ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

4413 STRA SJR 26 - SJR 30

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11/27/89
Date

02-519 (REV 8/78)

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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PUCKETT 1949

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

NOYES 1949

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

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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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SEMA E. LEDERMAN
ROBERT T. PRICE
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.

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James A. Smith
Signature of Camera Operator

11/27/89
Date

02-519 (REV 8/78)

SJR

2-9

Alaska State Legislature

Senate Transportation Committee

Sen. John B. (Jack) Coghill, Chairman
Sen. Paul Fischer, Vice-chairman
Sen. Mitch Abood
Sen. Jan Faiks
Sen. Joe Josephson

Pouch V
Juneau, Alaska 99811

M E M O R A N D U M

TO: Committee Members

FROM: Committee Staff BC

DATE: 1-17-85

RE: Analysis, SJR 29

Senate Joint Resolution 29 is self explanatory and stems from the desire of the cities mentioned in its title to maintain jet service through the essential air service.

Included in your packet is a copy of the resolution, and correspondence between the City of Wrangell and the U.S. Department of Transportation regarding Wrangell's reasons for requesting that the proposal to allow Convair 880 aircraft (a propeller driven aircraft) be rejected.

IDENTIFICATION

SJR 29

Relating To maintenance of essential air service to Cordova, Yakutat, Petersburg, Wrangell, and Gustafus, Alaska

DATE INTRODUCED
1/13/86

RELATED BILLS PENDING
None known

REFERRALS

SPONSOR(S)
Ziegler, Elason, Ray

INITIAL RESEARCH

INITIAL SUMMARY COMPLETED
Yes

LEGAL DIVISION SUMMARY
N/A

DEPT OF LAW SUMMARY
N/A

SPONSOR CONTACTED FOR BACKUP MATERIALS
Yes

FISCAL NOTE
None

AGENCY RESPONSE

OTHER INTERESTED LEGISLATORS NOTIFIED
Taylor, Elason Ray

BACKGROUND RESEARCH

SIMILAR BILLS INTRODUCED IN PREVIOUS LEGISLATURES
SJR 16

OTHER STATE OR FEDERAL PRECEDENTS, REGULATIONS, ETC

RESPONSES FROM INTERESTED PERSONS AND/OR GROUPS
Federal Highway Administration
& Ak Congressional delbgation

HEARING PREPARATION

CHAIRMAN BRIEFED

DATE & PLACE SET

STAFF MEMO TO COMMITTEE
Yes

TELECONFERENCE

BACKGROUND MATERIAL DISTRIBUTED

PSA/PRESS RELEASE

LIST OF WITNESSES
Sen. Ziegler

SUGGESTED AMENDMENTS/CS DRAFTED

DON YOUNG
CONGRESSMAN FOR ALL ALASKA

WASHINGTON OFFICE
2331 RAYBURN BUILDING
TELEPHONE 202/225-5765

COMMITTEES:
INTERIOR AND INSULAR AFFAIRS
MERCHANT MARINE AND FISHERIES
POST OFFICE AND CIVIL SERVICE

Congress of the United States
House of Representatives
Washington, D.C. 20515

DISTRICT OFFICES
701 C STREET, BOX 3
ANCHORAGE, ALASKA 99513
TELEPHONE 907/271-5978

BOX 10, 101 12TH AVENUE
FAIRBANKS, ALASKA 99701
TELEPHONE 907/456-0210

401 FEDERAL BUILDING
P.O. BOX 1247
JUNEAU, ALASKA 99802
TELEPHONE 907/586-7400

501 FEDERAL BUILDING
KETCHIKAN, ALASKA 99902
TELEPHONE 907/225-6880

RT. 1, BOX 1805
KENAI, ALASKA 99611

BOX 177
KODIAK, ALASKA 99615

P.O. BOX 1860
NOME, ALASKA 99762

January 24, 1986

The Honorable Jack Coghill
Chairman
Senate Transportation Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Jack:

I am writing with regard to State Senate Joint Resolution 29, which requests the U.S. Department of Transportation to continue to require jet service to the communities of Cordova, Yakutat, Petersburg, Wrangell, and Gustavus, Alaska.

In the past, Senator Stevens, Senator Murkowski and I have been successful in maintaining subsidized jet service to Southeast Alaska. However, due to the tremendous fiscal pressures caused by Grahamm-Rudman the chances for maintaining this program beyond December 31, 1986, appear doubtful.

In the meantime, I will continue to consult with the Department of Transportation regarding the future of this program. Additionally, I will be available to discuss the subject with you in more detail when I travel to Juneau in February.

With best regards,

Sincerely,

DON YOUNG
Congressman for All Alaska

P.S. Jack Hope to see you in Juneau soon!

CITY of WRANGELL, ALASKA

INCORPORATED JUNE 15, 1903

BOX 531, 99929 (907) 874-2381

ADOPTED AUGUST 1972

July 5, 1985

Mr. John V. Coleman, Director
Office of Essential Air Service
U.S. Department of Transportation
400 Seventh Street South West
Washington, D.C. 20590

Dear Mr. Coleman:

As an addendum to the enclosed Civic Part Questionnaire, the following letter will explain in more explicit detail the importance of continued commercial jet service to the City of Wrangell.

Wrangell is a city of 2,376 people located on the northern tip of Wrangell Island in Central Southeast Alaska. There are no roads to Wrangell. It is accessible only by air or water. The entire economy of Wrangell is dependent on these two modes of transportation, relying heavily on commercial jet service, our only high speed access to the major markets of Anchorage, Juneau, and the lower 48 states. Most of the people coming to Wrangell, as a destination point, for business or pleasure, travel by commercial jet.

The majority of our fly-in tourist trade would be unable or unwilling to come here if the only means available was by light aircraft, either scheduled or charter, for a variety of reasons. Limited vacation time, cumbersome scheduling, inadequate seating and luggage space, high cost, or just plain fear of flying in a light aircraft. The loss of scheduled jet service would be devastating to the Visitor Industry of Wrangell.

The Fishing Industry relies heavily on scheduled jet service to transport their product to markets in the lower 48 states. Four of the five seafood processors located in Wrangell deal exclusively in fresh or frozen product that is shipped by air to select markets in the lower 48. Seafood is susceptible to rapid spoilage and rapid price fluctuation so it requires the speed, special handling, and reasonable freight rates that commercial jet service provides. Jet service enables our processors to ship their products and have them arrive on time, in edible condition, and at a feasible cost. Without this service, they would be severely handicapped in servicing their markets properly. They would face the distinct possibilities of customer dissatisfaction, loss of revenue, and plant closure. The resulting domino effect would cause a drastic decline in Wrangell's fishing fleet because many fishermen would be forced to move to other ports in order to sell their product and others who were unable to move could be forced out of business.

CITY OF WRANGELL, ALASKA

Timber, our major industry, is heavily reliant on commercial jet service for delivery of replacement parts, small equipment, executive travel, and outside technical help. A situation that would be considered a minor breakdown in the lower 48 where parts are readily accessible, could cause a shutdown at the Wrangell Mill for want of a small but essential part or the expertise of a specialist, if scheduled jet service was not available.

Wrangell's entire economy evolves around the ability to provide efficient transportation for the goods, services and people that are the life blood of our community. Therefore it is essential that the federal government continues their support of commercial jet operations into Wrangell to help assure the future economic survival of our City.

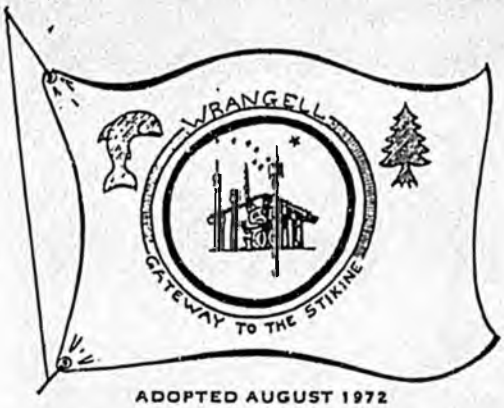
Sincerely,

William B. Privett, Major
City of Wrangell, Alaska

WP:fv

cc: Congressman Donald E. Young
Senator Ted Stevens
Senator Frank Murkowski
Governor Bill Sheffield
Commissioner Loren Lounsbury
Commissioner Richard Knapp

Enc.



CITY of WRANGELL, ALASKA

INCORPORATED JUNE 15, 1903

BOX 531, 99929 (907) 874-2381

November 14, 1985

Senator Robert Ziegler
307 Bawden
Ketchikan, Alaska 99901

Dear Senator Ziegler:

Enclosed is a copy of Mayor Privett's letter to Mr. William C. Boyd, with accompanying pertinent correspondence.

We ask your continued support in our efforts to maintain our present level of commercial jet service. We are just now getting back to square one after the 1982-83 mill and cannery closures. If we are denied this vital transportation link to our markets, it will cause irreparable damage to our two major employers and the consequent loss of jobs would severely impact our economic base.

Sincerely,

Jim Gove
Economic Development Director

JG:cd

Enclosure

U.S. Department of Transportation
Office of the Secretary of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

October 29, 1985

Honorable William Privette
Mayor
P. O. Box 531
Wrangell, Alaska 99929

Dear Mayor Privette:,

By Order 85-5-89, the Department of Transportation requested carriers interested in providing essential air service to Cordova, Yakutat, Petersburg, Wrangell and Gustavus, Alaska, to file service proposals, with subsidy requests if necessary. The Department's request was prompted by the impending end of Alaska Airlines' rate term for serving these communities on September 30, 1985.

Essential air service for each point, as established by Civil Aeronautics Board Order 80-1-167, requires seven round trips per week with large aircraft (over 60 seats). Off-peak season service at Gustavus requires only two round trips per week with small aircraft (up to 10 seats). The designated hubs for essential air service are as follows:

Eligible Point	Designated Hub
Cordova	Anchorage
Yakutat	Anchorage or Juneau
Petersburg	Juneau or Ketchikan
Wrangell	Juneau or Ketchikan
Gustavus	Juneau

Order 80-1-167 stated that although a certain size of aircraft was indicated in the essential air service determinations for points in Alaska, the Board would be willing to rely on operations with different size aircraft to meet the essential air service requirements provided that the number of frequencies were adjusted accordingly to provide sufficient capacity.

With respect to Cordova, Petersburg, Wrangell, Yakutat and Gustavus, however, Congress has directed us to rely only on large aircraft to meet the essential air service requirements unless the state agrees to service with smaller aircraft. This Congressional requirement is effective through December 31, 1986. In view of this requirement, we requested proposals for the period October 1, 1985, through December 31, 1986.

We are writing to the State and the civic officials of each of these communities to advise them of the status of the case at this time and to request their positions and comments on certain issues, as discussed below.

We received proposals to serve all five communities from Alaska Airlines and SEAIR Alaska Airlines. Alaska Airlines proposes to continue to provide its existing service pattern with B-737 and B-727 aircraft. SEAIR proposes to provide service with Convair 580 aircraft, which would require the agreement by the State in order for us to consider it. SEAIR filed two proposals. The first proposal involves one daily round trip operated over a linear route, Anchorage-Cordova-Yakutat-Juneau-Petersburg-Wrangell and return. The carrier requests an annual subsidy of $577,620 for this proposal. SEAIR's second proposal involves turnaround service between Anchorage and Cordova; Juneau and Yakutat and Juneau and Petersburg/Wrangell. SEAIR requests an annual subsidy of $437,902 for this proposal. SEAIR's proposals do not indicate specific schedules for Gustavus. However, the carrier has indicated that it intends to serve the point.

SEAIR has indicated that it does not want to hold a rate conference unless the State agrees to considering service with the Convair aircraft. As a first issue, therefore, we have requested the State's position on whether or not we should consider proposals with this equipment. If the State agrees to consider SEAIR's service proposal, we would hold a rate conference with the carrier.

We have concluded a rate conference with Alaska Airlines for its proposal, and the carrier has agreed to provide the service outlined in its proposal through December 31, 1986, for an annualized subsidy rate of $1,973,000.

In the event that the State does not agree to consider SEAIR's proposal, we would appreciate receiving your comments on Alaska Airlines' proposal and subsidy request for our consideration in making a decision in the case. Upon receipt of your comments, we plan to submit a recommendation to the Assistant Secretary on Alaska Airlines' proposal and subsidy request.

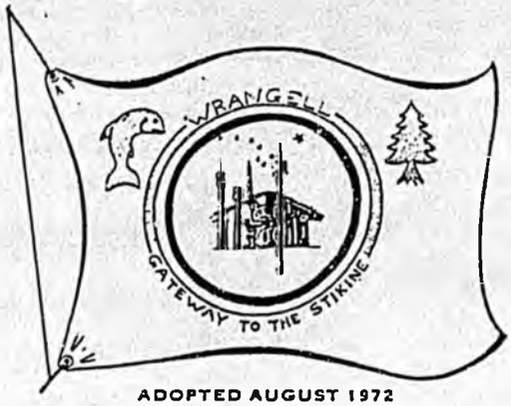
If the State agrees to considering SEAIR's proposal, we would hold a rate conference with SEAIR and afford Alaska Airlines an opportunity to amend its subsidy request. Following the completion of those procedures, we would advise you of the final service and subsidy requests and ask for your comments on the final proposals.

In order to complete this case as expeditiously as possible, we would appreciate receiving your response by November 15, 1985. An original and five copies of your response should be sent to William C. Boyd, Chief, Service Analysis Division I, S-63, Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590. A copy of your comments should also be sent to each carrier. If you have any questions, please contact Bernard Calure of my staff at (202) 426-9813 or Dick Steinman of our Alaska field office at (907) 271-5146.

Sincerely,

William C. Boyd

William C. Boyd, Chief
Service Analysis Division I
Office of Essential Air Service



ADOPTED AUGUST 1972

CITY of WRANGELL, ALASKA

INCORPORATED JUNE 15, 1903

BOX 531, 99929 (907) 874-2381

November 13, 1985

Mr. William C. Boyd, Chief
Service Analysis Division I, S-63
United States Department of Transportation
400 Seventh Street South West
Washington, D.C. 20590

Dear Mr. Boyd:

In response to yours of October 29, 1985, requesting our position regarding the proposal from SEAIR Alaska Airlines, I am enclosing a copy of my original letter to Mr. John V. Coleman of your office. The letter, dated July 5, 1985, clearly outlines our position on the essential air service issue. All of the parties listed as receiving copies of the original letter have gone on record as supporting our position.

In your current correspondence you indicate that SEAIR proposes service with Convair 580 aircraft for daily round trip service from Anchorage to Wrangell and points in between. SEAIR's proposal, as outlined in your letter, gives me cause for great concern for a number of reasons.

There is no mention of service south to Seattle via Ketchikan or to other points in the lower 48. The Convair 580 has marginal passenger capacity for our peak seasons and would be totally inadequate to meet the freight demands of Wrangell, let alone the additional demands of cities to our north. This past year we shipped 600,000 pounds of seafood to markets in the lower 48 states plus an additional 200,000 pounds of miscellaneous freight and mail for a total of 800,000 pounds. An increase of approximately 375,000 pounds in a two year period. Wrangell Forest Products, our major employer, is dependent on commercial jet service to and from the lower 48 for parts, technical personnel and Pacific Rim customers. Eight thousand passengers arrived from the south in 1985, the majority of which were tourists.

Our economic survival hinges on adequate air service. If we are unable to properly serve our timber, fishing, and tourism industries,

it will cause an economic catastrophe. Please consider these points carefully during your negotiations.

Sincerely,

William B. Privett
Mayor

WBP:fv

Enc.

cc: Congressman Donald E. Young
Senator Ted Stevens
Senator Frank Murkowski
Governor Bill Sheffield
Commissioner Loren Lounsbury
SEAIR Alaska Airlines
Alaska Airlines

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James R. Smith
Signature of Camera Operator

11/27/89
Date

02-519 (REV 8/78)

SJR

30

Executive Summary

The United States and the Republic of Korea have long enjoyed cordial aviation relations. These important allies have worked together to create a procompetitive air market in which carriers from both countries can operate profitably. However, progress in U.S.-Korea aviation relations has recently been stymied by the reluctance of the U.S. to ratify the 1980 Memorandum of Understanding (MOU) between the two nations.

The Republic of Korea strongly desires ratification of its 1980 aviation agreement with the United States. It believes that the obstacles to implementation of that agreement have been removed and that conditions now exist which will allow an end to the current deadlock.

A series of air transport agreements between the U.S. and Korea have conferred significant advantages on U.S. carriers:

-- The U.S. has designated 14 carriers to serve Korea while Korea has designated one carrier to serve the U.S.

-- Currently, U.S. airlines operate between Seoul and fourteen U.S. points. In contrast, the Korean carrier is only allowed to serve three points in the U.S.

-- U.S. carriers presently have unlimited rights to serve points beyond Korea and in fact serve five such points. Korean Air Lines (KAL) is not authorized to serve any beyond points.

In addition to favorable route rights, U.S. carriers serving Korea enjoy automatic fare approval, unrestricted charter rights, and the largest amount of cargo space allocated to foreign carriers at Kimpo International Airport. These factors, coupled with the large volume of U.S. Government business, have enabled the three U.S. carriers to compete effectively in the Korean market and to derive substantial profits from their services.

Although Korea has closely cooperated with the U.S. on aviation matters, and in fact, was one of the first countries in the world to accept a procompetitive bilateral agreement, its right to provide service to the U.S. is far more restricted than other nations offering transpacific service. Taiwan, Thailand, the Philippines and Japan all enjoy greater route rights to the U.S. than Korea. Moreover, Korea's conciliatory attitude on fares, designation, and capacity issues stands in stark contrast to the experience of U.S. carriers in many European and Latin American nations.

The rights granted to Korea by the 1980 Memorandum of Understanding represent a reasonable expansion of its present authority to serve the U.S. In return for additional benefits

conferred on U.S. carriers, KAL will receive full traffic rights at Anchorage, and the same rights with respect to Chicago and Oakland. For the first time, the 1980 agreement also provides for beyond rights to a single point in Europe. KAL's expanded route rights under the 1980 MOU are comparable to the rights presently enjoyed by other Asian nations and still leave U.S. carriers with a significant edge over their Korean counterpart.

Furthermore, the rights granted to KAL are matched by greater benefits for U.S. carriers serving Korea. The terms of the 1980 MOU permitted U.S. carriers to construct a new cargo terminal at Kimpo International Airport for their exclusive use. Flying Tiger, the U.S. all-cargo carrier, expressed its intention to construct the Kimpo cargo facility, but requested several concessions from the Korean Government before doing so. The Korean side made each one of these concessions, including:

-- an increase in the agreed-upon size of the facility; and

-- an increase in the amortization period for the facility from the ten-year period specified by Korean law to a twenty-year amortization period.

After obtaining these concessions, Flying Tiger advised the State Department that it no longer objected to the "immediate implementation of each of the rights granted to the Korean designated air carrier" as specified in the 1980 MOU.

Flying Tiger never began construction of the new cargo terminal because it lacked the necessary financial resources to complete it. Instead, the Korean Government pledged its commitment to build the cargo facility and in fact, has already commenced its construction. Completion is scheduled for early 1986. Once the facility is finished, U.S. carriers will have the capability to self-handle all cargo at Kimpo, fully implementing Korea's commitments under the 1980 agreement.

While the terms of the 1980 MOU will have been met by the Korean side, there is no sign that the U.S. is prepared to ratify the agreement and implement its provisions. Thus, KAL will be denied the benefits promised by the agreement while U.S. carriers continue to enjoy their already significant advantages while receiving additional rights on top of that. Because the commitment of the Korean Government to construct the cargo terminal at Kimpo has mooted U.S. objections to ratification, it seems grossly unfair to further delay implementation of the 1980 agreement.

By signing the 1980 Memorandum of Understanding, the U.S. undertook a commitment to seek its ratification and adhere to its provisions. The U.S. should now prove as good as its word by ratifying and implementing the 1980 agreement.

Alaska State Legislature

Senate

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

January 16, 1985

Senator Jack Coghill
Senate Transportation Committee
Pouch V
Juneau, Alaska 99811

Re: Senate Joint Resolution 30 (Relating to passenger service by Korean Air Lines in Anchorage)

Dear Senator Coghill:

The above captioned bill is currently in your committee. Attached is backup material on the bill; therefore I would like to respectfully request that the bill be scheduled for a hearing at your earliest convenience.

If you or your staff have questions concerning this bill, do not hesitate to contact my office.

Thank you for your consideration in this matter.

Sincerely,

Bill Ray

Bill Ray
Senator
District C

ANCHORAGE TRAFFIC RIGHT FOR KOREAN AIR

1. Status of Traffic Right at Anchorage

a) Under the 1978 Memorandum of Understanding between R.O.K. and U.S.A., Korean Air has the right to operate to New York via Anchorage with stopover right at Anchorage.

b) Under the 1980 Memoradum of Understanding between the two countries, Korean Air was granted the right to operate to Anchorage. However, this Understanding has not been ratified so that the Anchorage right is not in force.

c) In 1983, Korean Air requested an exemption to provide air transportation between Korea and Anchorage. However, Korean Air's request was denied on the ground that the 1980 Memorandum of Understanding was pending.

2. Operating Status at Anchorage

a) Korean Air operates total 40 flights to New York and Los Angeles via Anchorage as a technical stop as follows ;

KE 018	Seoul - Anchorage - New York	6 flights per week
KE 017	New York - Anchorage - Seoul	6 flights per week
KE 015	Los Angeles - Anchorage - Seoul	4 flights per week
KE 098	Seoul - Anchorage - New York	6 flights per week
KE 097	New York - Anchorage - Seoul	6 flights per week
KE 084	Seoul - Anchorage - Los Angeles	5 flights per week
KE 083	Los Angeles - Anchorage - Seoul	5 flights per week
KE 082	Seoul - Tokyo - Anchorage - Los Angeles	1 flight per week
KE 081	Los Angeles - Anchorage - Tokyo - Seoul	1 flight per week

b) Korean Air also provides 3 round - trip passenger flights between Seoul and Europe via Anchorage as a technical stop with all flights.

... / 3. Needs

3. Needs of Direct Service between Korea and Anchorage

a) No direct passenger service of any kind is provided by any U.S. or foreign carriers between Korea and Anchorage. Passengers wishing to travel between Korea and Alaska must use connecting passenger service which is inconveient, time-consuming and infrequent. And existing all-cargo service is via intermediate points with limited frequencies.

b) In the face of this dearth of air transportation service in the Korea - Alaska market, there is a great demand and urgent need for such air service by passenger and shippers alike.

c) The pressing need for improved air transportation service between Korea and Alaska also has been reflected by numerous expressions by support for Korean Air's service in the market by citizens, shippers, civic organizations and government officials in Alaska.

KOREAN AIR

CABLE ADDRESS: "KOREANAIRLINES"
C.P.O. BOX 864 SEOUL, KOREA
TELEX: "KALHO K27526", TEL. 7517-114, 771-86

January 24, 1986

Alaska State Senate
Committee on Transportation
State Capitol Building
Pouch V
Juneau, Alaska 99811

ATTN: Ms. Elizabeth Ziegler

Dear Ms. Ziegler:

Pursuant to our telephone conversation of yesterday, I am enclosing the booklet entitled "U.S.-Korea Aviation Relations and Ratification of the U.S.-Korea 1980 Memorandum of Understanding." Also included is a two page "Executive Summary."

I trust that the information and statistics contained in these documents will prove adequate support for the resolution being considered by the Alaska State Senate.

As you may be aware, Korean Air has been exerting every effort for quite some time to obtain authority for full traffic rights at Anchorage.

We sincerely appreciate the efforts being made by the Alaska State Senate in this regard, and hope that the seed being planted through the resolution will soon bear fruit.

Sincerely yours,

Lee Steiner
Manager
Government Affairs
American Regional Office
KOREAN AIR

Enclosure

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U.S.-KOREAN AVIATION RELATIONS AND RATIFICATION OF THE U.S.-KOREA 1980 MEMORANDUM OF UNDERSTANDING

I. INTRODUCTION

Since the inception of air transportation between the United States and the Republic of Korea, aviation relations between the two countries have been cordial and mutually beneficial. However, several differences of a minor nature have recently threatened to undermine this close and constructive relationship. These differences have caused the U.S. thus far to refuse to ratify and implement the provisions of an April 12, 1980 Memorandum of Understanding (MOU) with Korea concerning air transport services between the two countries. The reluctance of the U.S. to ratify the 1980 MOU has denied significant economic benefits to air carriers on both sides of the Pacific.

The Republic of Korea strongly desires ratification of its 1980 aviation agreement with the United States. It believes that the obstacles to implementation of that agreement have been removed and that conditions now exist which will allow an end to the current deadlock.

This paper will explore the present status of U.S.-Korea aviation relations, describe recent steps to resolve the outstanding issues, and suggest the advantages for both nations of an early and equitable resolution of their differences.

II. A BRIEF HISTORY OF U.S.-KOREAN AVIATION RELATIONS

Air services between the U.S. and Korea have been governed for almost thirty years by the 1957 U.S.-R.O.K. Air Transport Services Agreement. The air transport rights granted by the original agreement have been significantly expanded through several amendments to the basic document. The latest series of negotiations resulted in the 1978 and 1980 aviation agreements between the U.S. and Korea.

The 1978 U.S.-R.O.K. Memorandum of Understanding, signed ad referendum, significantly enhanced access and competition in the U.S.-Korea air market. The U.S. was given the right to designate an unlimited number of carriers to provide service to Korea. Moreover, the two countries agreed to a system of mutual disapproval of fares and rates, increasing the likelihood of fare reductions and fare discounts. In exchange, Korean Air Lines (KAL) was granted traffic rights to New York and passenger stopover rights at Anchorage. The 1978 MOU also raised for the first time the issue of self-handling of cargo by U.S. carriers at Kimpo International Airport (Seoul). At the request of the U.S. delegation, Korea agreed to special provisions for cargo handling by U.S. carriers.

Prior to ratification of the 1978 Memorandum of Understanding, the United States requested clarification of the provisions governing cargo self-handling at Kimpo. On March 14, 1979, the U.S. Ambassador in Seoul sent a letter to the Minister of Foreign Affairs specifying the handling rights to which U.S.

carriers would be entitled. In the same letter, the United States demanded that the Korean Government construct, or allow a U.S. carrier or U.S. carriers to construct, a new cargo terminal for the exclusive use of U.S. airlines. Even though the 1978 MOU was silent as to the construction of additional cargo facilities at Kimpo the Korean Government acceded to the United States' request. Following resolution of this issue, the United States and Korea exchanged diplomatic notes ratifying the 1978 Memorandum of Understanding.

One year after the 1978 agreement was ratified, representatives from the United States and Korea again met to discuss air transport relations between the two countries. During the talks, the Korean Government requested an expansion of the route schedule so that Korean Air Lines could offer service to additional points in the United States and points beyond. The delegations, in an April 12, 1980 Memorandum of Understanding, conferred on the Korean carrier traffic rights to Anchorage, Oakland and Chicago and beyond rights to one point in Europe. The new traffic rights, if implemented, would partially rectify the route imbalance which currently allows U.S. carriers to operate from <u>any</u> U.S. points via <u>any</u> intermediate points to <u>any</u> points in the R.O.K. and <u>any</u> points beyond while restricting the Korean carrier(s) to only three U.S. gateways without any beyond rights.

The 1980 MOU also provided that the Korean Government would give a U.S. carrier (Flying Tiger) the option to construct a new cargo terminal at Kimpo. If Flying Tiger chose not to exercise its option, the R.O.K. would construct the facility itself. The size of the facility would be no less than 2,688 square meters and would allow for both inbound and outbound cargo handling by U.S. carriers. Under the 1980 Memorandum of Understanding, the traffic rights granted to Korean Air Lines, except the traffic rights at Anchorage, were to be phased-in and tied to completion of the new cargo facility.

Although authorized to construct the Kimpo cargo facility and initially expressing interest in doing so, Flying Tiger decided not to proceed. It informed U.S. authorities in May 1983 that it did not have adequate financing to build the proposed facility. By choosing to forego construction, Flying Tiger delayed progress on the new terminal, preventing KAL from exercising its new traffic rights under the 1980 MOU.

The 1980 Memorandum of Understanding has not been ratified. Although Korea has repeatedly proposed its ratification to the U.S. Government, the United States has declined to ratify the MOU on the ground that the new cargo terminal at Kimpo must first be completed (notwithstanding the decision of Flying Tiger not to build the terminal as it originally stated it would). In order to resolve this issue and proceed with implementation of the 1980 agreement, the Korean Government has decided that it will construct the Kimpo cargo facility. Construction of the facility

is now under way and is expected to be completed by early February 1986. When completed, the new facility, which will exceed 4,032 square meters in size, will enable U.S. carriers to self-handle inbound, outbound and transit cargo at Kimpo. Thus, with construction of the new cargo facility, the major issue stalling implementation of the 1980 MOU has been resolved according to the terms of that agreement and in a manner which should be satisfactory to the United States.

III. BENEFITS UNDER THE U.S.-KOREA AVIATION AGREEMENTS

Despite the goodwill that has generally pervaded U.S.-Korea aviation relations, the 1980 Memorandum of Understanding is no closer to ratification today than it was five years ago. In large measure, the impasse over ratification results from the protracted controversy over the cargo facility at Kimpo, an issue which, as explained above, has now been resolved. However, also behind the failure to ratify the 1980 MOU is the view held by some in the U.S. aviation community that the agreement is "tilted" towards Korea. That is simply not the case. As the following analysis demonstrates, the economic rights enjoyed by U.S. carriers under the 1978 and 1980 agreements outweigh those enjoyed by KAL. Moreover, the benefits enjoyed by U.S. carriers serving Korea will only continue to grow as the Korean economy develops and trade and commerce between the two countries increases.

A. Structure Of The U.S.-Korea Air Market

The U.S.-Korea air market is presently served by one Korean carrier (Korean Air Lines) and three U.S. carriers (Pan American, Northwest and Flying Tiger). Pan Am, Northwest, and KAL conduct both passenger and cargo operations. Flying Tiger is strictly an all-cargo carrier.

Under the U.S.-Korea bilateral agreement as modified by the 1978 MOU, the route rights enjoyed by U.S. carriers are far greater than those allowed to KAL:

-- With the right to designate an unlimited number of carriers, the U.S. has designated 14 carriers to serve Korea while Korea has designated one carrier to serve the U.S. (Exhibit A, Table 4).

-- U.S. carriers may provide service between any points in Korea and any points in the U.S. Currently, U.S. airlines operate between Seoul and fourteen U.S. points. In contrast, the Korean carrier is only allowed to serve three points in the U.S. (Exhibit A, Table 5).

-- With respect to service beyond each country, U.S. carriers under the existing agreement have unlimited rights to serve points beyond Korea with full Fifth Freedom rights[1/] and in fact serve five such points and derive substantial economic benefits from such services. (Exhibit A, Tables 18, 19). KAL is not authorized to serve any beyond points.

The imbalance in route rights severely limits the competitive opportunities available to KAL. U.S. carriers can now operate, in both directions, from <u>any</u> U.S. points, via <u>any</u> intermediate points, to <u>any</u> points in Korea, and beyond Korea to

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1/ Fifth Freedom rights are rights granted carriers of one country to carry local traffic (i.e., passengers and cargo) between the other country and a third country.

any points other than certain Communist countries.2/ KAL, on the other hand, has been limited to the same route rights for approximately thirty years, with the single addition of traffic rights to New York and stopover rights at Anchorage.

In addition to favorable route rights, U.S. carriers serving Korea enjoy automatic fare approval, unrestricted charter rights, and the largest amount of cargo space allocated to foreign carriers at Kimpo International Airport. These factors, coupled with the large volume of U.S. Government business, have enabled the three U.S. carriers to compete effectively in the Korean market and to derive substantial profits from their services.

As the Korean economy continues to grow and as the 1988 Summer Olympics approach, U.S. carriers will have further opportunity to exploit their advantages under the existing air agreement between Korea and the United States.

B. Total Market Statistics

By any objective standard, the U.S.-Korea air market is large and rapidly growing. As of October 31, 1984, the number of passengers traveling between Seoul and various points in the U.S. reached an annual figure of 496,813, a 69.4% rise over 1979. The statistics for cargo traffic are similarly impressive: 141,157,000 pounds of cargo ferried between the U.S and Korea last year, a 93.2% rise over 1979. These figures establish the

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2/ In accordance with the 1980 Memorandum of Understanding, the Korean government consistently has advised the U.S. government that this restriction on beyond rights will be eliminated immediately upon ratification of the 1980 agreement.

U.S.-Korea air market as second largest of the transpacific passenger markets (Exhibit A, Table 2), and fourth largest of the transpacific markets for air cargo (Exhibit A, Table 3).

The U.S. participation in the market has been steadily rising over the past several years. Since 1978, the number of passengers enplaned at Seoul by U.S. carriers has grown at an average annual rate of 18.2% (Exhibit A, Table 10). Over the same period, freight enplaned by U.S. carriers at Seoul has increased each year by an average rate of 15.4%. (Exhibit A, Table 10). As the traffic carried by U.S. operators has risen, so has the number of flights between the U.S. and Korea. In May 1985, weekly flights by U.S. carriers serving the U.S.-Korea air market had risen by 31% over the prior year. The increase in the number of passenger flights by U.S. carriers has been particularly dramatic, nearly tripling in frequency over the past seven years. (Exhibit A, Table 10A). Most impressive of all, measured in terms of annual available seats, U.S. carriers will provide 60% of passenger capacity in this market in 1985 compared to the 40% share held by KAL. (Exhibit A, Table 8).

Translated into revenue, these figures mean significant earnings for U.S. airlines. Last year, U.S. carriers received an estimated $153 million from passenger operations in the U.S.-Korea market. (Exhibit A, Table 13). Cargo operations generated revenue of $68 million. (Exhibit A, Table 14). Total revenue has increased dramatically over the past six years, an upward trend which shows no signs of abating.

This analysis of the U.S.-Korea air market confirms the substantial benefits received by the U.S. under its aviation agreement with the Republic of Korea. Implementation of the 1978 MOU has dramatically increased revenue and traffic for U.S. carriers operating flights to Seoul. Ratification of the 1980 MOU would continue this record of growth by expanding the competitive opportunities available to U.S. carriers.

III. ARGUMENTS SUPPORTING RATIFICATION OF THE 1980 MEMORANDUM OF UNDERSTANDING

Over the years, the give-and-take of U.S.-R.O.K. negotiations has produced a series of agreements, which have somewhat improved the imbalance favoring the U.S. under the Air Transport Services Agreement between the two countries. The 1980 MOU is no exception to this pattern of continuing improvement. Its terms provide for an exchange of benefits intended to enhance competition in the U.S.-Korea air market. The following analysis summarizes the policy and economic justifications for ratification of the 1980 MOU, from both the U.S. and Korean perspective.

A. Korea Has Been Extremely Cooperative In Aviation Matters With The U.S.

The Republic of Korea has always been forthcoming in aviation relations with the U.S. As demonstrated by the discussion below, it has accommodated U.S. interests on several matters resulting in significant benefits for U.S. carriers. Ratification of the 1980 MOU would provide the basis for

continuing cooperation by the Koreans in aviation affairs and further cement the cordial ties between the U.S. and one of its most dependable allies.

1. The 1978 Memorandum of Understanding.

The 1978 U.S.-R.O.K. Memorandum of Understanding (MOU) was a precedent-setting agreement. At the time, the U.S. was aggressively pursuing an "open skies" policy in bilateral aviation agreements with foreign nations. "Open skies" meant greater competition in international air markets and was intended as the international corollary to deregulation at home. Although such agreements were uncommon at the time, Korea accepted a "liberal" bilateral treaty reflecting the procompetitive policies of the U.S. Government.

Korea was the first major country in the Far East and one of the first countries in the world to accept a procompetitive bilateral. While many foreign governments refused to sign such procompetitive agreements in order to protect their own carriers, Korea did not. Korea's acceptance of such an agreement was hailed by U.S. aviation officials as a major step in extending the "open skies" policy to Asia. In fact, shortly after the 1978 agreement was concluded, several other Asian nations (i.e., Singapore, Thailand and Taiwan) followed Korea's lead and agreed to procompetitive bilateral arrangements with the United States.

Under the "open skies" approach of the 1978 MOU, U.S. carriers serving Korea enjoy the unrestricted right to set fares, determine frequency of service, and select routes. This

contrasts sharply with the rights of U.S. carriers under other bilateral agreements regarding air transport services including those between the U.S. and some of its major trading partners and allies. Consider the following:

-- Many bilaterals restrict the number of carriers the U.S. can designate to provide international service. The agreements with Great Britain, Canada, Mexico, Italy, and the Philippines, to name a few, all impose firm limits on the number of designations.

-- Many of the same agreements also limit the routings over which U.S. carriers can operate.

-- Many bilaterals provide for unilateral disapproval of carrier fare initiatives. The agreements with Germany, Switzerland, and the United Kingdom permit prior governmental review of fares. Indeed, a spate of notices of rejection from the British government last fall precipitated a major crisis in U.S.-U.K. aviation relations.

-- Schedules frequently are subject to prior governmental review. Under the aviation agreement between the U.S. and Great Britain, carrier schedule increases must be negotiated every six months.

Significantly, these matters have never been the subject of a dispute between the U.S. and Korea. The 1978 MOU gave the U.S. the right of unlimited designation of carriers, with no restrictions on flight routes or schedules. Fares are reviewed according to a mutual disapproval system under which U.S. carriers are effectively able to set fares as they wish. On matters of capacity, as on most matters involving aviation, the U.S. and Korea see eye-to-eye.

2. Modification of the 1978 MOU.

When the U.S. sought additional rights for U.S. carriers, Korea once again acceded to its demands. The 1978 MOU was modified to allow U.S. cargo carriers greater self-handling rights at Kimpo International Airport. The U.S. refused to ratify the 1978 MOU until Korea specified the self-handling rights that U.S. carriers would enjoy. An additional concession, one which apparently is unique in the history of bilateral agreements, involved the commitment of the Korean Government to construct, or allow a U.S. carrier or U.S. carriers to construct, a new cargo terminal at Kimpo airport for the exclusive use of U.S. airlines.

3. Fifth Freedom rights.

Fifth Freedom rights, especially important for U.S. carriers, have been hotly contested in negotiations conducted by the U.S. with other nations. Often, the availability of Fifth Freedom rights determines the economic viability of a particular route. Out of a desire to protect their own carriers, most nations are extremely reluctant to allow U.S. carriers traffic rights to points in other countries. In fact, in the case of a number of countries such as Peru and Greece, the issue of Fifth Freedom rights led to the renunciation or near-renunciation of aviation agreements with the U.S.

Not so in the case of Korea. U.S. carriers serving Seoul have full Fifth Freedom rights to serve beyond points and presently provide such service to Hong Kong, Taipei, Manila,

Osaka, and Tokyo. Moreover, U.S. carriers may exercise Fifth Freedom rights beyond Seoul to points in the People's Republic of China if the 1980 MOU is ratified. Substantial traffic is generated by present Fifth Freedom markets. In 1982, the most recent year for which figures are available, U.S. carriers flew 197,179 passengers between Seoul and Tokyo, and 25,277 between Seoul and Taipei (Exhibit A, Table 18).

Korea's conciliatory attitude on Fifth Freedom rights is all the more remarkable given the fact that at present it has no similar rights in the U.S. Although the right to serve one beyond point in Europe was granted by the 1980 Memorandum of Understanding, that right has been held in abeyance by the failure of the U.S. to ratify the 1980 agreement.

4. Commencement of service by U.S. carriers.

Korea follows a laissez-faire approach with respect to start-up service by U.S. carriers. Both Braniff and Pan Am were able to initiate service to Seoul with a minimum of bother and delay. This is in stark contrast to the difficulties typically experienced in Latin America and Japan. Throughout Central and South America, the problems associated with start-up operations have been acute. Challenge Air Transport experienced particular difficulty in Guatemala and Peru, where its attempts to begin operations met delay after delay. Bureaucratic delays also stalled the commencement of service by United to Japan. The Japanese relented only after intense pressure from the U.S. including several retaliatory measures against Japan Air Lines.

U.S.-Korea aviation relations have never reached the nadir marked by United's application to serve Japan. U.S. carriers have been free to come and go from Seoul pretty much as they please.

As indicated by this review of U.S.-R.O.K. aviation relations, the Republic of Korea has been cooperative and flexible in negotiations with the United States. The cordial attitude of the Korean Government has led to pragmatic aviation agreements, emphasizing a balanced exchange of economic rights and opportunities. It is anomalous, to say the least, that the nation which has championed "open skies" should respond to the Korean approach of lowering constraints and promoting competition by refusing to ratify the 1980 Memorandum of Understanding. The present U.S. position not only penalizes a trusted American ally but undermines the basis for what has been up to now a very special relationship between the U.S. and Korea with respect to aviation affairs.

B. Ratification Of The 1980 MOU Will Guarantee U.S. Carriers Sufficient Space For Self-Handling Of Cargo At Kimpo International Airport.

The 1979 letter from the American Ambassador to the Korean Foreign Ministry secured for U.S. carriers the right to self-handle cargo at Kimpo airport. However, the size of the cargo area presently used by U.S. carriers prevents them from self-handling all freight.

The construction of a new cargo facility at Kimpo will provide a considerably larger space (in excess of 4,032 square meters) for the exclusive use of U.S. cargo carriers. The addition of this space will remove the physical constraints which currently prevent U.S. carriers from self-handling all their own cargo. Consequently, with the construction of the new facility, import, export, and transit cargo will be totally self-handled by U.S. carriers.

C. The Route Rights Granted To KAL Under The 1980 MOU Are A Reasonable Expansion Of Its Present Authority And Are Consistent With Similar Rights Granted To Other Nations.

In approaching the 1980 aviation negotiations, Korea sought an expansion of route rights for KAL. As previously noted, these route rights were severely limited and far less than the rights enjoyed by U.S. carriers serving Korea.

Prior to 1978, KAL was restricted to one U.S. route--from Seoul to Los Angeles, via Tokyo and with a mandatory stop in Honolulu. In the 1978 MOU, the U.S., in return for Korea's acceptance of a "liberal" bilateral agreement, granted to KAL the right to provide passenger and cargo service to New York, with passenger stopover rights (but not traffic rights) at Anchorage. The 1980 MOU allowed KAL full traffic (as opposed to stopover) rights at Anchorage, upon notification by the Korean Government that it had removed restrictions on service to Communist nations as part of the "beyond rights" of U.S. carriers serving Seoul. Under the same agreement, KAL was given rights to Oakland, upon completion of the new cargo facility at Kimpo International

Airport. One year after the cargo facility was completed, KAL was to receive rights to Chicago, and one year after that, beyond rights from one point in the U.S. to one point in Europe.

The new authority granted to KAL as part of the 1980 MOU was not given for "free" but resulted from negotiations between the U.S. and Korea. In each case, the new route rights were closely tied to additional benefits for U.S. carriers serving Seoul.

Moreover, the route rights granted to other countries under similar bilateral agreements are far more significant than those granted to Korea under the 1978 and 1980 agreements. Other Asian nations agreeing to procompetitive bilateral agreements received new route rights in return. Taiwan, for example, presently enjoys rights to Guam, Honolulu, Seattle, San Francisco, Los Angeles, Dallas, and New York, plus beyond rights to a point in Europe and a point in either Central or South America. Thailand enjoys rights to New York, Honolulu, Los Angeles, Guam, Seattle and one additional point, together with beyond rights to Canada and Europe. Even countries which have been restrictive in rights granted to U.S. carriers have enjoyed rights comparable to those conferred by the U.S.-Korea aviation agreements. The U.S.-Philippine agreement, for example, which contains strict capacity and designation limitations, grants Philippine carriers rights to Guam, Honolulu, San Francisco, Los Angeles and five points to be elected, together with beyond rights to three countries to be selected.

D. Implementation Of The 1980 MOU Will Mean Better Service For Chicago And San Francisco/Oakland.

The new route rights granted to KAL under the 1980 agreement will allow a boost in service to markets which at present are underdeveloped. Although Chicago and San Francisco/Oakland presently receive service from U.S. carriers flying to Korea, traffic and revenue generated by these points is far greater for other transpacific markets. For example, there are thirty-four weekly passenger flights to Tokyo from Chicago, non-stop and one-stop, with similar service from San Francisco 49 times a week. (Exhibit A, Table 20). Contrast this with the frequency of service to Seoul, which features only 16 weekly flights from Chicago and 12 flights from San Francisco. (Id.)

The figures for air cargo over these routes also indicate underdeveloped markets. Last year at Chicago, air cargo exports to and imports from Korea stood at 11.5% and 14.5%, respectively, compared to the same figures for trade with Japan (Exhibit A, Table 22). For San Francisco, the percentages are 8.5% and 13.8%. In other cities served by U.S. carriers, the air cargo figures for the U.S.-Korea and U.S.-Japan markets reflect a much narrower gap. (Id.). The addition of KAL service to Chicago and Oakland would spur competition between carriers, lower fares, and promote the development of those markets. However, this will only come about if the U.S. implements the 1980 Memorandum of Understanding.

IV. ACTIONS TAKEN BY KOREA CONCERNING THE 1980 MEMORANDUM OF UNDERSTANDING

The 1980 MOU stipulated several understandings. While the 1980 Agreement has not been ratified, the Korean Government has taken the necessary actions to implement most of the measures agreed upon. U.S. carriers have already been enjoying the benefits which these understandings provide for, such as the settlement of a storage facility problem and exemption of U.S. carrier ground handling equipment from the normally applicable customs duties.

The major issue which has prevented U.S. ratification and implementation of the 1980 Memorandum of Understanding concerns the construction of an additional cargo facility at Kimpo International Airport. The following account of the delays surrounding construction of the Kimpo cargo facility is intended to dispel any misconception that the Korean Government has disregarded its commitments under the 1980 agreement by impeding progress on the new cargo terminal.

The 1980 Memorandum of Understanding provided that the Korean Government would present to U.S. carriers a specific proposal for the construction of a new cargo facility and would provide the option for U.S. carriers to construct the building. The agreement further provided that, if the option was not exercised, the Korean Government would construct the facility on its own.

On May 8, 1980, less than four weeks after the agreement was signed, the Korean Government presented its specific proposal for construction of the new cargo facility to the U.S. carriers. The proposal, which was accompanied by preliminary design sketches, contemplated a facility of 2,688 square meters which would be erected immediately adjacent to the space then being allocated to the U.S. carriers. In a letter dated June 13, 1980, Flying Tiger notified the Korean Government that it was exercising its option to construct the facility and requested that the facility be expanded to comprise 4,032 square meters.

On November 17, 1980, the Korean authorities approved Flying Tiger's request, subject to the requirement that the facilities be constructed in conformity with applicable Korean laws and regulations and that, upon completion, title to the facility be transferred to the Korean Government as prescribed by the National Properties Act, a requirement which all companies in Korea must conform to.

In the months following the approval of its proposal, Flying Tiger did not submit construction plans or other information regarding the facility to the Korean authorities. Six months later, Flying Tiger submitted to Korean authorities a draft agreement to lease premises located at Kimpo in order to develop and construct a cargo facility consisting of 3,360 square meters. Because the draft agreement submitted by Flying Tiger contained terms inconsistent with relevant Korean laws, the Korean authorities advised Flying Tiger that its draft agreement did not

conform to Korean law and provided Flying Tiger with the appropriate forms and procedures to be followed in connection with construction of the facility. In June 1981, Korean officials advised the United States of the recent developments concerning the cargo facility at Kimpo.

On July 13, 1981, noting that Flying Tiger's delay was holding up implementation of the 1980 Memorandum of Understanding, the Korean Ministry of Transport sent a letter to Flying Tiger requesting it to commence construction "at the earliest possible date". Korean officials advised the U.S. State Department of the Ministry of Transport's letter to Flying Tiger. Flying Tiger did not respond to the letter.

Over the next thirteen months, Flying Tiger informally raised several objections, through the U.S. Embassy in Seoul, concerning existing Korean laws governing the construction of facilities at Kimpo Airport. The principal objection concerned the approximately ten year amortization period specified in Korean law -- a requirement which applied to all facilities constructed by Korean Air Lines or any other private company at Kimpo Airport. On June 15, 1982, the Korean authorities advised Flying Tiger that it would be allowed to amortize the new cargo facility over 20 years and requested "timely construction of the air cargo facility for early implementation of the Memorandum of Understanding". The U.S. Embassy in Seoul also was advised of this fact.