TITLE REVIEW – NATURE OF INTEREST
OMNIBUS DEED RIGHTS-OF-WAY: FEE OR EASEMENT

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The purpose of this paper is to discuss the nature of interest that the State of Alaska holds in its highway rights-of-way established by federal Public Land Orders and conveyed to the State in the 1959 Omnibus Act Quitclaim deed. Although the Department of Transportation and Department of Natural Resources have been fairly consistent it their treatment of these highways as easement interests, occasionally a recurring argument that the State received a fee interest in the highway rights-of-way arises and causes confusion with those charged with the mapping and management of these facilities.

Background:

The term "right-of-way"[1] does not clearly define the nature of the interest created or conveyed to the State of Alaska in the Omnibus Act Quitclaim Deed. It may include a range of interests from a limited permit to an easement to fee. In my estimation, the bulk of Alaska's highway rights-of-way were based on Public Land Orders issued by the Department of the Interior prior to Statehood. These PLOs were initially withdrawals of lands from the public domain but over time were converted to easements. In 1959, the Department of Commerce issued the Omnibus Act Quitclaim Deed (QCD) that conveyed approximately 5,400 miles of highway ROW to the State of Alaska. In my paper Highway Rights-of-Way in Alaska 2013[2], I briefly discussed the differing opinions regarding the nature of the interest conveyed and that the most recent Department of Law opinion[3] had concluded that the conveyed PLO rights-of-way were highway easements.

The alternative view argues that the PLO withdrawals were never converted to easement interests prior to Statehood and that under the Equal Footing doctrine, the Omnibus QCD conveyed the entire federal interest to Alaska as opposed any lesser interest that may have been held by the Department of Commerce.

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[1] A right-of-way is a class of easement. See Wessells v. State, Dep't of Highways, 562 P.2d 1042, 1046 n. 5 (Alaska 1977); Jon W. Bruce & James W. Ely, Jr. The Law of Easements & Licenses in Land ¶ 1.06 [1] (1988). An easement is an "interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specified limited purpose." Black's Law Dictionary 527 (7th ed.1999). See also Restatement of Property § 450, cmts. a-d; 4 Powell on Real Property § 34.02[1]; Thompson on Real Property § 60.02; AS 44.88.900(12) (defining "real property" as "land and rights and interests in land, including, without limitation, interests less than full title such as easements, uses, leases, and licenses"). Northern Alaska Environmental Center v. State, Dept. of Natural Resources, 2 P.3d 629 (FN38)(Alaska June 2, 2000)

[2] Available on-line at http://alaskapls.org/standards2013/Highways-2013.pdf (Dated 1/1/13 - minor rev. 3/24/13)

[3] See Nature of property interest/title conveyed to State of Alaska in highway rights-of-way at statehood, Carolyn E. Jones, AAG and Rhonda F. Butterfield, AAG, February 19, 1993, File 661-91-0546.

The most vocal supporter for the alternative view has been former Department of Highways and Department of Transportation Commissioner[4] Bruce A. Campbell, P.E. Campbell's experience with highways in Alaska began in 1952 when he joined the Alaska Road Commission as an engineer. Campbell continued his career as the ARC transitioned to the Bureau of Public Roads and into the State Department of Highways in 1959. His experience in the field and in management commencing with the Alaska Road Commission and through its ultimate transformation to the Alaska Department of Transportation gave Campbell a historical insight into the inner workings of the Territorial/Federal/State highway agency that few others, if any, can claim. And of equal importance as indicated in his writings, Campbell expressed an interest in right-of-way issues that was rarely seen in upper level transportation managers.

As a result of this interest and his extensive experience and collection of archival documents, Campbell wrote a series of reviews and commentary regarding his opinions on whether the State had received a fee or easement interest in the highway rights-of-way that were conveyed to Alaska in the June 30, 1959 Omnibus Act Quitclaim Deed. Several of his writings were apparently initiated as a result of communications between Campbell and DOT&PF Central Region ROW Engineering staff between 2013 and 2014 as a part of the Sterling Highway MP 58-79 project in which the nature of the interest held by the State through the Kenai National Wildlife Refuge was in question.

Campbell's writings included the following:

- August 2010: Commentary to Accompany Photo Donation to Denali Park – 646 pages – "*The subject of this commentary is the Denali Highway between Paxson and Kantishna but the analysis and conclusions apply to all other highways in Alaska that were deeded to the State in 1959. One needs only to substitute a different highway name when using the attachments as a resource.*"
- December 11, 2013: Appendix to Commentary for Photo Donation to Denali Park – "*…I decided to write this appendix to expand its scope to include all of Alaska Highways and road under the jurisdiction of the DOT&PF and express my opinion as to the status of ownership transferred to Alaska at the time of Statehood."*
- December 16, 2013 (Rev. 1/8/14): Analysis of the Quit Claim Deed – "*Reference is made to my 2010 Commentary and its 2013 Appendix concerning Highway ownership by Alaska as a result of the Statehood Act of 1959."*
- December 20, 2013: Letter to Karen Tilton, (R&M Consultants) – "*Fee ownership by either the Feds or the State is the only answer that makes sense."*
- January 10, 2014: Review of Attorney General Informal Opinion of February 19, 1993 – "*It appears that the authors of the AG opinion were the first of the hundreds involved in the*

[4] Campbell served as Commissioner of Highways between 1971-1974 under the Egan administration and as Commissioner of DOT&PF from 1993-1994 under the Hickel administration.

transfer of highways from the United (sic) Government to the new State of Alaska to believe that easements were the basis of transfer."

- January 15, 2014: Addendum to My Review of the AG Opinion of Feb. 19, 1993 – *"The roads administered by the ARC as authorized by the Secretary of Interior on March 24, 1949 (see tab 23) were roads within areas reserved for highways. They were not easements."*

Campbell's review strongly concludes that the PLOs did not create easements, that PLO 1613 was invalid, that the QCD could only convey a fee interest and that the Omnibus Act[5] and the "*Equal Footing Doctrine*" obligated the federal government to convey a fee interest in the PLO based highway rights-of-way to the State of Alaska. He favors an earlier 1985 AGO informal opinion asserting fee title to the highway ROW over a later 1993 AGO informal opinion overruling the earlier opinion but does not explain why during his two terms as Commissioner, there is no directive to staff via manual, policy or procedure to commence managing the PLO based highway rights-of-way as if the State had received a fee interest in them.

Recognizing that there are two significantly diverse views of this issue, the questions are:

- Why is this issue still unsettled more than a half century after statehood?
- Which legal opinion is correct and what are the implications of the alternative (fee) view?
- What has been the state's policy, procedure and practice regarding this issue?

My introduction to the issue commenced soon after I joined the Northern Region ROW Section as the ROW Engineering Supervisor in October of 1986. With 13 years managing the development of ROW titles and plans and the following 15 years as Regional ROW Chief, title issues were part of the daily diet. The development of ROW titles and plans would often require the advice of the Attorney General's staff to provide legal support for our work product.

Campbell's January 10, 2014 review of the 2/19/93 AGO opinion speaks to the Nature of property interest/title conveyed to State of Alaska in highway rights-of-way at statehood. I requested this opinion in April of 1991 upon recognition that the current and long standing practice of both DNR and DOT&PF to manage the highway ROW as if it was an easement interest conflicted with an October 25, 1985 opinion by AAG Jack McGee and a December 25, 1986 reference by AAG Linda Walton.

Chronology:

The following is a chronology of correspondence and documentation relating to the "easement v. fee" issue that led to and followed the 1993 opinion.

1949-1951: During this period there is a series of correspondence circulating between the Bureau of Land Management (BLM), the Alaska Road Commission (ARC), and the Department of Interior, DC (DOI) and the "Alaska Field Committee". The "Field

[5] Alaska Omnibus Act, 73 Stat. 141, § 21(a)

Committee" was a working group of DOI agency representatives that included the Alaska Road Commission, the Geological Survey, the Governor's Office, the Alaska Public Works Agency, the Bureau of Land Management, the Bureau of Mines, the Alaska Native Service, the Alaska Railroad, the National Park Service, the Bureau of Reclamation, the Bureau of Mines, the DOI Secretary's Office and the Fish and Wildlife Service. The Field Committee periodically met to discuss land policy for Alaska. On August 10, 1949 Public Land Order No. 601 withdrew public lands for highways from the public domain. While there had been earlier PLO's relating to specific highways, this was the first highway PLO of broad application. Prior to and after the implementation of PLO 601, the Field Committee and others within DOI raised concerns about the effects of highway withdrawals on the disposal of lands.

In a September 9, 1949 letter, BLM Regional Administrator, Lowell Puckett said "*There have been several discussions as to the designation of road rights-of-way as easements or withdrawals. You will probably recall that I have indicated our feeling in the Anchorage office that easements would present far fewer problems to the disposal of land.*" But resistance was met from BLM Assistant Secretary Warns. In a January 26, 1950 memo to Lowell Puckett, Warns said "*I consider a withdrawal for the establishment of highway rights-of-way as being preferable to an easement....Nor am I impressed with the argument that the withdrawals will unduly increase administrative difficulties.*"

An October 10, 1950 BLM memo discussing the issue provided the following comments: "*Although Region VII, Bureau of Land Management, had attempted to have easements created rather than withdrawals, before the actual withdrawal order was issued, we had not even then begun to comprehend to what extent the Executive Order would complicate the functions of the Bureau of Land Management....The situation is very grave. The results of the promulgation of Executive Order 601 were not foreseen, but now that we are operating with it in effect, we can see its failings, and we should act accordingly.*"

An October 24, 1950 letter from the Alaska Field Staff Director Kadow to DOI Assistant Secretary Doty identified several right of way issues that had been placed on the Committee's agenda for consideration, including the issue of easements versus withdrawals. The Committee concluded that "*...the establishment of withdrawals along Alaska's highways is creating considerable confusion and is retarding development along these highways.*" The problems resulting from withdrawals included a requirement that all highway rights-of-way adjoining homestead or other entries be surveyed prior to patent. A patent could be made subject to an easement and relieve BLM of the burden in terms of both time and funds to perform these surveys. Homestead and other entries were not permitted

to straddle a highway ROW if it was based on a withdrawal. A highway easement would not segregate the homestead claim and so would be allowed. Realignments of highways based on withdrawals would leave many small but mostly unusable parcels under federal ownership and management where an easement interest, once released, would return the unencumbered use of the land to the owner of the fee estate. Other issues included the unintentional segregation of homesteader cultivated land from homes when the exact location was not known by BLM and delays in issuing patents under the Veteran's program due to survey requirements. *"After reconsidering all of the above facts the Alaska Field Committee unanimously recommends that easements instead of withdrawals be created for all road rights of ways in Alaska including those already established as withdrawals."* These discussions among the DOI agencies eventually led to PLO 757 and SO 2665 on October 16, 1951. These orders revoked the withdrawals for roads classified as "Feeder" and "Local" and replaced them with highway easements. Later, in 1958, PLO 1613 applied the same conversion to easements for the remaining "Through" classified roads. This pre-statehood documentation of the withdrawal vs. easement issue among the Alaska Field Committee members establishes a clear intent and understanding by the federal and territorial representatives that the PLO based highway rights-of-way were to be based on easements. To remain consistent in their management of federal lands through and after Statehood, these federal land managers would have to restrict their conveyance of these properties under the Omnibus QCD to an easement interest.

12/22/81: AAG Larry Wood to AAG Jack McGee – BLM Position on State Highway Ownership This memo cites an 11/23/81 memo from AAG Greene that "*It is BLM's position that this quitclaim deed transferred only an easement in the highway right-of-way and not fee since the Department of Commerce only had a limited interest in lands.*"

7/28/82: State Director (BLM) to Division of ANCSA and State Conveyances – Reservation of Rights-of-Way Issued to State of Alaska in State Selection Patents - BLM Instruction Memorandum No. AK 82-296 notes that "*In the case of lands patented to the State, which are crossed by rights-of-way issued to the State, regardless of which State agency is responsible for the right-of-way, the right-of-way interest held by the State merges with the State's fee upon issuance of the patent, and the right-of-way becomes a nullity."* The many "merger of title" decisions issued by BLM support the federal understanding that the QCD only conveyed an easement interest in the PLO based highway ROW.

6/18/84: Anderson, Director to Wunnicke, DNR Commissioner – PLO 1613 and Omnibus Lands - In a discussion regarding PLO 1613 Highway lots and their resulting title conflicts, the memo notes that "*BLM has consistently taken the position that the State received an easement from the Omnibus Act."* and *"The two State*

departments concerned, DNR and DOT/PF have never established a strong formal position as to the title acquired by the QCD; whether we received an easement or fee title." - "*...generally, DOT/PF has claimed that the State received fee title."*

3/6/85: Verniman, Acting BLM District Manager to Knapp, DOT&PF Commissioner – Responding to what in BLM's view is a trespass case relating to a non-highway use of a PLO highway easement, the letter starts with the statement: "*In the years since Statehood, the question of who holds fee title to Alaska's roads and highways has remained unresolved."* Citing the State's position that it received a fee interest in the Omnibus Act highways, Verniman states that "*The net result has been a great deal of confusion for private land owners in Alaska and for the public at large."*

5/20/85: AAG McGee to Knapp, DOT&PF Commissioner – BLM's Jurisdictional claim over Richardson Highway right-of-way located at approximately 57.4 out of Valdez – This letter relates to a specific situation where BLM has charged a person with trespass for a structure within a PLO 1613 ROW after DOT has issued an encroachment permit for the structure. BLM argues that as it owns the fee underlying the highway easement and that the placement of the structure constitutes a use beyond the scope of the highway easement, it must be removed. AAG McGee's letter argues that BLM has not retained any interest in the "road easement" while at the same time suggesting that the entire federal interest was conveyed to the State via the Omnibus Act QCD. The letter concludes that BLM retains no interest in the lands associated with the PLO 1613 highway ROW.

10/25/85: AAG McGee to Hickey, DOT&PF Special Assistant – BLM's jurisdictional claim of underlying fee beneath Alaska highway easements – This informal AGO opinion was reported in Westlaw (1985 WL 70133). The opinion formalizes the McGee letter of 5/20/85. BLM asserts that where a PLO Highway easement crosses BLM lands, they retain the authority to control and permit uses that fall beyond the scope of a highway easement. (This would also apply to other federal agencies where a PLO ROW crosses lands assigned to NPS, USFWL, Forest Service, Military, etc.) Rather than focusing on the trespass case that was the basis for the 5/20/85 letter, the opinion cites BLM's assertion that placement of utilities within a PLO easement that crosses federal lands also requires their permission. McGee suggests that BLM is only asserting authority over underground or sub-surface placement of utilities, but I believe that BLM's interpretation of the scope of a highway easement under federal law does not include the right to unilaterally permit any utilities. (See 23 CFR § 645.206(d) "*When utilities cross or otherwise occupy the right-of-way of a direct Federal or Federal-aid highway project on Federal lands, and when the right-of-way grant is for highway purposes only, the utility must also obtain and comply with the terms of a right-of-way or other occupancy permit*

for the Federal agency having jurisdiction over the underlying land." As the preceding CFR governs the federal agency providing the bulk of Alaska's highway funds, it is difficult for Alaska to reject BLM's assertion without placing highway funds at risk. 17 AAC 15.021(f) & (i) Application for utility permit is consistent with the CFR.)

The opinion focuses on the Omnibus Act section 21(a) language that McGee says "*...can only mean all interests in lands held by the United States.*" But he does not speak to whether the Department of Commerce had authority to convey the entire federal interest. He then discusses the federal obligation to treat Alaska similar to Hawaii under the "equal footing doctrine" and read the "*...Alaska Omnibus Act as requiring the transfer to the State of Alaska of the full interest of the United States in those public roads...*" In conclusion, the opinion holds that the Omnibus QCD conveyed fee title to the PLO rights-of-way where they crossed federal lands at statehood with the following statement that "*...the quitclaim deed itself, since it was issued pursuant to a federal statute, must be interpreted as having conveyed the entire federal interest in these roadways to the state."*

12/15/86: AAG Walton to McMullen, DOT&PF Northern Region Director – Fairbanks – Nenana Road – This memo from the AGO to Northern Region DOT discusses a situation where an erroneous interpretation by DNR of a PLO 1613 ROW width resulted in DNR conveying away the outer 50-feet of the Fairbanks – Nenana highway adjoining a particular subdivision. In this memo, Walton makes a statement based on the 1985 McGee opinion that "*The State of Alaska has always taken the position that the Commerce deed transferred to the state, all the federal government's interest in the roads."* Walton expresses concern that to argue in this case that DNR could not have unilaterally conveyed away the State's entire interest would conflict with the State's assertion that the Omnibus QCD conveyed the entire federal interest.

4/25/91: Miller, NR ROW Chief to Sisk, Director, Design & Construction – Omnibus Act Right of Way Interest – This memo from the Northern Region ROW Chief explains the conflicts arising from the 10/25/85 McGee opinion and DOT/DNR's operating practices, policies and procedures. It is noted that a formal AGO opinion may be required.

5/1/91: Turpin, DOT&PF Commissioner to Cole, Attorney General – Request for a Formal Legal Opinion – This request from the DOT&PF Commissioner to the Attorney General notes that the Department has always claimed a highway easement was transferred to the state by the Omnibus Act and that the 1985 McGee opinion, if adopted as the State's position would be opposed by federal land managers and "*...have a major effect on other land owners in the state.*" This memo requests a

second opinion and if the results are in accordance with the McGee informal opinion, that a formal AG's opinion be issued. The memo then notes that "*Mr. McGee agrees a second opinion should be rendered because of the nature of the change suggested.*"

2/19/93: Cole, Attorney General to Turpin, DOT&PF Commissioner – Nature of property interest/title conveyed to State of Alaska in highway rights-of-way at statehood – AAG's Jones and Butterfield issued this unpublished opinion that claims to overrule the McGee opinion. The opinion concludes that "*...in general, the State of Alaska received from the federal government at statehood only a right-of-way easement for its highways.*" (The conclusion footnotes that this only applies to through, feeder and local roads in existence at the time of statehood and that those lands held by the Secretary of Commerce in fee could have been conveyed in fee by the Omnibus QCD.)

This opinion rejects the McGee conclusion based on the following:
1) The Omnibus QCD could not have conveyed the federal government's entire interest. It could only convey that interest held by the Department of Commerce.
2) The "*equal footing doctrine*" did not obligate the federal government to convey fee title to the highways in the manner of Hawaii or other states.
3) "*With government conveyances, deeds are construed in favor of the federal government and against the grantee in order to prevent the unintentional conveyance of the public domain and the public's rights in its lands.*"

While this opinion was not issued as a "formal" AG opinion, it would be considered as the current operational policy of DOT&PF until revoked.

9/28/93: B. A. Campbell, DOT Commissioner to C. E. Cole, Attorney General – ROW Interest – Transmittal of Historical Analysis – McKinley Park Road – Jurisdiction and Ownership – DOT&PF – Rev. September 13, 1993 – During Campbell's second term as DOT&PF Commissioner, he commissioned a historical review of the ownership of the McKinley Park Road (Denali Highway) in anticipation of requests to install pipeline and other utilities within these rights-of-way. As BLM asserted that permitting of utilities is beyond the scope of a highway easement according to federal law, the review rejects the 1993 Jones/Butterfield unpublished AGO opinion that the Omnibus Act QCD only conveyed an easement interest in most highway rights-of-way. Taking a position that the State received fee title to its highways through the QCD would relieve utilities from having to obtain federal permits where those highways crossed federal lands.

Why does the fee vs. easement issue continue to arise? Many of the "fee" proponents argue on the basis of "state's rights" and "equal footing" that Alaska should have and in fact did receive the

federal government's entire interest in the highway rights-of-way. At a time when the term "federal overreach" is commonplace in political speeches and news articles the federal assertion that Alaska only received the Department of Commerce's "easement" interest is offered as just another example of federal infringement on Alaska's sovereign rights.

One of the preceding quotes is that Alaska has "*always*" taken the position that the QCD transferred a fee interest in the highway ROW to the State. If that is true, how did the State's representation through DOT&PF, the legislature and the courts make it clear that the State was managing the Omnibus QCD highway interests as if they were held in fee?

DOT&PF Policy & Procedure:

- In my 29 years with DOT&PF I had never seen a policy, procedure or manual that advised or directed department staff to manage Omnibus QCD PLO based highway rights-of-way as if the State held a fee interest. To my knowledge the 1985 McGee opinion was never distributed to DOT&PF staff as guidance to now treat these PLO based rights-of-way as properties held by the state in fee.

  To manage the Omnibus ROW as if the State held a fee interest would mean that encroachment permits could be issued within them without requiring FHWA approval. Utility permits could be issued in these rights-of-way where they crossed federal lands without the need for the applicant to obtain federal agency approval.

- Disposal of excess lands is the primary area in ROW management where the interest in the existing ROW (fee or easement) must be clear. The authority for disposal of highway ROW does not clearly distinguish between rights-of-way held in fee as opposed to rights-of-way held as an easement interest.[6] In practice, when DOT&PF owns the land in fee, the department will dispose of the excess land by a Commissioner's Quitclaim Deed. If it owns an easement interest, it will generally dispose of the ROW using a Commissioner's Deed of Vacation.

  Prior to 1988 a Commissioner's Deed of Vacation did not name a grantee. A Deed of Vacation included the statement that DOT&PF "*acting under the authority of the Alaska Statutes, Section 19.05.070, conveys, quitclaims and otherwise vacates unto those persons or their heirs, successors or assigns in whom the following property was vested at the time of acquisition by the State of Alaska or its predecessors in interest.*" While the old form of the Deed of Vacation uses the terms "*convey*" and "*quitclaim*", a Deed of Vacation served to release a highway easement and by operation of law returns the unencumbered use of the land to the owner of the underlying fee estate. In 1988, A.S. 40.17.030 was enacted which required among other things that the document provide the names and addresses

[6] A.S. 19.05.070

of the Grantor and Grantee for indexing purposes. As disposal of an easement was generally accomplished by a Deed of Vacation, this created a potential title problem if the incorrect grantee was named due to error or obscure title. One resolution was to insert a paragraph that *"The Grantee named is the ostensible owner and is named for recording indexing only. The unencumbered use of the land underlying the vacated easement reverts by operation of law to the owner of the fee estate, whomever that may be."*

The standard practice during my tenure with DOT&PF and the apparent practice prior to that time based on a review of archived land disposal documents is that highway ROW based on PLO and transferred to the State under the Omnibus QDC were released using a Commissioner's Deed of Vacation on the basis that they constituted an easement interest.

Legislative Actions:

- A.S. 9.45.015 and A.S.9.45.052 both relate to PLO 1613 highway rights-of-way where the acquisition of the "highway lot" representing the fee interest under the highway easement had been manipulated by an unscrupulous patentee to extort excessive access fees from another adjoining owner. Owner "A" sold a parcel of land adjoining the Glenn Highway ROW to owner "B", while he had a pending application before BLM for the adjoining "highway lot". Once patent to the highway lot was received, owner "A" petitioned DOT to vacate a strip of land between the road and the land now held by owner "B". Once the vacation was approved, owner "A" informed owner "B" that they would have to cross his fee property to gain access to the highway and to do so would require a significant payment. This action eventually reached the ear of a legislator and their solution was to place the burden of proof on the grantor of land adjoining a highway to show that such a conveyance did not convey the owner's interest up to the highway centerline. The second statute provided another resolution through the state's adverse possession laws. Both statutes make reference to "*...an easement created by Public Land Order 1613.*" These references suggest that the legislature recognized these solutions were necessary because the State only received an easement interest in the PLO based highway ROW transferred under the Omnibus QCD.

  Legislative Committee hearings were held for the bills establishing A.S. 9.45.015 and A.S. 9.45.052 in 1986. One of the DOT&PF representatives at the hearings was AAG McGee. McGee testified at the House Finance Committee on 3/14/86, several months after his 10/25/85 opinion regarding the State's receipt of fee title under the Omnibus QCD for the PLO highway interests. McGee testified that *"In 1958, the Secretary of Interior issued Public Land Order 1613 which revoked the PLO, creating easements in place of the withdrawals."* While this statement alone is not inconsistent with his 1985 opinion that the entire federal interest (fee) was conveyed to the State, the conflicts that arose and required resolution through these statutes could not have existed if the State had asserted fee title to the Glenn Highway right-of-way.

Alaska Supreme Court:

- Simon v. State 996 P.2d 1211, Alaska, 2000: *"At statehood, the federal government conveyed all rights and interest in Alaska's highway lands to the state…The patent reserved the highway easement that ran across it, as established by PLO 1613."* In this case the Court affirmed the judgment of the Superior Court. The Superior Court found that the highway easement included the right to use the subsurface land or materials to the extent necessary for the purpose of the easement. The T&M entry leading to patent in this case was post-statehood. An assertion by the State that it held fee title in this PLO based Omnibus QCD highway ROW, if supported by the Courts, would have eliminated the basis of the plaintiff's claim. The term "easement" is used 46 times in this decision.

- State v, Alaska Land Title Ass'n 667 P.2d 714, Alaska 1983: *"The State of Alaska and the Municipality of Anchorage are claiming highway easements for local, feeder, and through roads in excess of easement widths specified in patents issued to Alaska property owners."* While many arguments are raised, all parties in this case appear to consider the PLO based highway interests to be easements. The term "easement" is used 80 times in this decision.

We know of no Alaska cases in which the courts have concluded that PLO based highway ROW, transferred under the Omnibus QCD, conveyed the entire federal interest in fee as opposed the easement interest held by the Department of Commerce. It is important to note that while there are many cases that recognize the conversion of PLO rights-of-way from withdrawals to easements prior to statehood, the Simon case is the only one where the property in question was entirely federal land at the time of the Omnibus QCD. Had the state intended to argue that the entire federal interest was conveyed under the QCD, this would have been the opportunity to do so.

- State, DOT&PF v. First Nat. Bank of Anchorage 689 P.2d 483, Alaska 1984: The issue in this case is whether a homesteader's vested rights commenced at date of patent or date of entry when considering a "valid existing right" under PLO 601. The Court chastised the State for repeating arguments previously rejected in State v. Alaska Land Title Association and Resource Investments v. State. The Court cited the 1923 U.S. Supreme Court decision in Stockley v. United States *"…that an unperfected homestead entry was within an excepted category of 'existing valid claims' excluded from the terms of a government withdrawal order."* More important and in the context of the "*fee vs. easement*" issue, the Court noted in footnote 13 that "*The government should not be permitted retroactively to invalidate the deliberate actions of its officers after they have been reasonably relied on for 34 years."*

The preceding case would suggest that when the actions and policies of the State treat PLO based highway rights-of-way transferred under the Omnibus QCD as easements for over a half century, and land owners adjoining the highway system have reasonably relied upon such actions and

policies, the State should be estopped from now asserting that the QCD transferred the full federal interest or fee in the highway ROW.

PLO/QCD Fee Interest Exception over State Owned Lands:

Where federal lands were subject to PLO rights-of-way prior to statehood, and those lands have since been conveyed to the State of Alaska under the Statehood Act or other authorities, the State of Alaska and more specifically DOT&PF can be said to hold fee title to the highway right-of-way.

This is an exception that is currently being discussed in regard to the status of the Seward Highway right-of-way where it crosses the Chugach State Park. The position previously held is that where the State through DNR accepts patents for federal lands subject to Omnibus QCD highway easements, DNR would hold fee title to the highway corridor subject to DOT&PF's interest in and management of the highway easement.

It has also been suggested that the doctrine of "*merger of title*" would have extinguished the highway easement when the State also received the underlying fee interest. This is certainly the federal position and they would often issue "*merger of title*" decisions as a part of patents to the State where the lands in question were crossed by Omnibus QCD highways. The more reasonable view is that public easements, unlike private easements, are split into use and control rights.[7] The right to control and manage government easements for the benefit of the public is located in the state or other government body while the right to use the easement rests with the public. As the government holds these easements in trust for the public, they cannot be terminated through "*merger of title*". The "*merger*" argument was considered the in a 2009 Superior Court case regarding the Nikishka Beach road[8]. In discussing the management of the highway easement for the public benefit, the court stated: "*While control of the benefit includes the right to transfer, terminate, or otherwise dispose of the servitude benefit, legal title does not trigger the doctrine of merger for the purposes of a public easement. To find otherwise would mean that all public roadways deeded to the State of Alaska by quitclaim deed by the federal government in 1959 were automatically vacated upon issuance of the federal patent for the remainder of these lands…*"

The Alaska Legislature granted DOT the exclusive power to manage, protect and control the state highway system.[9] To allow the exercise of that exclusive power, the Legislature gave DOT the powers to independently acquire and manage highway rights-of-way, and gave DOT the exclusive power to accept federal property available for highways.[10] As the agency with exclusive right to manage, protect, and control the state highways, DOT must hold all rights, title, and interests held by the state in the state's highway rights-of-way. These provisions relating to the administration

[7] The Law of Easements And Licenses In Land, Bruce & Ely 2001, § 10:27
[8] State of Alaska v. Offshore Systems – Kenai; Case No. 3KN-08-453 CI; Order On Summary Judgment dated July 9, 2009. The case, Offshore Systems – Kenai v. State of Alaska was appealed to the Supreme Court with Opinion No. 6697 issued on July 27, 2012 (282 P.2d 348) but was decided on issues other than merger of title.
[9] A.S. 19.05.010
[10] A.S. 19.05.040

of public facilities and transportation systems are authorized in Alaska's Constitution[11] while at the same time, the Constitution excludes lands used or intended exclusively for governmental purposes such as transportation systems from DNR's public domain authority[12].

At statehood, the Omnibus QCD conveyed easement interests for the PLO based highway ROW to Alaska. Also at statehood, Congress entitled the State of Alaska to select vacant, unappropriated, and unreserved lands to create the state public domain land base.[13] When the state received patent to the selected federal lands subject to the existing highway system, the Alaska Constitution's definition of public domain prevented lands intended for exclusive governmental purposes (transportation) from falling under DNR's administrative authority. As only DOT&PF has authority to accept federal property for highways and public works, the fee title to the lands received under the federal patent would necessarily fall under DOT&PF jurisdiction.

While the Seward Highway exception is currently being discussed in the context of a specific project, the assertion clearly has statewide application. Under constitutional and statutory authorities, the transportation system is excluded from the DNR managed state public domain and DOT&PF retains exclusive authority to hold title to the transportation system. The discussion to this point has been in regard to the pre-statehood PLO based highway rights-of-way that were conveyed to the State under the Omnibus Act QCD. The logical extension would also apply to post statehood grants of ROW from the federal government to DOT&PF over lands where Alaska subsequently received patent under the Statehood Act. A follow-up question would be whether the preceding constitutional provisions would allow DNR to continue its practice of issuing ROW Permits or Interagency Land Management Assignments (ILMA) to DOT&PF for public highways and airports or whether a transfer of fee title is implied or required.

This last discussion regarding fee or easement title to highway ROW across state owned lands is fairly recent and until it becomes clarified through the AGO or in Department policy it is recommended that no action be taken based on it until directed.

Summary and Conclusion:

Highway rights-of-way in Alaska created by public land order prior to statehood were conveyed to the new state as easement interests.

- The progression of pre-statehood highway ROW related PLOs clearly track the conversion of highway corridor withdrawals into easements for all classes of highways.
- The federal record recognizes the intent and need for converting the withdrawals to easements.
- The Department of Commerce managed and held title to the highway easements prior to Statehood.

[11] Article 8, Section 5. Facilities and Improvements.
[12] Article 8, Section 6. State Public Domain.
[13] Alaska Statehood Act, 72 Stat. 339, § 6(a) & (b)

- The Omnibus Quitclaim Deed only transferred the highway right-of-way interest held by the Department of Commerce to the State of Alaska.
- Since statehood, State policies and procedures have directed management of the PLO based highway rights-of-way across private and federal lands as if they were easement interests.
- Legislation and Alaska Supreme Court decisions related to PLO based highway rights-of-way have treated them as easement interests.
- The "Equal Footing Doctrine" did not require conveyance of the entire federal interest in the highway rights-of-way at statehood.
- The 1985 AGO McGee opinion is inconsistent with the history, evidence and practice relating to the issue and was overruled by the 1993 AGO Jones/Butterfield opinion.
- The Campbell position, while commendable in its support of State's rights, is without sufficient basis to overcome the history, evidence and practice relating to the fee vs. easement issue.
- The 1993 AGO Jones/Butterworth responds to the "*fee interest*" arguments, is supported by the documentary evidence and is consistent with past policy, procedures and practice. This opinion supports the position that the State received an easement interest in the PLO based, QCD transferred highway rights-of-way.