SJR

26

SENATOR
JOHN B. "JACK" COGHILL
Chairman

Senator Jan Faiks—Vice Chairman
Senator Mitch Abood
Senator Paul Fischer
Senator Joe Josephson

Alaska State Legislature

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

Senate Committee on Transportation

May 1, 1985

MEMORANDUM

To: Committee members

From: Committee staff

Re: SJR 26 Background information

This afternoon, the committee is scheduled to take up SJR 26, which represents the next logical step in the process begun by SB 141. As the members will recall, SB 141 would require the State to relinquish its right to certain highway rights-of-way created by the federal government through a series of public land orders (PLOs) in the late 40s and 50s.

After two hearings in this committee, it became apparent that the administration was totally opposed to the concept of relinquishment, partly because the Federal Highway Administration (FHWA) had indicated that it would not participate in funding to repurchase the rights-of-way. SJR 26 asks that Congress direct the Department of Transportation through FHWA to participate in this funding.

When the committee last heard SB 141, FHWA presented a comparison of the differences they saw between PLO rights-of-way, and those created by the Act of 1947 (later extinquished). Their interpretation - that the PLO rights-of-way are not precipitated on the 1947 Act - is also that of the State Supreme Court and of DOT/PF, but it is substantially different from that of the proponents of SB 141. They contend that the PLOs were issued by the Interior Department to clarify and define the rights-of-way reserved under the 1947 Act. The Supreme Court disagreed with this interpretation, maintaining that the PLO's were authorized by an Act of 1932, which gave the Interior Department general road-building and maintenance powers in Alaska.

The attached material contains correspondence researched after the court decision, which generally supports the contention that the Alaska Road Commission did not have adequate right-of-way reservation powers, based upon the 1932 Act, and therefore needed the 1947 Act and its consequent PLOs.

For further background on this issue, the members are asked to refer to their files on SB 141.

Dept. of Transportation & Public Facilities

Position Paper

BILL NO: Senate Joint Resolution No. 26

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

APPROVED: R. J. Knapp
Commissioner

DATE: 5-1-85

The Department of Transportation and Public Facilities has objected and will continue to object to the concept of the State purchasing rights-of-way which were granted to the State of Alaska by the Federal government for highway purposes.

The Department has no objection, however, to the intent of S.J.R. No. 26 providing that funds made available for this purpose do not come out of the annual apportionments for Federal-aid highways in Alaska.

For further information call Susan Fleischhauer at 465-3900.

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

Rec'd for files
Jan. 14-1939

JOHNSON 1939

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/12-10, 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

ICKES 1940

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
Bill Wilson

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."

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. Ivander 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, on 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 rights-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 Sta :, 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

LAW OFFICES OF
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CLIFFORD J. GROH
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SALLY KUCKO

MICHAEL P. CONDON
SEMA E. LEDERMAN
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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ROBERT P. OWENS

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

DRAFT

May 1, 1985

MEMORANDUM

To: Committee members

From: Committee staff

Re: SJR 26 Background information

This afternoon, the committee is scheduled to take up SJR 26, which represents the next logical step in the process begun by SB 141. As the members will recall, SB 141 would require the State to relinquish its right to certain highway rights-of-way created by the federal government through a series of public land orders (PLOs) in the late 40s and 50s.

After two hearings in this committee, it became apparent that the administration was totally opposed to the concept of relinquishment, partly because the Federal Highway Administration (FHWA) had indicated that it would not participate in funding to repurchase the rights-of-way. SJR 26 asks that Congress direct the Department of Transportation through FHWA to participate in this funding.

When the committee last heard SB 141, FHWA presented a comparison of the differences they saw between PLO rights-of-way, and those created by the Act of 1947 (later extinquished). Their interpretation - that the PLO rights-of-way are not precipitated on the 1947 Act - is also that of the State Supreme Court and of DOT/PF, but it is substantially different from that of the proponents of SB 141. They contend that the PLOs were issued by the Interior Department to clarify and define the rights-of-way reserved under the 1947 Act. The Supreme Court disagreed with this interpretation, maintaining that the PLO's were authorized by an Act of 1932, which gave the Interior Department general road-building and maintenance powers in Alaska.

The attached material contains correspondence researched after the court decision, which generally supports the contention that the Alaska Road Commission did not have adequate right-of-way reservation powers, based upon the 1932 Act, and therefore needed the 1947 Act and its consequent PLOs.

For further background on this issue, the members are asked to refer to their files on SB 141.