MEMORANDUM

State of Alaska
Department of Law

TO: Frank G. Turpin
Commissioner
Department of Transportation & Public Facilities

DATE: February 19, 1993

FILE NO.: 661-91-0546

TEL NO.: 269-5100

SUBJECT: Nature of property interest/title conveyed to State of Alaska in highway rights-of-way at statehood

NORTHERN REGION
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COMMISSIONER'S OFFICE

You requested an Attorney General's opinion concerning the nature of the title held by the State of Alaska in highway rights-of-way received from the United States at statehood under the Alaska Omnibus Act. The question is whether the state received fee simple title to the land within the rights-of-way, or only a right-of-way easement over that land. Our conclusion to the narrow question asked is that, in general, the State of Alaska received from the federal government at statehood only a right-of-way easement for its highways.[1]

The conclusion reached here that, in general, the State of Alaska received "easements" from the United States rather than "fee simple" title, is contrary to that stated in our earlier informal opinion. See 1986 Inf. Op. Att'y Gen. (663-86-0473; October 25). The 1985 opinion concluded that the State of Alaska had received the entire interest of the United States, including the fee interest, in the roads conveyed to Alaska at statehood. We now overrule that opinion.

[1] This conclusion has two caveats. First, it applies only to those through, feeder, and local roads in existence at the time of statehood. Second, the conclusion is general in nature. Because the Secretary may have held a fee simple interest as to some lands, it is possible that fee simple interests were conveyed as to particular parcels of land. As the analysis shows, the interest conveyed to the State of Alaska at statehood was whatever interest the Secretary of Commerce held at the time.

I. THE TITLE STATUS OF ROADS IN ALASKA BEFORE STATEHOOD

A. Public Land Orders

The vast majority of land in the Territory of Alaska before statehood was owned by the United States of America. The major roads in Alaska were first protected by the United States when the federal government withdrew a fee or easement interest in certain affected lands by a series of public land orders (PLO's) and Secretarial Order (DO) 2665. Those PLO's most applicable to your question are: 601, 757, and 1613. PLO 601, effective in 1949, reserved certain specified lands along specified roads for highway purposes, and set the widths of through, feeder, and local roads.[2] In 1951, PLO 601 was modified by PLO 757 and Secretarial Order (DO) 2665 simultaneously, which together retained the reservation of a fee interest for through roads, but changed the interest held in feeder and local roads to that of a "right-of-way or easement for highway purposes". The reservation and rights-of-way or easements specified in DO 2665 attached "as to all new construction involving public roads in Alaska." The purpose of this change was to permit land previously split into separate parcels by a crossing feeder or local road to qualify as a single contiguous parcel for homesteading purposes.

B. Public Land Order 1613

The last PLO before statehood was PLO 1613, filed April 7, 1958 pursuant to the authority in 43 U.S.C.A. §971(a). PLO 1613 expressly revoked the PLO 601 reservation of a fee interest in specified lands for the through highways in Alaska, and established an "easement for highway purposes, including appurtenant protective, scenic, and service areas, over and across [certain described] lands" of 150 feet on each side of the centerline of the through highways. PLO 1613, Sec. 3. The effect of PLO 1613 as to through roads, and PLO 757 and DO 2665 jointly as to feeder and local roads was to dissolve the right-of-way **fee** interest in all federal roads in Alaska, and to replace it with an easement interest.

The provisions of PLO 1613 also converted certain withdrawals parallel to highways to easements: 50-foot widths for telephone lines and 20-foot widths for pipelines. These easements

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[2] Those roads are named and listed in PLO 601, and also in State v. Alaska Land Title Association, 667 P.2d 714, 718, n. 4 (Alaska 1983).

were parallel to the highway, and could run next to or within the highway easement.

The last subject dealt with by PLO 1613 was the grant of a preference right to adjoining landowners to purchase the land released from withdrawal. PLO 1613, para. 7, specified that:

> Owners of such private lands shall have a preference right to purchase at the appraised value so much of the released lands adjoining their private property as . . . equitable, . . . only up to the centerline of the highways . . . .

In summary, a review of PLO 1613 as a whole shows an intent: to convert the remaining Alaska highway withdrawals to easements; to convert the other rights-of-way for telephone lines and pipelines to easements; and to permit sale of the fee interest underlying these highway and utility easements to qualifying adjoining property owners.

C. Transfers of Jurisdiction over Alaska Roads

Jurisdiction over roads in Alaska changed over the years prior to statehood. From 1905 to 1932, roads in Alaska were administered through the Alaska Road Commission, under the Secretary of War. In 1932, Congress transferred the Alaska Road Commission to the Department of the Interior, and provided that "The Secretary of the Interior shall execute or cause to be executed all laws pertaining to the construction and maintenance of roads and trails and other works in Alaska . . . ." 48 U.S.C.A. § 321(a), repealed June 25, 1959. The Secretary of Interior was also granted the "power, by order or regulation, to distribute the duties and authority hereby transferred." 48 U.S.C.A. § 321(b).

Three years before statehood, Congress transferred the functions, duties, and authority over roads in Alaska from the Department of the Interior to the Department of Commerce. Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374, 5 U.S.C.A. § 485, repealed August 27, 1958, This authority remained in the Secretary of Commerce until statehood. See § 119 of Pub. L. No. 85-767, August 27, 1958, 72 Stat. 898, 23 U.S.C.A. § 119, repealed July 1, 1959.

Section 107(e) of the 1956 Federal-Aid Highway Act authorized the Secretary of Commerce to distribute the functions and duties transferred by the Act as the Secretary deemed appropriate. On August 17, 1956, the Secretary of Commerce

delegated authority over the construction and maintenance of roads and other works in Alaska by transferring the Alaska Road Commission to the Bureau of Public Roads. 21 Fed. Reg. 6682 (September 5, 1956). A few days after that delegation, the Secretary of Interior and the Secretary of Commerce agreed that the easements formerly managed by the Alaska Road Commission for the Department of the Interior (1) would be transferred to the Department of Commerce and (2) would remain in full force and effect. Memorandum of Agreement dated August 15, 1956, 21 Fed. Reg. 6395-96 (August 24, 1956). The next transfer of jurisdiction occurred at statehood.

II. THE STATE'S INTEREST IN ROADS AT THE TIME OF STATEHOOD

A. The Alaska Statehood Act

The Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (July 7, 1958), in Sec. 5, specified:

> Sec. 5. The State of Alaska and its political subdivisions, respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public land.

For the United States, the Section 6 exclusion included public lands, except those lands granted and subject to selection by the State of Alaska. The listed purposes for state land selection included fish and wildlife resources, schools, mineral permits, licenses, contracts, colleges, submerged lands, and other purposes. Land for highways and utilities is not listed in Section 6. Read together, sections 5 and 6 mean that the Alaska Statehood Act does not transfer title in the United States' highways to the State of Alaska.

B. The Alaska Omnibus Act and Quitclaim Deed

Shortly after statehood was granted, Alaska received the interest in its roads from the federal government pursuant to the Alaska Omnibus Act, Pub. L. No. 86-70, 73 Stat. 141 (June 25, 1959), and the resulting Quitclaim Deed. The Alaska Omnibus Act, in the "Highways" section, provided as follows:

> Sec. 21. (a) The Secretary of Commerce shall transfer to the State of Alaska by appropriate conveyance without compensation, but upon such terms and conditions as he may deem desirable, all lands or interests in lands, including buildings and fixtures, all personal property, including machinery, office equipment, and supplies, and all records pertaining to roads in Alaska, which are owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska [with two specified exceptions] . . . [3]

(emphasis added). The resulting Quitclaim Deed provided:

> [T]he Secretary of Commerce, Grantor, . . . does hereby devise, release, and quitclaim unto the State of Alaska, Grantee, its successors and assigns, subject to the condition set forth below, all rights, title, and interest of the Department of Commerce in and to all of the real properties . . . now owned, held, administered or used by the Department of Commerce in connection with the activities of the Bureau of Public Roads in Alaska . . . .
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> . . . subject, however, to the condition that if the said Grantor . . . determines and publishes notice [within a certain specified time] . . . that all or any part of the above premises (sic) or any interests therein are needed for continued

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[3] The same section also provided:

> (c)(1) The State of Alaska shall be responsible for the maintenance of roads, including bridges, tunnels, and ferries, transferred to it under subsection (a) of this section, as long as any road is needed for highway purposes.

This provision that the State of Alaska be responsible for maintenance of the roads transferred is consistent with the conveyance of easements rather than fee simple title, because ownership of the land does not preclude a delegation of the maintenance responsibility to the holder of the easement.

> retention in Federal ownership for purposes other than or in addition to road purposes, the Grantor may enter and terminate the estate hereby quitclaimed . . . .

Quitclaim Deed, dated June 30, 1959, recorded in Anchorage Recording District at Book 391, Page 12, and Juneau Recording District, Book 90, Page 243 (emphasis added).

It is a well-established principle of law that a Quitclaim Deed conveys only the interest held by the grantor. See, e.g., Anchorage v. Nesbett, 530 P.2d 1324, 1329, and n. 9 (Alaska 1975). Although Congress could have established that specific interests be conveyed to the State of Alaska, such as all fee simple interests, or all easements, Congress chose not to specify those interests. Instead, Congress directed that the "lands or interests in lands" to be conveyed to the State of Alaska were "owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska," whether they be interests in fee simple, easements, or anything else. Alaska Omnibus Act, 73 Stat. 141 at sec. 21(a) (1959).

By reason of the PLO 601, 757 and 1613 and DO 2665, however, the Department of Commerce generally administered only easements for highway purposes, and did not control the fee interest underlying the easements. Supra, at 1-3. See also State v. Alaska Land Title Association, 667 P.2d 714, 718, 719 and nn.5, 6, 720, 723 and n.12 (Alaska 1983), cert. den., 464 U.S. 1040, 104 S. Ct. 704. Therefore, the only interest that the Secretary of Commerce could convey to the State of Alaska under the Alaska Omnibus Act was an easement. Thus the Alaska Omnibus Act and the Quitclaim Deed, read as a whole, left the fee interests underlying the easements conveyed pursuant to section 21(a) of the Alaska Omnibus Act in the ownership of the United States.

C. Arguments for the Fee Interest

While there are some arguments for the proposition that the state received a fee simple interest, none of them are compelling in light of the right-of-way interests established under the Public Land Orders, the plain language of the Omnibus Act and Quitclaim Deed, related case law and general principles of law.

1. Isolated Language in the Omnibus Act

One argument that the state received a fee interest in its roads is based on the words "all lands or interests in lands"

in the Omnibus Act, and the words "all rights, title, and interest" in the Quitclaim Deed. 1986 Inf. Op. Att'y Gen. (663-86-0473; October 25) at 2-3. Based on those words, it can be argued that the United States, as the owner of the fee in those lands, conveyed all of its interest in the lands where the roads are located, and therefore, the state received fee simple title to the roads.

However, this argument ignores the qualifying language in both the Omnibus Act and the Quitclaim Deed, which each contain two qualifying clauses. The lands conveyed are restricted to such lands or interest in lands: (1) "which are owned, held, administered by, or used by the Secretary"; and (2) "in connection with the activities of the Bureau of Public Roads in Alaska . . . ." Thus, it cannot be said that the lands conveyed to the state consisted of "all lands or interests in lands" held by the United States and all departments thereof. The lands conveyed are clearly restricted and plainly described.

2. Merger of Interests

A second argument that the state received a fee simple interest in its roads is based on the concept that where the owner of two different interests (such as fee simple and easement) is the same, i.e., the United States, the interests merge and become one. 28 C.J.S. Easements sec. 57 (1941). This argument overlooks the fact that different departments and different Secretaries of those departments in the federal government had the legal responsibilities associated with those interests in Alaska, and those responsibilities may very well have been different, or even at cross-purposes. This argument also overlooks the qualifying language described in the previous paragraph.

3. The "Equal Footing" Doctrine

The "equal footing" doctrine has also served as a basis for the argument that the State of Alaska received fee simple title to its roads in the conveyance at statehood. 1986 Inf. Op. Att'y. Gen. (663-86-0473; October 25) at 3-4. The "equal footing" doctrine holds that when a state is admitted to the union of states that make up the United States, it is admitted as an equal to the other states. Because the State of Hawaii received fee title to its roads at statehood shortly after Alaska's statehood, we previously held that the State of Alaska was also entitled to receive the fee interest in its roads, as a matter of "equal footing".

However, the "equal footing" doctrine has not been interpreted so broadly. The doctrine applies to states' political

rights, not to economic standing. State of California ex rel. State Lands Commission v. United States, 457 U.S. 273, 102 S. Ct. 2432, 73 L. Ed. 2d 1 (1982). The application of the "equal footing" doctrine is best stated in United States v. State of Texas, 339 U.S. 707, 70 S. Ct. 918, 922, 94 L. Ed. 1221 (1950):

> The "equal footing" clause has long been held to refer to political rights and to sovereignty. See Stearns v. State of Minnesota, 179 U.S. 223, 245, 21 S.Ct. 73, 81, 45 L.Ed. 162 [1900]. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. See Stearns v. State of Minnesota, supra, 179 U.S. pages 243-245, 21 S.Ct. pages 80-81. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.

While the "equal footing" doctrine has some application to the property rights of the states, such as navigable waters, the doctrine recognizes that the states came into the union on different terms and with different amounts of property within their borders. For example, Congress specifically declared that federal legislation in 1841, 1850, and 1862 providing certain grants of land for new states did **not** extend to the State of Alaska. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, Sec. 6(l) (July 7, 1958)(emphasis added). Cases subsequent to United States v. State of Texas have recognized that "[t]he power of Congress to dispose of any kind of property belonging to the United States is vested in Congress without limitation." State of Alabama v. State of Texas, 347 U.S. 272, 273, 74 S. Ct. 481, 98 L. Ed. 689 (1954).

There are other examples where the "equal footing" doctrine has been interpreted not to mean "equality." When Hawaii was admitted to the United States, the court upheld the power of the federal government to regulate inter-island air traffic on the theory that the flights were not within the boundaries of the

state, in spite of the "equal footing" argument that the decision would make Hawaii the only state without control of its intrastate air traffic. Island Airlines, Inc. v. C.A.B., 363 F.2d 120 (9th Cir. 1966). In State of Oklahoma, et al. v. Federal Energy Reg. Comm'n, 494 F. Supp. 636, 661 (W.D. Oklahoma 1980), aff'd 661 F.2d 832 (10th Cir. 1981), cert. denied 457 U.S. 1105, 102 S. Ct. 2902, 73 L. Ed. 2d. 1313 (1982), the court held that the federal government could regulate the price of natural gas within gas producing states on the ground that "the equal footing doctrine does not require economic equality among the states."

Finally, in two Nevada cases, the "equal footing" doctrine has not prevailed against the federal power to control property within the states. In State of Nevada, et al. v. United States, 512 F. Supp. 166, 171 (D. Nevada 1981), aff'd as moot 699 F.2d 486 (9th Cir. 1983), the court held that the federal government could change its policy from disposal to retention of federal land in the land grant states without violating the "equal footing" doctrine, because the doctrine "does not cover economic matters, for there never has been equality among the states in that sense." Similarly, in State of Nevada v. Watkins, 914 F.2d 1545, 1554-55 (9th Cir. 1990), cert. denied 111 S. Ct. 1105, 113 L. Ed. 2d 215 (1991), the court held that the "equal footing" doctrine did not permit Nevada to refuse to accept all high-level nuclear radioactive waste because Congress has the power to decide the issue under the Property Clause of the Constitution. See generally, United States v. State of Alaska, 423 F.2d 764, 768 (9th Cir. 1970), cert. den., 400 U.S. 967, 91 S. Ct. 363 (1970).

In summary, the "equal footing" doctrine has not required equality among the states in the property interests each state received from the federal government at statehood. It is not a valid basis upon which to claim that the State of Alaska received "fee simple" title to its highways and rights-of-way at statehood.

D. Other Applicable Principles and Rules

The usual presumptions concerning deeds are reversed for deeds from the federal government. Deeds are usually construed against the grantor in order to prevent remnants of property interests from remaining with the grantor and thereby creating confusing land title problems. 26 C.J.S. Deeds sec. 82(e) (1956). 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. There is an

> established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.

United States v. Union Pacific Railroad Co., 353 U.S. 112, 116, 77 S. Ct. 685, 687, 1 L. Ed. 2d 693 (1957), citing Caldwell v. United States, 250 U.S. 14, 20-21, 39 S. Ct. 397, 398, 63 L. Ed. 816 (1919). See also 63A Am. Jur. 2d Public Lands § 73 (1984), citing numerous cases. See also DeBoer v. United States, 470 F. Supp. 1137, 1139 (D. Alaska 1979), rev'd on other grounds, 653 F.2d 1313 (9th Cir. 1981); Southern Idaho Conference of Seventh-Day Adventists v. United States, 418 F.2d 411, 415, n. 8 (9th Cir. 1969). The rule applies where a conveyance is made from the federal government to a state government, and has recently been explained as "the principle that federal grants are to be construed strictly in favor of the United States." State of California ex rel. State Lands Commission v. United States, 457 U.S. 273, 287, 102 S. Ct. 2432, 2440, 73 L. Ed. 2d 1 (1982)(emphasis added), citing United States v. Grand River Dam Authority, 363 U.S. 229, 235, 80 S. Ct. 1134, 1138, 4 L. Ed. 2d 1186 (1960); and United States v. Union Pacific R. Co., 353 U.S. 112, 116, 77 S. Ct. 685, 687, 1 L. Ed. 2d 693 (1957). Applying this presumption to the facts here results only in the same conclusion: that the federal government conveyed highway easements to the State of Alaska in the Alaska Omnibus Act and Quitclaim Deed.

There is also a general rule of law that refutes a "fee simple" argument. That rule holds that, in the absence of statutes to the contrary, the public [government] acquires only an easement in highways, and title to the underlying fee remains in the owner. S. B. Penick & Co. v. New York Cent. R. Co., 111 F.2d 1006, 1007 (3d Cir. 1940); Fontenot v. Texaco, Inc., 271 F. Supp. 753, 755 (W.D. La. 1967), aff'd 397 F.2d 275 (5th Cir. 1968); Finch v. Matthews, 443 P.2d 833, 838 (Wash. 1968). Title to the fee is presumed to be in the abutting landowner. But where the legislature wants to take a fee interest on behalf of the public, it must clearly declare an intention to do so; otherwise, an easement only will be taken. Mott et al. v. Eno, 90 N.Y.S. 608 (N.Y. App. Div. 1904), 74 N.E. 229, 233, 181 N.Y. 346 (N.Y. 1905). In the case of Alaska's roads, there is no legislation, and no expressed legislative intent in either the federal or state statutes, purporting to place any interest other than an easement in the roads in the State of Alaska. On the contrary, the language consistently specifies that an "easement" for highway purposes is taken.

III. SUMMARY

The conclusion that the interest in roads conveyed to Alaska at statehood was generally that of an "easement", is supported by the following:

1. PLOs 757 and 1613, and DO 2665 that repealed an earlier PLO (601) reserving certain lands, and established "easements for highway purposes" in the lands previously withdrawn or reserved.

2. The provisions of the Alaska Statehood Act that the State and the United States would each retain title to all property to which it had title before statehood.

3. The provisions of the Alaska Omnibus Act and the Quitclaim Deed itself, which conveyed only the "lands or interest in lands . . . which are owned, held, administered by, or used by the Secretary [of Commerce] in connection with the activities of the Bureau of Public Roads in Alaska . . .", since those interests were generally easements.

4. The presumption applicable to federal government deeds construing the deed strictly in favor of the federal government. This presumption precludes an inference that the Department of Commerce conveyed a greater interest than it held in the property.

5. The nature of quitclaim deeds, which convey only whatever interest the grantor holds. In this case, the interests held, administered, or used by the Secretary of Commerce were generally easements.

6. The principle that the public acquires only an easement in highways, with title to the fee remaining in the owner, unless the legislature has clearly stated an intention to take the fee interest on behalf of the public. No legislative intent to take the fee interest appears in the legislative history for the ownership of Alaska's highways. Indeed, all of the legislative language speaks of "easements".

IV. CONCLUSION

Based on the above, it is our conclusion that, under the Alaska Omnibus Act and resulting Quitclaim Deed, the State of Alaska received, in general, easements for its roads at statehood.

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