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John Bennett, Alaska DOT&PF, State Government, johnf.bennett@alaska.gov
11/24/2008

I thought I had a reference on this but I can't seem to find it. In Alaska, most of our existing highway ROW are easements. Our current DOT policy is to acquire fee title when feasible and our statutes say that we must acquire ROW for controlled access facilities in fee. The federal rule (23 CFR 1.23 & 23 CFR 710.201(e)) say that the interest we acquire "shall be adequate for the construction, operation and maintenance ..." of the project. My question is whether someone has a citation to a federal rule or policy that tells us that the minimum interest we can acquire for a federal aid controlled access facility must be a fee simple interest? It makes sense that once we acquire an abutter's right of access to a highway, an easement interest would leave them with little more than a right to reversion, and so we should acquire A/C ROW in fee....but is it required by FHWA to acquire the interest in fee? Thanks in advance...

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Glenn Bridger, HDR Engineering, Industry/Commercial
12/05/2008

With the variety of State laws that govern the acquisition of lands for highways, it is highly unlikely that any such National policy exists within FHWA. For example, most of the Interstate System ROW in Pennsylvania (and that is a lot of roadway) was acquired as easements. Even today, when an agency makes a request for a Federal Land Transfer under the provisions of 23 CFR 710.601, a highway easement deed is most probably the highest level of rights that will be granted.

The FHWA Office of Real Estate Services has during the past several years working to capture and categorize all still pertinent policy that has been issued during the life of the program. My old policy files are among those researched in this pursuit. I do not recall seeing any references to a national policy of this nature as having existed since 1956.

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John F. Bennett, Alaska DOT&PF, State Government, johnf.bennett@alaska.gov
12/08/2008

Glenn, thanks for your response. I was a bit surprised to find that parts of the interstate in the lower '48 was acquired as an easement although I recognize that the HED over federal lands is as good as we can get. My thinking was that interstates are generally supposed to be access controlled facilities and due to the restrictive nature of an A/C facility, fee acquisition was to be the rule of the day. Of course in Alaska we are in the interesting position in that the majority of our interstate mileage is neither a fee interest or access controlled. I was just curious whether there was a federal rule to match our state rule that ROW for an A/C facility was to be acquired in fee. JohnB

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Glenn Bridger, HDR Engineering, Industry/Commercial
12/12/2008

One of the issues I did not hit upon, and which is I believe very much your

concern also, is the need for the controlled access feature of the facility to be protected should any part of the easement roadway be vacated. This is where the ROW plan and legal description folks need to be very aware of State law and what might happen sometime in the future should a roadway that crosses or interchanges with the control of access facility be abandoned.

In Pennsylvania, where an acquisition encompassed lands needed for more than one ramp, cross road, or mainline segment, each of these segments and the control of access was described separately. This placed overlapping easements on the plan and in the instrument. In this manner, were one ramp or road vacated, the rights would continue for the rest of the facility.

Now, is fee ownership preferable? In virtually all cases for permanent highways, I believe the answer is yes. But if there area barriers to achieving that goal, such as State laws or extreme costs that can be avoided, there is flexibility to still get the project acquired.

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