

Karen R. Crane, Director  
Division of Libraries,  
Archives & Museums

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Disposition of Alaska  
territorial court records

Janice Gregg Levy  
Assistant Attorney General  
Human Services Section-Juneau

You have asked our opinion regarding the proper disposition of Alaska territorial court records. Both the State of Alaska and the National Archives claim to be the proper custodian for the records. Additionally, you asked whether state agencies may transfer records to State Archives and Records when proper permanent disposition of the records is in question.

The short answer to your question is that the Statehood Act required transfer of some territorial court records to the appropriate court in the new state court system, and some to the new United States District Court for the District of Alaska. The Statehood Act did not provide for the disposition of other nonjudicial records which were held by the territorial court system. Other action suggests that Congress intended the new state to receive many records. Because the transfers did not occur according to the Statehood Act and, perhaps, some other acts, and because transfer pursuant to those Acts is impracticable at this time, National Archives and the state should attempt to resolve the issue through agreement. We see no legal impediment to the transfer of disputed records from state agencies to State Archives pending final disposition.

#### FACTUAL BACKGROUND

Prior to statehood, the only court system operative in Alaska was United States Federal District Court for the Territory of Alaska. Court officials performed many functions besides traditional court functions and proceedings, and thus the "territorial court records" in dispute consist not only of judicial case files, but also of other miscellaneous territorial government records originally held by the federal district court.

The Alaska Statehood Act provided for a transition to two court systems for the new state: an Alaska Court System and a United States District Court for the District of Alaska. The Act sets forth that certain court records held by the United

States District Court for the Territory of Alaska should be transferred to the United States District Court for the District of Alaska, and that others should be transferred to the newly created state court system. The Act addressed only the records of court cases "pending or determined." It did not provide for other nonjudicial territorial government records which had been held by the United States District Court for the Territory of Alaska.

Custody of both types of records is in dispute. Presently, they are held by state agencies, including the Alaska Court System and Alaska Archives and Records, and National Archives and Records Administration (NARA). For purposes of determining proper disposition, this memo treats the two types of records separately.

#### ANALYSIS

1. Who is the proper custodian for records and files of judicial cases pending before or determined by the District Court for the Territory of Alaska at the time of Statehood?

The Alaska Statehood Act provided for a transition to two new court systems: a state court system, and a United States District Court for the District of Alaska. Sections 15 and 16 of the Act provide:

#### [SUCCESSION OF COURTS]

Sec. 15. All causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State which are of such nature as to be within the jurisdiction of a district court of the United States shall be transferred to the United States District Court for the District of Alaska for final disposition and enforcement in the same manner as is now provided by law with reference to the judgments and decree in existing United States district courts. All other causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State shall be transferred to the appropriate State court of Alaska. All final judgments and decrees rendered upon such transferred cases in the United States District Court for the District of Alaska may be reviewed by the Supreme Court of

the United States or by the United States Court of Appeals for the Ninth Circuit in the same manner as is now provided by law with reference to the judgments and decrees in existing United States District courts.

[TRANSFER OF CASES]

Sec. 16. Jurisdiction of all cases pending or determined in the District Court for the Territory of Alaska not transferred to the United States District Court for the District of Alaska shall devolve upon and be exercised by the courts of original jurisdiction created by said State, which shall be deemed to be the successor of the District Court for the Territory of Alaska with respect to cases not so transferred and, as such, shall take and retain custody of all records, dockets, journals, and files of such court pertaining to such cases. The files and papers in all cases so transferred to the United States district court, together with a transcript of all book entries to complete the record in such particular cases so transferred, shall be in like manner transferred to said district court.

Alaska Statehood Act of 1958, Pub. L. No. 85-508, •• 15 and 16, 72 Stat. 379.

The federal district courts do not have jurisdiction over a cause of action unless there is statutory authority granting such jurisdiction. Significant legal battles are waged over whether a federal district court has jurisdiction to hear a case. To determine whether a cause of action was one which would be "within the jurisdiction of a district court of the United States," someone would have to examine the issues raised by the case. If the cause of action was one that would have been within a federal district court's jurisdiction under section 15 of the Act, the file should have been transferred to the federal district court. If a file was not transferred pursuant to section 15, then according to section 16 it should have been transferred to the proper state court.

This separation and transfer must have taken place for pending cases, because some court had to finally resolve pending matters. But for the many cases already determined (closed cases), the separation and transfer apparently did not occur. This fact is not surprising. In 1987, an assistant archivist for

the National Archives wrote to the Alaska Court System that the segregation of cases was abandoned as a project "after it was learned that the task would take 200 attorneys one year to accomplish." What apparently did occur is that some case files came to be in the custody of the federal district court, and some came to be in the custody of the new state court system. Both agencies probably have in their custody records that, if properly segregated pursuant to the Statehood Act, should have been transferred to the other entity.

In your opinion request you state that the Division of Libraries, Archives and Museums and the Court System "believe Sections 16 and 18, Alaska Statehood Act, mandate custody of Territorial Court records for the State of Alaska." You also state that "[t]he National Archives contends Sections 16 and 18 also mandate custody to the federal Government." In our opinion, these sections complement what was set out in section 15, that the records were to be divided according to whether a United States District Court for the State of Alaska could properly exercise jurisdiction over the case. The language of section 16 clearly requires that cases not transferred pursuant to section 15 devolve upon the new state court system and are state records.

Alaska has a strong claim, then, for the return of cases that were not transferred under section 15, but nonetheless came to be in the custody of the United States District Court for the District of Alaska. In our opinion, a corresponding claim by National Archives that Alaska holds cases improperly is not as strong, because section 16 unambiguously states that all cases not transferred devolve upon the state.

Section 18 of the Act addresses when the jurisdiction of the District Court for the Territory of Alaska terminates. It provides that the separation and transfer of cases prescribed in the preceding sections is not effective until three years after the effective date of the Act, unless the President proclaims sooner that the new United States District Court for the District of Alaska is prepared to begin functioning. The President ended the jurisdiction of the District Court for the Territory of Alaska by Executive Order No. 10,867 on February 20, 1960. See Revisor's notes to AS 22.10.020. This section identifies when the transfer should have occurred, but does not mandate custody to either entity.

Thus, the Statehood Act is not authority for the proposition that all territorial court records belong in either the National Archives or the State Archives. Each entity is properly the custodian for some territorial court records. A practical resolution of the dispute, of course, would be

desirable. Some options available to the State and National Archives include agreeing that one entity should maintain all the records, agreeing to maintain custody according to who has custody today and provide finding tools to each other for facilitating access to all the records, or agreeing to trade certain categories of records perhaps dependent on heaviest use by certain groups and the availability and accessibility of documents. The Department of Law would be available to review any proposed agreement between the agencies.

2. Who is the proper custodian for nonjudicial files and records held by the United States District Court for the Territory of Alaska at the time of statehood?

Your finding tool entitled "District and Territorial Court System Record Groups 505 - 509 and National Archives and Records Administration Record Group 21" explains that territorial court records include records related to licensing, land transactions, corporate files, creation of school districts, and other records not traditionally held by courts. These records are "territorial court records" only because no other agency existed during territorial days to hold them. The Statehood Act did not specifically address where those records were to be transferred at statehood. There is some language in the Act, however, that supports the state's position that it should be custodian for some of those records. Other congressional action additionally supports the view that Congress intended at least some of those nonjudicial records to be transferred to the new State of Alaska.

The Alaska Statehood Act, • 6(e) provides as follows:

All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law . . . shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency.

Broadly defined, "personal property" is "everything that is the subject of ownership, not coming under denomination of real estate." Black's Law Dictionary 1096 (5th ed. 1979). In our opinion, "personal property" includes records and files. Thus, the Statehood Act mandated the transfer and conveyance to the State of Alaska of records and files "specifically used for the sole purpose of conservation and protection of fisheries and

wildlife of Alaska, under the provisions of the Alaska game law."\* There is room for argument as to which records would fall within this mandate. In our opinion, if Alaska has a colorable claim to a record related to conservation, fish, or wildlife, the dispute should be resolved in Alaska's favor in order to assist the state in managing its resources.

The Alaska Omnibus Act provides:

The Secretary of Commerce shall transfer to the State of Alaska by appropriate conveyance without compensation . . . 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[.]

Alaska Omnibus Act • 35 (a). Any records from the territorial courts related to roads, then, should be state property. The Act further states:

The Administrator of the Federal Aviation Agency is authorized and directed to transfer . . . all the right, title, and interest of the United States in and to the public airports . . . and other personal property appurtenant thereto and necessary for the operation thereof[.]

Alaska Omnibus Act • 45 (a). Because personal property includes records, if any territorial court records relate to airports, they should arguably be transferred to the state. Section 45 (a) of the Alaska Omnibus Act states:

If the President determines than any function performed by the Federal Government in Alaska has been terminated or curtailed by the federal Government and that performance of such function or substantially the same function has been or will be assumed by the State of Alaska, the President may, until July 1, 1966, in his discretion, transfer and convey to the State of

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\* This provision mandates transfer from "the appropriate Federal agency" and thus covers more than just territorial court records.

Alaska, without reimbursement, any property or interest in property, real or personal, situated in Alaska which is owned or held by the United States in connection with such function, the assumption of which function is pursuant to this Act or the Action of July 7, 1958 (72 Stat. 339).

Alaska Omnibus Act • 45 (a). Although the Act's transfer authority has expired, (the property must have been transferred by July 1, 1966), the language evidences Congress's intent that the state have what it needs to take over functions previously held by the federal government.

In a joint resolution transferring the archives and records of the Territorial Governors of Alaska, 1884-1958, from the National Archives to the State of Alaska, at the expense of the United States, Congress stated that "Federal records created by territorial governments pertaining to territorial activities have traditionally been transferred to the successor State government when a State enters the Union[.]" P.L. 93-542; 88 Stat. 1740. This is additional evidence of Congressional intent that the state should receive or retain custody of records which but for the territorial status of Alaska would have been state records.

Taken together, the Alaska Statehood Act, the Omnibus Act, and the Resolution transferring archives and records of the Office of the Territorial Governors of Alaska to the state provide strong evidence that Congress intended many records to be transferred to the newly created State of Alaska. In light of this intent, perhaps State Archives and NARA could agree that NARA should retain only those records that would in any event have been federal records, even if Alaska had been a state. Those records that are in NARA's custody solely because prior to 1959 there was no state agency to perform what were essentially state functions, and which records are of continuing historical value to the state and its agencies that now perform those functions, at least arguably should be transferred to the State Archives. As is the case with judicial records, a cooperative agreement of some type is desirable.

3. May a state agency transfer records to State Archives and Records when the agency knows NARA seeks to obtain the same records?

According to your memo, the Alaska Court System and perhaps other state agencies possess territorial records that

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according to records retention schedules should properly be held by the State Archives. We see no legal obstacle to those records being transferred to State Archives at this time, even if NARA disputes that the state is the proper custodian. Transferring the records to State Archives would not impede recovery of the records by NARA if NARA prevailed in a suit against the state to recover the records. Additionally, the safe preservation of the records can be provided for better by State Archives than by individual agencies around the state.

#### CONCLUSION

Segregation of judicial territorial court records did not occur in the manner provided for in the Alaska Statehood Act, and apparently Alaska Archives and Records and NARA are in agreement that it would be impractical to do so at this time. Some type of agreement should be pursued to determine permanent disposition. State Archives should also attempt to arrive at an agreement with NARA regarding nonjudicial territorial court records, which records were not provided for in the Statehood Act. There is some evidence that Congress intended that records relating to functions taken over by the new state should be transferred to the state to assist it in performing those functions. While suggesting a cooperative approach to these problems, we emphasize that the state is correct in disputing NARA's claim that all territorial court records belong to the federal government.

Finally, we believe it is appropriate for a state agency to transfer to State Archives records that are due to be archived pursuant to the agency's records retention schedule. State Archives is better prepared to protect and preserve records safely than is an individual agency, and the transfer would not preclude NARA from recovering those records if it prevailed in a claim that it is the proper custodian of the records.

I hope this assists you in your endeavor to provide for the preservation and accessibility of territorial court records. Please do not hesitate to contact our office if you have other questions or concerns.

JGL/bap

cc: Honorable Jerry Covey  
Commissioner  
Department of Education