 1970 states:

> Any right-of-way for roads, roadways, highways, tramways, trails, bridges and appurtenant structures reserved by section 321(d) of Title 48, United States Code (61 Stat. 418, 1949), not utilized by the United States or by the State or Territory of Alaska prior to the date of enactment hereof, shall be and hereby is vacated and relinquished by the United States to the end and intent that such reser-

> vation shall merge with the fee and be forever extinguished.

Unlike the State Right-of-Way Act, the federal legislation does not specifically indicate that it includes all reservations and easements created under the 1932 Act as Amended by the 1947 Act. However, we believe that that proposition is clear, that the 1947 Act was an Amendment to the 1932 Act which created an obligation on the part of the Federal Government to place in the patent a reservation for highway purposes. We have enclosed testimony by both Senator Stevens and State officials which clearly indicate that the State would not be taking the rights-of-way in the future. (Exhibit G.)

The State of Alaska however decided that since the PLOs state they were promulgated under the general authority of the Secretary of Interior and the DO 2665 was "apparently" promulgated under 48 U.S.C. §321a (the 1932 Act) they would attempt to take property despite both the State and Federal Acts designed to end the uncertainty and unfairness which had resulted from the creation of such easements and rights-of-way.

In a case which ultimately reached the Alaska Supreme Court entitled State v. Alaska Land Title Association, 667 P.2d 714 (Alaska 1983) (Exhibit H), the Alaska Supreme Court determined that the original withdrawals by PLO 601 culminated in the rights-of-way described in DO 2665. The Court further found that DO 2665 was published pursuant to 48 U.S.C. §321a. The Court determined that 48 U.S.C. §321a was a separate source of power for the Secretary of Interior to create easements from that identified in 48 U.S.C. §321d. That is, the court refused to recognize that the 1947 Act's purpose was to amend the 1932 Act to require that any easement created by the Secretary of Interior under the 1932 Act be placed on the patent.

The court went further to find that the Right-of-Way Act of 1966 passed by the Alaska Legislature applied only to the 1947 Act. This is in contradiction to the clear language of the 1966 Act. As noted earlier the Federal-Aid Highway Act of 1970 §138(b) can be on its face interpreted as applying only to the 1947 Act. Therefore, since the Alaska Supreme Court had already interpreted the 1947 Act as being separate from the 1932 Act the Federal-Aid Highway Legislation was ineffective.

It is interesting to note that the court did allow the one homeowner who is not protected by title insurance to prevail. In

that instance the court found that if the homesteader had entered the property prior to the date of the promulgation of PLO 601 (August 10, 1949) then PLO 601 would not be effective against him. The State has challenged this proposition and believes that a homesteader would not prevail against PLO 601 until the date he received his final certificate, usually significantly later in time from entry. There are currently two cases pending before the Alaska Supreme Court which will address this issue.

The State of Alaska has taken the position that it inherited the Federal Government's rights to the easements and rights-of-way under the PLOs pursuant to the quitclaim deed of 1959. They are further taking the position that even if a road had not been constructed at the time of the PLOs or had been subsequently moved, the State has the right to take the property without payment. The greatest difficulty with defending against this form of arbitrary action is that the PLOs and DOs do not specifically identify where a road is located on an entryman's property.

Additionally, the average landowner has no warning of the existence of a road. Since a significant number of individual homeowners do not have title insurance on their property, they are completely unprotected against the actions of the State. The State has further shown itself to be callous to the rights of such landowners by simply taking their land even in cases where their property would not be subject to the PLO due to entry prior to the effective date of PLO 601. Also, because the State does this on an as needed basis, there is no opportunity for homeowners to be appraised of the problem in advance. Only at the time the State finally determines that it will expand the highway does the homeowner learn that his property is to be taken and even then the only outcry is among a few owners along the proposed road expansion. Thus, the problem goes on without the property owners in Alaska having an opportunity to face the issue all at once.

The problem also extends to title insurance companies. Although contrary to prior decisions in other jurisdictions and the language of Alaska statutes, the Alaska Supreme Court has determined that publication of PLOs in the Federal Register, although not recorded in the recording district, and not describing specific parcels of land are to be considered "public records" for the purposes of determining the meaning of such language in title insurance policies. Title insurance companies have suddenly found themselves to be exposed to a tremendous liability without having initially included such risks in the setting of their premiums.

All sides of the issue agree that potential liability for the cost of all the property which could be seized under the PLOs is in excess of one billion dollars over a long period of time. This is a staggering amount for title insurance companies to incur without having already built the risk factor into their rate setting. Thus, there is a potential threat to the viability of the title insurance industry in Alaska to provide homeowners, businesses and banks with title insurance on an on-going basis.

It is our opinion that federal legislation can be proposed which will provide for adequate protection for Alaskan landowners. We have enclosed a working draft of language for such federal legislation based upon Congress declaring that the utilization of such easements without compensation is a violation of due process under the Fifth Amendment as applied to the State by the Fourteenth Amendment. Our research indicates such an approach would withstand judicial scrutiny. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Katzenbach v. Morgan, 384 U.S. 641 (1965); Ramirez v. Puerto Rico Fire Service, 715 F.2d 694 (1st Cir. 1983) Equal Employment Opportunity Commission v. Elrod, 674 F.2d 601 (7th Cir. 1982).

I want to thank you very much for your assistance in this matter and, as we noted in our meeting, it is not a problem which apparently is going to go away. Hopefully, after your office has had the chance to review the documentary materials you, Senator Stevens and Congressman Young will assist us in this endeavor. Mr. Greg Chapados is working on the problem in Senator Steven's office and I am transmitting a copy of this letter to Congressman Young.

Please let me know if you have any questions and we look forward to hearing from you in the near future.

Sincerely,

GROH, EGGERS & PRICE

Michael W. Price

Clifford J. Groh

:hf

cc: Congressman Don Young
Greg Chapados

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

REPLY TO:

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465-3603

March 14, 1985

Mr. John Manly
Transportation Committee Aide
Senate Transportation Committee
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Mr. Manly:

As you know, our office, at the request of Blake Call, Secretary of the Senate Transportation Committee, reviewed SB 141. A copy of that review dated March 5, 1985 is attached. Senator Faiks of the Transportation Committee has now asked us to review the attached proposed Committee Substitute for Senate Bill 141. This letter is in response to that request.

The issue of the state's right to use public road easements created by certain public road land orders appears to have arisen as the result of the federal government's failure to note these public road easements in federal patents. The State of Alaska, of course, had nothing to do with the issuance of federal patents and even though it appears that the State of Alaska is without fault in this regard, legislation has been proposed that would bar the state from utilizing these public road easements. CSSB 141 is just such a bill; it would prohibit the state from utilizing significant portions of any public road right-of-way created by 48 U.S.C. §§ 321(a) -- 327, Public Land Order 601, Public Land Order 757, Public Land Order 1613 and Department Order 2665. See sec. 2 of CSSB 141. As noted in our review letter dated March 5, 1985, these public land orders are responsible for the creation of 80 percent of the public road rights-of-way in Alaska.

The practical effect of CSSB 141 is identical to that of SB 141. That is, the bill operates to relinquish to private landowners significant portions of publically owned rights-of-way created by the above land orders. The bill provides that those portions of these rights-of-way that were not physically occupied

by a road on the effective date of the bill would have to be purchased back by the state should they subsequently be needed by the state for road improvement. See sec. 3(b) of CSSB 141.

Because CSSB 141 operates to transfer, at no cost, significant portions of publically owned rights-of-way to a particular class of private landowners. CSSB 141 is substantively no different from its predecessor, SB 141. Accordingly, the same legal problems raised in our March 5 review are also raised by CSSB 141. In brief, these difficulties involve, among others, the public purpose provision of article IX, section 6 of the Alaska Constitution as well as the equal rights provision of article 1, section 1 of the Alaska Constitution.

Our conclusion, then, is that CSSB 141, because it would transfer public property at no cost to private owners, would likely violate the public purpose provision of article IX, section 6 of the Alaska Constitution. 1/

—In addition, because CSSB 141 would take away potentially valuable property rights owned by the general public and bestow the right to the fair market value of these rights upon an identifiable class of private individuals, CSSB 141 results in the creation of special privileges for a particular class of individuals. 2/ As a result, CSSB 141 most likely violates the

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1/ The fact that the state had no responsibility for the issuance of the patents that gave rise to this issue (many of which were issued before statehood) underscores the public purpose objection.

2/ It should also be noted that title companies will also stand to gain certain advantages from this bill. As matters stand now, title companies are contractually obligated to pay damages to title policy holders whose title policies fail to note the existence of public land order rights-of-way. See Alaska Land Title Association v. State, 667 P.2d 714, 725 (Alaska 1983); Hahn v. Alaska Title Guaranty Co., 557 P.2d 143, 146 (Alaska 1976). Should this bill become law, title companies will be relieved of this contractual duty because the state will no longer be able to claim these public land order easements.

discriminatory treatment prohibition of article 1, section 1 of the Alaska Constitution.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Jack B. McGee
Jack B. McGee
Assistant Attorney General

JBM:ebc

Enclosure

Moen
3/5/85 ✓

Original sponsor: Coghill

IN THE SENATE BY THE TRANSPORTATION COMMITTEE

CS FOR SENATE BILL NO. 141 (Transportation)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act requiring just compensation for the utilization of certain rights-of-way; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. LEGISLATIVE PURPOSE AND FINDING. The purpose of this Act is to provide just compensation to landowners in the state who are suffering economic hardship and physical and mental distress by virtue of the state utilizing certain rights-of-way created, withdrawn, or reserved under 33 Stat. 616 (Act of January 27, 1905); 47 Stat. 446 (Act of June 30, 1932); 48 U.S.C. secs. 321(a) - 327 (Act of July 24, 1947); Public Land Order 601, 14 Fed. Reg. 5048 (1949); Public Land Order 757, 16 Fed. Reg. 10, 749 (1951); Public Land Order 1613, 23 Fed. Reg. 2376, 2378 (1958); or Departmental Order 2665, 16 Fed. Reg. 10, 752 (1951).

* Sec. 2. TAKING OF PROPERTY WITHOUT COMPENSATION IS BARRED. The state may not take, utilize, or occupy a right-of-way for a road, roadway, highway, tramway, trail, bridge, or appurtenant structure created, withdrawn or reserved under 33 Stat. 616 (Act of January 27, 1905); 47 Stat. 446 (Act of June 30, 1932); 48 U.S.C. secs. 321(a) - 327 (Act of July 24, 1947); Public Land Order 601, 14 Fed. Reg. 5048 (1949); Public Land Order 757, 16 Fed. Reg. 10, 749 (1951); Public Land Order 1613, 23 Fed. Reg. 2376, 2378 (1958); or Departmental Order 2665, 16 Fed. Reg. 10, 752 (1951) without payment of just compensation if the right-of-way on the effective date of this Act is not physically occupied by a road, roadway, highway, tramway, trail, bridge, or appurtenant structure.

* Sec. 3. PHYSICAL OCCUPATION OF RIGHT-OF-WAY. (a) The provisions of this Act do not require compensation by the state for land physically occupied on the effective date of this Act by a road, roadway, highway, tramway, trail, bridge, or appurtenant structure then constructed within the right-of-way created, withdrawn, or reserved under the Acts of Congress and the orders described in sec. 2 of this Act; nor do the provisions of this Act require compensation by the state for taking, utilizing, or occupying an interest in an easement of specific width set out in the original patent from the state or federal government whether or not physically occupied on the effective date of this Act.

(b) Expansion beyond an existing road, roadway, highway, tramway, trail, bridge, or appurtenant structure requires the payment of just compensation to the owner of the land only to the extent that the state actually takes, utilizes, or occupies beyond the physical occupation within the meaning of this section. The state has the burden of proof to show by clear and convincing evidence that the physical occupation occurred before the effective date of this Act.

* Sec. 4. APPLICATION TO FEDERAL LAND. The provisions of this Act do not require the state to pay compensation for taking, utilizing, or occupying a right-of-way that affects land in which fee title is, on the date of the taking, utilization or occupation, vested in the United States of America.

* Sec. 5. DEFINITION. As used in this Act, "physically occupied" means the construction of the actual roadway, including its shoulders and ditching, highway, tramway, trail, bridge, or appurtenant structures, before the effective date of this Act.

* Sec. 6. RETROACTIVE APPLICATION. This Act does not relieve, alter, or void a voluntary conveyance of an easement including an easement dedicated by plat.

* Sec. 7. EFFECTIVE DATE. This Act takes effect immediately in accordance with AS 01.10.070(c).

March 5, 1985

x

465-3603

Mr. Blake Call, Secretary
Senate Transportation Committee
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: Request for Opinion on SB 141
Our File: 366-380-85

Dear Mr. Call:

This letter is in response to your request for our analysis of SB 141 which has as its subject matter Public Land Orders 601, 757, 1613 and Department Order 2665.

Public Land Orders 601, 757, 1613 and Department Order 2665 are responsible for the creation of 80 percent of the public road rights-of-way in Alaska. Moreover, the legal validity of the rights-of-way and easements created by these land orders was upheld by the Alaska Supreme Court against numerous legal challenges raised by the Alaska Land Title Association in a case that went all the way up to the U.S. Supreme Court. See Alaska Land Title Association v. State of Alaska, 667 P.2d 714 (Alaska 1983), cert. denied, 104 S.Ct. 704 (1984).

The effect of SB 141 would be to require the state to vacate and relinquish to certain private landowners significant portions of public highway rights-of-way that were created by PLO 601, PLO 757, PLO 1613 and D.O. 2665. Specifically, those portions of the rights-of-way not physically occupied on the effective date of the bill would have to be relinquished by the state.

There are at least two major legal concerns raised by this bill. The first involves article IX, section 6, of the Alaska Constitution. This provision reads as follows:

> Section 6. PUBLIC PURPOSE. No tax shall be levied, or appropriation of public money made, or

public property transferred, nor shall the public credit be used, except for a public purpose.

The easement rights created by PLO 601, PLO 757, PLO 1613, and D.O. 2665 are held in common by the general public. These rights, therefore, are a form of public property. The clear effect of Senate Bill 141 is to transfer this public property to certain private individuals. This is so because the bill, while relinquishing public road easements held in common by the general public, bestows the right to the fair market value of these easements upon those private landowners whose property was previously subject to them. See sections 2 and 3 of SB 141. The bill, in effect, transfers public property to private individuals who would not pay anything to the state for the value of the rights transferred to them. Such a transfer, on its face, would appear to violate the public purpose provision of the state Constitution. This is underscored by the fact that the public, if it requires the vacated road easement area for future road improvement, must purchase it back from private ownership. Only these private individuals would benefit from this arrangement and the repurchase costs would probably be significant. Thus, it is difficult to understand how this bill would not violate the public purpose requirement of article IX, section 6, of the Alaska Constitution that must be met whenever public property is transferred. 1/

A second legal difficulty concerns article 1, section 1, of the Alaska Constitution. This provision provides that all persons are entitled to equal rights under the law and, conversely, prohibits unfair distinctions between classes of persons.

1/ Because this bill would eliminate significant portions of public road easements, it would most likely have a negative effect on public access to various areas of the state. As a result, SB 141 appears to be inconsistent with article VIII, sections 1 and 2 of the Alaska Constitution. Article VIII, Section 1 states that it is the policy of the state "to encourage the settlement of its lands and development of its resources by making them available for maximum use consistent with the public interest." Article VIII, section 2 requires the legislature to "provide for the utilization, development, and conservation of all natural resources belonging to the state . . . for the maximum benefit of its people."

See Ale v. State, 484 P.2d 677 (Alaska 1971); Leege v. Martin, 379 P.2d 447 (Alaska 1963) .

The effect of this bill is to divest the general public of its right to utilize significant portions of the public road easements created by public land orders. Since the effect of this divestment would be to eliminate the public's right to claim these public road easements, only those private individuals owning land fronting on the public roads created by these land orders would benefit from this divestment. That is to say, after the effective date of this bill, the public, acting through the state, would have to purchase from this class of individuals the right to use the same public road easements that were previously owned by the public.

In sum, as matters stand now, the public road rights granted by these land orders are owned by all members of the public in common. Should this bill become law, it would mean that the cash value of these rights, rights which were formerly held by all, would be granted to a class of property owners, i.e., those individual property owners fortunate enough to own land fronting on the very roadways created by these public land orders. Thus the practical effect of this bill is to take away potentially valuable property rights owned by the general public as a whole and bestow the right to the fair market value of these rights upon a class of private individuals. Since article I, section 1 of the Alaska Constitution adopts the principle that "all persons are equal and entitled to equal rights, opportunities, and protection under the law," the granting of special privileges by this bill to a particular class at the expense of the public may very well violate this provision.

At present, only one class of persons exists relative to the public road easements created by these public land orders. This class is made up of members of the general public who own these public road easements in common. Should this bill become law, these easement rights would, in effect, be taken from the general public. 2/ The right to the cash value of these public road easement rights would then be bestowed, not on the general

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2/ This "taking" from each member of the public by itself may violate article XIII, section 16 of the Alaska Constitution which provides that "no person shall be involuntarily divested of . . . his interests in lands . . ." unless the divestment is for a public purpose and he is paid just compensation.

public as a whole, but on a special class of property owners. This bill, in effect, would create two classes of persons: the class of all those members of the general public who do not own real property fronting on the roadways created by the public land orders and the class of those property owners who do own property fronting on the roadways created by these public land orders. This latter class would then be given the right to the fair market value of the easements previously owned by the entire public. It is likely that such discriminatory treatment is barred by article I, section 1, of the Alaska Constitution.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: J. B. McGee

Jack B. McGee
Assistant Attorney General

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July 24, 1984

Via DHL

Senator Frank Murkowski
United States Senate
Washington, D.C. 20510

Attention: John Moseman

Re: Federal Highway Easements in Alaska

Dear John:

Thank you for meeting with us during your visit last week in Alaska. It was a pleasure having the opportunity to meet you and we look forward to our future contact. As we discussed, we are presently embroiled in an extremely serious controversy for which we are seeking the aid of the Alaska Congressional Delegation. This letter and its enclosures will assist you in your preliminary investigation into this matter. At your earliest convenience, we would like to discuss the possibility of the introduction and passage of our proposed federal legislation with you, and the other members of the Alaska Congressional Delegation.

As you may recall from our meeting, the difficulty lies in the interpretation of a series of public land orders (PLOs) and department orders (DOs) which were issued by the Department of Interior in the late 1940's and early 1950's. Up through 1947 there existed two methods by which the Federal Government could create highway rights-of-way in Alaska. The first was a 1932 Act which was codified at 48 U.S.C. §321a through §322.1/ Pursuant to that Act the Department of Interior had the right to build and construct roadways in Alaska. Additionally, under 44 L.D. 513 the Department of Interior determined that the Federal Government had the right to establish a roadway by appropriation. That is,

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1/ A copy of this legislation is attached and identified as Exhibit A. Also attached are the other relevant materials identified as discussed in this letter.

a combination of identifying a potential highway plus the allocation of specific funds from Congress was sufficient to reserve the right in the Federal Government to build the road.

In 1947, Congress, at the urging of the Department of Interior passed an amendment to the 1932 Act which was codified at 48 U.S.C. §321d. (Exhibit B.) Under 48 U.S.C. §321d the Department of Interior was required to place in every patent for land in Alaska taken up thereafter a reservation for a road right-of-way for the Federal Government. It is our opinion that the amendment in 1947 was designed to protect the Federal Government's interest in maintaining the right to build roads into those portions of Alaska which were being taken up by homesteaders and which were not yet subject to a 43 U.S.C. §932 section line dedication or a roadway established by appropriation under 44 L.D. 513. It also served the function of consolidating the power of the Department of Interior under the Act of 1932 by specifically requiring that the reservation be put in the patent so that settlers would be on notice.

In August of 1949, the Department of Interior under PLO 601 withdrew from all forms of appropriation certain rights-of-way for highways in Alaska. (Exhibit C.) Under PLO 601 highway widths of varying amounts were established for through, feeder and local roads. The "local" roads were never identified by name which causes particular problems.

Considerable controversy arose over the fact that PLO 601 was a withdrawal rather than the establishment of an easement or right-of-way. Consequently the Department of Interior published modifications of PLO 601 which culminated in the publication of DO 2665. (Exhibit D.) DO 2665 established easements in lieu of rights-of-way.

In the introductory language of DO 2665 the Secretary of the Interior indicated that he was publishing the order pursuant to 48 U.S.C. §321a. It is our belief that the authority cited by the Secretary deals with only the construction powers under the 1932 Act and must be viewed in the light of the 1947 Amendment which required that such easements and rights-of-way be reserved in the patents. However, it is this one "authority section" which has allowed the Alaska Supreme Court to circumvent both the Alaska and Congressional bills designed to eliminate these easements.

None of the withdrawals and easements created by PLO 601 and its successors including DO 2665 were noted in the patents of homesteaders in Alaska, although, all of the patents which were issued for lands taken up after 1947 contain the reservation required by the 1947 Act and 48 U.S.C. §321d. (Exhibit E, for example.) Further, at least in regard to local roads, there was no identification of the roads or of any record by which a homesteader or other interested individual could determine if his property was effected by such a right-of-way.

In 1959 the United States government quitclaimed its interest in the roads in Alaska to the State. The quitclaim deed does not specifically address the question of whether the Federal Government intended to pass its rights-of-way and reservations under the PLOs and DO 2665. The State of Alaska did not record its quitclaim deed until 1969 and it is impossible by referencing the quitclaim deed to determine whether any given parcel of land in Alaska was affected by the withdrawals or easements for roads.

In the mid 1960's concern over the possibility of the State taking land under the federal easements and rights-of-way surfaced and the State Legislature passed the Right-of-Way Act of 1966 (Exhibit F.) The 1966 Act states that "no agency of the State may take privately-owned property by the election or exercise of a reservation to the state acquired under the Act of June 30, 1932, ch. 320 §5, as added July 24, 1947, ch. 313, 61 Stat 418, and taking of property after the effective date of this Act by the election or exercise of a reservation to the state under that federal act is void."

The Federal Government also attempted to alleviate the unfairness of the federal reservations and easements for rights-of-way in patents issued to Alaskans between 1947 (the date of the Amendment of the 1932 Act) and 1959 (Alaska Statehood). Section 138(b) of the Federal-Aid Highway Act of 1970 states:

> Any right-of-way for roads, roadways, highways, tramways, trails, bridges and appurtenant structures reserved by section 321(d) of Title 48, United States Code (61 Stat. 418, 1949), not utilized by the United States or by the State or Territory of Alaska prior to the date of enactment hereof, shall be and hereby is vacated and relinquished by the United States to the end and intent that such reser-

vation shall merge with the fee and be forever extinguished.

Unlike the State Right-of-Way Act, the federal legislation does not specifically indicate that it includes all reservations and easements created under the 1932 Act as Amended by the 1947 Act. However, we believe that that proposition is clear, that the 1947 Act was an Amendment to the 1932 Act which created an obligation on the part of the Federal Government to place in the patent a reservation for highway purposes. We have enclosed testimony by both Senator Stevens and State officials which clearly indicate that the State would not be taking the rights-of-way in the future. (Exhibit G.)

The State of Alaska however decided that since the PLOs state they were promulgated under the general authority of the Secretary of Interior and the DO 2665 was "apparently" promulgated under 48 U.S.C. §321a (the 1932 Act) they would attempt to take property despite both the State and Federal Acts designed to end the uncertainty and unfairness which had resulted from the creation of such easements and rights-of-way.

In a case which ultimately reached the Alaska Supreme Court entitled State v. Alaska Land Title Association, 667 P.2d 714 (Alaska 1983) (Exhibit H), the Alaska Supreme Court determined that the original withdrawals by PLO 601 culminated in the rights-of-way described in DO 2665. The Court further found that DO 2665 was published pursuant to 48 U.S.C. §321a. The Court determined that 48 U.S.C. §321a was a separate source of power for the Secretary of Interior to create easements from that identified in 48 U.S.C. §321d. That is, the court refused to recognize that the 1947 Act's purpose was to amend the 1932 Act to require that any easement created by the Secretary of Interior under the 1932 Act be placed on the patent.

The court went further to find that the Right-of-Way Act of 1966 passed by the Alaska Legislature applied only to the 1947 Act. This is in contradiction to the clear language of the 1966 Act. As noted earlier the Federal-Aid Highway Act of 1970 §138(b) can be on its face interpreted as applying only to the 1947 Act. Therefore, since the Alaska Supreme Court had already interpreted the 1947 Act as being separate from the 1932 Act the Federal-Aid Highway Legislation was ineffective.

It is interesting to note that the court did allow the one homeowner who is not protected by title insurance to prevail. In

All sides of the issue agree that potential liability for the cost of all the property which could be seized under the PLOs is in excess of one billion dollars over a long period of time. This is a staggering amount for title insurance companies to incur without having already built the risk factor into their rate setting. Thus, there is a potential threat to the viability of the title insurance industry in Alaska to provide homeowners, businesses and banks with title insurance on an on-going basis.

It is our opinion that federal legislation can be proposed which will provide for adequate protection for Alaskan landowners. We have enclosed a working draft of language for such federal legislation based upon Congress declaring that the utilization of such easements without compensation is a violation of due process under the Fifth Amendment as applied to the State by the Fourteenth Amendment. Our research indicates such an approach would withstand judicial scrutiny. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Katzenbach v. Morgan, 384 U.S. 641 (1965); Ramirez v. Puerto Rico Fire Service, 715 F.2d 694 (1st Cir. 1983) Equal Employment Opportunity Commission v. Elrod, 674 F.2d 601 (7th Cir. 1982).

I want to thank you very much for your assistance in this matter and, as we noted in our meeting, it is not a problem which apparently is going to go away. Hopefully, after your office has had the chance to review the documentary materials you, Senator Stevens and Congressman Young will assist us in this endeavor. Mr. Greg Chapados is working on the problem in Senator Steven's office and I am transmitting a copy of this letter to Congressman Young.

Please let me know if you have any questions and we look forward to hearing from you in the near future.

Sincerely,

GROH, EGGERS & PRICE

Michael W. Price

Clifford J. Groh

:hf

cc: Congressman Don Young
Greg Chapados

TAKING OF RIGHTS-OF-WAY
WITHOUT COMPENSATION

In recent years there has been a tremendous amount of road construction by the State of Alaska to serve the needs of the State's growing population and economic development. An important part of building new roads and expanding old ones is establishing the right-of-way upon which the road can be constructed. In the Lower 48 and, to some extent in Alaska, when a state wishes to construct a road it purchases the right-of-way across private land either by direct negotiation or by condemnation. Thus, a private land owner whose property is effected by a highway is compensated for the loss of the use of his property.

This is not so for a large number of land owners in Alaska. The State of Alaska has determined that it can take rights-of-way and expand existing roads over private property without compensation to the land owners based upon some obscure federal regulations and statutes, despite the fact the Alaska State Legislature has already made one attempt to prohibit such takings.

In order to understand how the State can claim an easement or right-of-way for highway purposes across private land without paying compensation one must look at the history of road development in Alaska. Prior to 1947, there were two primary ways by which roads could be established. The first was by appropriation. Under the doctrine of appropriation, if the federal government wished to build a road, it could do so on public lands simply by expending money for the construction of the road. As a matter of custom the width of such roads was generally 33 feet either side of the center line.

Roads were also established prior to 1947 under a special federal statute (48 U.S.C. §932) which granted the right to the public to construct highways across vacant and unappropriated federal public lands. Several territorial enactments established a right-of-way along all section lines in the state four rods (66 feet) wide.

Following World War II numerous veterans found Alaska an appealing place to live and migrated to our state, These Homesteaders soon had identified parcels for entry and proceeded to lawfully obtain title to these lands. The Department of Interior which was responsible for the construction of most roads in Alaska through the Alaska Road Commission soon discovered that

Historical Road Over View

its road construction could not keep up with the pace of settlement. Homesteaders would often enter the property before the Alaska Road Commission could build a road by appropriation. Once the homesteader entered the property the right to build a road by appropriation was lost since the property was no longer considered public lands.

To remedy this problem, Congress passed a law in 1947 requiring a general reservation for highway rights-of-way be placed in all patents where the homesteader entered after July 24, 1947. It was envisioned that as the Alaska road network developed in the territory, the Alaska Road Commission could then construct a road across the patented property even though it was no longer in the hands of the federal government.

Unfortunately, the 1947 law did not establish where the roads were or their width. This placed the homesteader at risk, that, at any time in the future, a road could be constructed across his property. In 1949 the Department of Interior attempted to clarify this problem by publishing Public Land Order No. 601 which established the width for various types of roads in Alaska. The Public Land Order withdrew from the public domain strips of land along all highways in Alaska. By withdrawing the strips of land the federal government actually made those portions of federal public lands unavailable for homesteading.

PLO 601 established several classifications of roads. For through roads such as the Alaska Highway, Richardson Highway, Glenn Highway, Haines Highway, and Tok Cutoff, the right-of-way was 150 feet either side of center line or 300 feet total. For feeder roads such as the Steese Highway, Elliott Highway, McKinley Park Road, Anchorage-Porter-Indian Road, etc. the rights-of-way was 100 feet either side of center line or 200 feet total. The last classification was entitled local roads and represented a withdrawal of 50 feet either side of center line or 100 feet total. However, unlike the through roads and feeder roads, local roads were not specifically identified by name.

The problem with PLO 601 was that homesteaders who entered their property after August of 1949 were often not told that their property might be effected by PLO 601.

The BLM was required, because of the withdrawal by PLO 601, to survey those withdrawals and to post them to their plats. Additionally they were required to tell a homesteader who entered the property and who claimed land under his application which was effected by the PLO 601 that his homestead could not include those lands which PLO 601 effected. The BLM did neither. The

cost and manpower involved in identifying and surveying the property effected by the Public Land Orders and posting it to the plats was beyond the physical and fiscal capability of the BLM in the late 40's and early 50's.

As a result of local BLM protest to Washington the Department of Interior recognized the difficulties inherent in the withdrawals under PLO 601. In 1951 therefore they published PLO 757 which ended the withdrawals as to local and feeder roads and simultaneously published Department Order 2665 which converted those withdrawals to easements. Therefore, a homesteader who entered the property after D. O. 2665 could claim up to the center line of a local or feeder road but would take subject to an easement in favor of the federal government. But, as had happened when PLO 601 was in effect, many homesteaders were not informed of the full nature of the federal government's interest in their property. Some homesteaders had the existence of the local or feeder road easement noted in their prepatented documents but many did not. The easement was never noted in the patent that was issued to them.

The last difficulty associated with these rights-of-way was that the withdrawal that had remained in effect as to through roads. Congress in the late 1950's decided to sell the withdrawn land to the adjoining land owners and convert the remaining through road withdrawals to easements. The Department of Interior published Public Land Order 1613 which converted the withdrawals to easements and the underlying fee was to be sold to the then current adjoining land owner.

The Department of Interior did not immediately institute the program because of Statehood in 1959. During the transition phase much of the federal responsibility for highways and highway rights-of-way passed to the State of Alaska. The State claims its interest to the rights-of-way pursuant to a quitclaim deed issued by the Federal Government in 1959. The State did not bother to record the quitclaim deed until 1969. Thus, there was no document of record in a recording district by which the State claimed any title. The United States government had also never placed the easements of record in the territorial commissioner's office (the predecessor to recorders office).

In the mid 1960's the Bureau of Land Management once again rediscovered its obligations under PLO 1613 to convey the land to the adjoining land owner. It sent out to many of the adjoining land owners notices that they had the right to purchase the underlying fee to the highway along their property. Some of the adjoining land owners paid the purchase price. However, because

of the general freeze on the conveyancing of federal lands in Alaska the federal government failed to issue patents to those individuals.

In the last two years the BLM has once again discovered its obligations under PLO 1613 and have now made the property available to the adjoining land owners, but at today's prices. Further, where the 1965 adjoining land owner has filed an application to purchase and paid his purchase price in 1965, the BLM will now issue the patent to him and not the current adjacent land owner. This causes a great concern among current land owners who believed that they owned the property in front of their homes and businesses. It is conceivable that not only will they have an interloper between themselves and the highway but perhaps even a loss of access to their property.

In 1966, the Alaska legislature became aware that the State was building certain roads along these federally created highway rights-of-way without paying compensation. The only land owners which were effected by this unfair taking were those who entered the property after July of 1947 and before statehood. All other Alaskans were entitled to compensation if such a taking occurred on their property.

Representative Hillstrand bought the issue before the Alaska legislature and they virtually unanimously agreed that such a taking was unfair and unjust to the land owners. The legislature in 1966 therefore passed the Right-of-Way Act of 1966 which barred the state from taking any further land under the grants by the federal government. Between 1966 and 1970 the State therefore paid citizens in Alaska for highway construction and expansion on their lands. Indeed, in 1970 the commissioner for the Department of Transportation testified before the United States Congress that the State had paid several million dollars to land owners in compensation for the federal rights-of-way which had been created in the 1940's and 50's.

In the early 1970's however the problem re-emerged. The rapid increase in the population of Alaska and development of its economy required the State to build additional roads and to expand existing roads to accommodate the growth. In the mid 1970's the State once again began to take property under the 1947 Act. When confronted with the 1966 Act which barred the State from taking property without compensation, the State came up with a legal theory circumventing the Act. In the late 1970's and early 1980's several cases went to the Alaska Supreme Court concerning whether the State had a highway right-of-way across private land which it could take without compensation. In each

M-L 70's State Ignores 1966 Act

of those cases the trial court after having heard the evidence and arguments by the State and land owners ruled in favor of the land owners. In each case the Alaska Supreme Court reversed.

The Alaska Supreme Court's reversal rests on two weak premises. First, that the Alaska legislature in 1966 intended only to end those easements under the 1947 act. The Court's second premise was that the 1947 Act was an independent statute and did not modify the prior act authorizing the Secretary of Interior to build roads in Alaska. The Court found that that prior legislation which authorized the Secretary of Interior to build highways in Alaska permitted him to also create easements independent of the fact that Congress in 1947 modified the law to require that those easements be placed in the patent. Since Department Order 2665 states that it is promulgated under the Department of Interior's responsibility to construct roads in Alaska Department Order 2665 survives the 1966 Act and is not affected by it.

The position of the Alaska Supreme Court seems incredible. It is difficult to believe that in 1966 the Alaska Legislature was only doing away with the right of the State to take an easement under the 1947 Act, which was at least identified to the land owner in his patent, and not prohibit the taking of a concurrent easement which was not identified in the land owners patent. Indeed the premise of the Alaska Supreme Court is refuted by the BLM's own memorandum discussing these rights-of-way.

The most burdensome aspect of the highway right-of-way problem lies in the fact that the federal government mishandled the implementation of the programs. The only notice was published in the Federal Register. The Federal Register is a relatively obscure document to most people. Indeed in the late 1940's and 1950's the existence of the Federal Register, let alone the potential impact on their lives was not realized by most people. The rights-of-way were not placed of record against specific parcels and in cases where the statute or land order required that a map be made of the highway and placed of record with the BLM that was often not done. Further, over the years the State of Alaska in upgrading and improving highways has moved the location of the highway. Now it is difficult to know exactly where the highway was in the 1950's to determine how much property could be taken from the land owner without compensation.

Recently the State has aggravated the problem by permitting other activities to take place on the rights-of-way such as bike paths, horse trails, and utility lines but forced the entity

constructing this nonhighway use to place it on the far edge of the easement thus long before the road might have to actually be expanded, if at all, the easement is being utilized and the homeowner suffers from the loss of trees, shrubs, and use of his land as well as any improvements thereon.

It is this combination of factors which makes the taking by the State of Alaska unfair and inequitable. Lack of adequate notice to the original patentee, lack of notice contained in the patent, lack of notice to the general public except as published in the Federal Register, no recording of the easements in the recording district of the territory or State of Alaska, failure of the State of Alaska to record its quitclaim deed until 1969, and the belief that the 1966 Act by the Legislature ended once and for all the controversy, all contribute to make this taking without compensation extremely unfair.

It is clear that the legislative relief is required to close the loopholes created by the Alaska Supreme Court in the 1966 Act. It was unjust and inequitable then and it is unjust and inequitable now.

MEMORANDUM RE HOUSE BILL

TO RELINQUISH RIGHTS-OF-WAY

Alaska achieved statehood twenty-five years ago. Before stathood the Department of Interior, through certain Pulic Land Orders, took rights-of-way for roads from landowners without compensating the landowners. Since statehood the Department of Transportation and Public Facilities (DOTPF), acting for the State of Alaska, is still taking private property without compensating the landowners.

In 1966, the Alaska State Legislature enacted Ch. 92 (HB 415 am) which prohibited such takings by the State. The purpose of the law was to "alleviate economic hardship and physical and mental distress occasioned by the taking of land by the State of Alaska [for] which no compensation is paid to the person holding title to the land." The Legislature prohibited any further utilization of rights-of-way pursuant to various Public Land Orders and federal acts.

At the time of Statehood the State received a quit claim deed from the federal government conveying to the State certain roads built by the United States. DOTPF claims that the quit claim deed also conveyed certain easements or rights-of-way that were not described therein but included in Public Land Orders that were not even recorded in the various Recorders Offices throughout the state. DOTPF presently claims a right to highway rights-of-way varying in width from 100 to 300 feet surrounding

every major highway in the state and a smaller easement for most of the local roads throughout the state. When DOTPF determines that it needs to expand or modify an existing roadway where it claims a right-of-way exists by virtue of the federal government, it does so without paying compensation to the landowner for the value of the property taken.

The reservations for rights-of-way and easements were made by the federal government between 1947 and 1956. They were set forth in a series of Public Land Orders (namely PLO 601, 757, and 1613) and a Department of Interior Order (DO 2665) which were not recorded in District Recorders Offices in Alaska but were published in the Federal Register, which was a publication utilized by federal agencies.

The rights-of-way and reservations were not specifically included in the patents issued to homesteaders in Alaska. Homesteaders in Alaska were not informed of the existence of the easements and rights-of-way at the time they were issued patents and did not know the federal government was claiming a portion of their property for highway purposes. Now DOTPF is claiming right-of-way easements in the same way by virtue of the quit claim deed mentioned above.

No landowner or member of the public can know where DOTPF claims a right-of-way easement because those easements are not recorded and are not shown on plats available in the Recorder's Offices.

The Supreme Court of Alaska, in State v. A.L.T.A., has held that the easements are valid. The decision is wrong and must be reversed through the enactment of a law that will relinquish these easements and require DOTPF to pay just compensation for lands taken by them.