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MEMORANDUM State of Alaska

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DATE: October 25, 1985

FILE NO: 366-473-86

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SUBJECT: BLM's jurisdictional claim of underlying fee beneath Alaska highway easements

Over 80% of all the public roads in Alaska have been created by public land orders issued by the federal government. The effect of these land orders was to create public road easements across much of Alaska. See Alaska Land Title Association v. State, 667 P.2d 714 (Alaska 1983). Most of these roads were transferred to the state by the Department of Commerce in 1959.

In reference to those federally created public highways in Alaska that have been transferred to the State of Alaska by the United States Department of Commerce, the Bureau of Land Management of the U.S. Department of Interior (BLM) has taken the position that any placement of below-ground utilities within the right of way of any such highway requires the permission of BLM. BLM is apparently arguing that even though a particular highway may have been transferred to the state by the quitclaim deed issued by the Department of Commerce in 1959, control of the underlying fee remains with BLM and, therefore, any use of this underlying fee requires BLM's permission. 1/

Since BLM's argument turns on its claim to the fee underlying the road easement, an analysis of BLM's argument must begin first with a discussion of the nature of the interest of

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1/ The first observation to be made of this argument is that, if valid, it holds only for those highway segments that presently cross federal lands. Lands over which a highway passes that have been conveyed to the state remain untouched by BLM's argument since the general rule is that those conveyances include the underlying fee subject to the public road easement. See M.B.M Inc. v. Geyer, 655 F.2d 530 (C.A. Virgin Islands (1981)), Evers v. Custer County, 745 F.2d 1196 (9th Cir. 1984), Chickasha Cotton Oil Co. v. Town of Maysville, 249 F.2d 542 (Okl. 1958). As subsequently discussed in this memo, however, there are sound reasons for doubting the validity of BLM's argument.

the United States that was transferred to the state by the quitclaim deed and, second, with a discussion of the nature of the interest that is created by a public road easement. Discussions of both follow below.

a) The Nature of the Interest Transferred to Alaska by the Quitclaim Deed of 1959:

The quitclaim deed of 1959 was issued pursuant to the authority granted by the Alaska Omnibus Act, Pub. Law 86-70, § 21(a), 73 Stat. 141, (1959). The pertinent parts of this act read 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 ...
>
> (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 such road is needed for highway purposes.

It is clear that section 21(a) required the Secretary of Commerce to transfer "all lands or interests in lands, ... 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 ..." (emphasis added). BLM would interpret this language to mean that the Secretary was authorized to transfer only that interest in these roads that was held by the Secretary of Commerce. But this is not what section 21(a) says. The language is clear; it reads: "shall transfer ... all lands and interests in lands ..." This can only mean all interests in lands held by the United States. If it meant to transfer only the duty of maintenance and control (leaving the underlying fee with the United States), section 21(c)(1) would be wholly unnecessary and superfluous. It is, of course, a cannon of statutory construction that a law is to be construed in such a way that all of its parts, taken together,

have a coherent meaning. See Sands, 2A Sutherland Statutory Construction § 46.06, p. 104 and the cases cited in notes 2 and 3.

Since BLM's interpretation would render section 21(c)(1) wholly superfluous, it is not a proper (or even intelligible) reading of section 21(a) of the Alaska Omnibus Act. The correct meaning of section 21(a) is that it required the Secretary of Interior to transfer any and all interest that the United States had in all those public roads in Alaska that were administered by the Secretary of Commerce. The quitclaim, issued by the Secretary, then must be construed as doing exactly what the Act required.

The above interpretation of section 21(a) is in full accord with the manner and mode in which the transfer of roads to the newly formed State of Hawaii was accomplished. Section 5(b) of the Hawaii Statehood Act, Pub. Law 86-2, § 5(b), 73 Stat. 4, (1959) reads as follows:

> Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

Hawaii, upon statehood, got the entire interest of the United States in the public roads located within its boundaries, both surface easement and underlying fee. This fact assumes no small degree of importance because of the "equal footing doctrine." 2/ Since the equal footing doctrine requires all states to be admitted to the Union on an equal footing with each other, an interpretation that would have Alaska receiving title from the federal government to only a surface easement in public roads while Hawaii received the entire interest of the federal government in public roads would obviously violate this constitutional

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2/ See Shively v. Bowlby, 152 U.S. 1 (1893); and U.S. v. Texas, 339 U.S. 707 (1950).

doctrine. Such an interpretation should be avoided and it can be avoided only by interpreting 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 "owned, held, administered by, or used by" the Department of Commerce.

The above discussion casts considerable doubt on the truth of the premise inherent in BLM's argument, i.e., that the fee underlying the public road easement transferred by the quitclaim deed remained with the federal government.

b) The Nature of the Interest that is Created by a Public Road Easement:

Even if one assumes, arguendo, that the quitclaim deed did not pass the entire interest of the United States in these roads but rather conveyed to the state only a surface easement, BLM's position still faces a fundamental objection. And this objection stems from the nature of the interest that is created by a public road easement.

In the most general sense, a public road easement vests in the general public a right of "passage and repassage" across the area defined by the easement. See O'Sullivan v. Brown, 171 F.2d 199 (5th Cir. 1948). The permissible uses of a highway easement, however, are not narrowly restricted to passage and travel. See Mayor and Council City of Baltimore, 147 F.2d 786 (4th Cir. 1945). Moreover, the scope of a public road easement extends upward and downward for a distance that is sufficient to accommodate and protect all proper uses of the roadway. City of Dixon v. Snow and Weinman, 183 N.E. 570, 571 (Ill. 1932). Sears v. Crocker, 69 N.E. 327 (Mass. 1904), and Anderson v. Stuarts Draft Water Co., 87 S.E.2d 756 (Va. 1955). And proper uses of a roadway include the placement of telephone poles, pipes, electrical conducts, sewers, and water mains. See Village of Grosse Point v. Ayres, 235 N.W. 829 (Mich. 1931); State v. Dreyer, 129 S.W. 904 (Mo. 1910); Levy v. Schwartz, 95 A.2d 322 (Md. 1953); Riley v. Davidson, 196 S.W.2d 557 (Tex. 1946) and St. Tammany Waterworks Co. v. New Orleans Waterworks Co., 120 U.S. 64 (1887). A highway easement thus includes with it the right to the use of the easement area, both above and below the surface, for the placement of utilities.

From the above it is clear that a public highway easement can be utilized for more than just simple travel and that other lawful uses include the placement of underground utilities. Of course, the control of the various uses that might be made of a public highway right-of-way remains in the hands of the public

authority that is charged by law with the duty to maintain the highway. See Clark v. Pour, 274 U.S. 554 (1927); Morris v. Doby, 274 U.S. 135 (1927); Frost and F. Trucking v. Railroad Comm., 271 U.S. 583 (1926) and United States v. Rogge, 10 Alaska 130 (Alaska 1941).

As for the public highways that are the subject of the Secretary of Commerce's quitclaim deed to the State of Alaska, it is clear that the state has the duty and authority to maintain these highways: Section 21(c) of the Alaska Omnibus Act required the state to assume the responsibility for the maintenance of the roads transferred by the quitclaim deed. 3/ (The U.S. Department of Commerce was vested with the exclusive authority to control and maintain public roads in Alaska prior to the issuance of the quitclaim deed. 4/)

Since, as a matter of law, the State of Alaska has been assigned the exclusive duty to maintain these highways, the control over their use remains with the state. BLM, since it has no maintenance responsibilities for these roads, does not have any control over their use either. Accordingly, BLM has no authority over the placement of under-ground utilities within the boundaries of these public road rights-of-way.

Summary

BLM's claim that it retains control of the subsurface area beneath those public roads transferred to the state by the quitclaim deed issued by the Department of Commerce must be rejected for two reasons. First, 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. Secondly, even if one concedes, arguendo, that the quitclaim deed transferred only an interest in a road easement, that interest is sufficient onto itself to give the State of Alaska exclusive control over any below-surface use of the easement.

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3/ Even the fact that the federal government has aided in the construction of a state highway does not diminish the power of the state to regulate and control the highway. See Morris v. Doby, supra.

4/ See Act of August 27, 1958, Pub. Law 85-767, § 119, 72 Stat. 885, 898 (1958).

DOT easement policy changed

The Department of Transportation revised its procedures on notifying people about certain easements following an ombudsman inquiry into a complaint in Ketchikan.

No one knew about the 100-foot easement on the North Point Higgins Road. The Ketchikan Gateway Borough wasn't aware of it, nor were surveyors, nor the title insurance company, and least of all the couple who bought a lot on the road in 1982. When the Department of Transportation and Public Facilities announced plans to rebuild the road in the fall of 1989, these property owners were unhappy to learn their house sat on the edge of the easement and their carport encroached into it.

The easement is the result of Public Land Order No. 601, passed by Congress in 1949, which listed many highways in Alaska and applied to many unnamed local roads. The department's right-of-way section uncovered the public land order during a routine check of federal, territorial and state highway records. Earlier surveys and plats failed to change the original 66-foot easement to the 100-foot corridor mandated by the federal order.

The angry property owners who contacted the ombudsman's office challenged the state's right to the easement and also the department's lack of adequate notice about this obscure federal order. The ombudsman agreed to review whether the department could have handled the public notice better.

The ombudsman found, and agency officials agreed, that the department should have notified unsuspecting property owners by letter. Highway officials routinely notify property owners whose land they intend to purchase but don't usually send letters to people who are only affected by easement work. Department officials have revised their procedures to require a letter of notice in cases where easements set by public land orders are not general knowledge. John Jordan, chief right-of-way agent for the Southeast region, said this step "should go far in reducing future conflicts."

The property owners were not required to move their carport.

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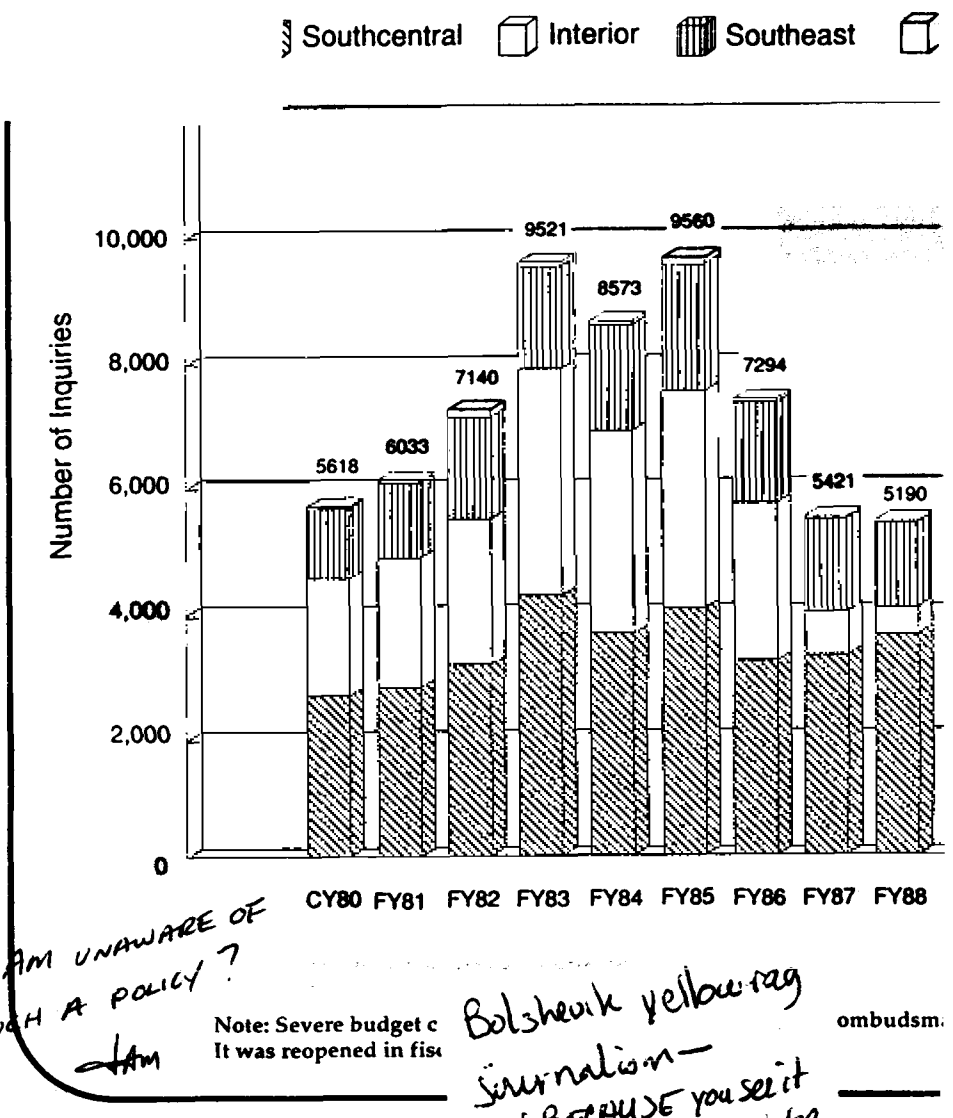

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DFYS transports runaway

In the "fiddling while Rome burns" category, last winter the Division of Family and Youth Services refused to transport a runaway girl to the home of her mother, despite the fact that the state had legal custody of the child and the child was living "on the street."

The division took the position that the father, who the child had run away from and who had allegedly abused the child, could afford the plane ticket and the agency should not be responsible for the cost.

After getting nowhere with the field office, the investigator contacted the regional DFYS director and pointed out that the state's liability in the event that something should happen to a child in its custody could be hundreds of thousands of dollars.

subdivision

Irate that his neighbor operates a guide service from a home in a rural subdivision, a central Alaska homeowner called the Fairbanks ombudsman's office for help. According to the homeowner, it is illegal to hunt in the subdivision.

The homeowner said the neighbor is violating his state-issued guide license by operating the guide business there. Even if it was allowed, the state would be wrong to license the guide business to operate in the subdivision, he argued.

The ombudsman found that the neighbor has both a current guide-