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July 24, 1984

Via DHL

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

Attention: John Moseman

Re: Federal Highway Easements in Alaska

Dear John:

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

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

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

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

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

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

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

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

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

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

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

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

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

vation shall merge with the fee and be forever extinguished.

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

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

In a case which ultimately reached the Alaska Supreme Court entitled State v. Alaska Land Title Association, 667 P.2d 714 (Alaska 1983) (Exhibit H), the Alaska Supreme Court determined that the original withdrawals by PLO 601 culminated in the rights-of-way described in DO 2665. The Court further found that DO 2665 was published pursuant to 48 U.S.C. §321a. The Court determined that 48 U.S.C. §321a was a separate source of power for the Secretary of Interior to create easements from that identified in 48 U.S.C. §321d. That is, the court refused to recogrize 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

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cc: Congressman Don Young
Greg Chapados