DRAFT Appendix A
Width of Right-of-Way for McCarthy Road
Crossing Through Patented or Interim Conveyed Lands
CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

This appendix accompanies our memorandum of advice to John F. Bennett, Chief Right-of-Way Agent, Northern Region, Alaska DOT&PF dated May 17, 2002; File No. 665-01-0015. The parcel information included in this appendix was obtained from our review of BLM files. **The conclusions drawn in this draft appendix are tentative and are not intended as affirmative legal advice concerning the width of the McCarthy road right-of-way across the parcels discussed herein.**

Except where specifically noted, we have not examined the title to these patented lands after the date of original patent. A title examination should be conducted before the conclusions as to any parcel may be relied upon. Subsequent owners of the land may have subdivided or conveyed the parcels subject to different easement widths for the McCarthy road. While these subsequent conveyances would not be effective to reduce the PLO right-of-way below its 100-foot width, they may be effective to increase the right-of-way if the conveyance specifies an easement of greater width. Therefore, the terms of subdivision plats and subsequent conveyances should be reviewed to see whether they affect the conclusions set out below

The McCarthy road has not been surveyed. The road may cross patented parcels not identified herein and, in a few cases, may not actually cross some of the parcels identified herein. A survey will be necessary to definitively identify all parcels affected by the road.

Patented parcels that are similarly situated as to facts and legal analysis are grouped together below. Citations in this appendix to Rules 1 through 4 refer to the rules and legal authority set out on pages 14-15 of our May 17, 2002 memorandum of advice. We have identified the following categories of patented lands along the McCarthy road between the Copper and Kennicott Rivers:

A. PATENTED PARCELS SUBJECT TO A 100 FOOT RIGHT-OF-WAY UNDER RULE 1.

The State has a clear case for asserting a 100-foot PLO easement for the McCarthy road across the following parcels of land because the lands were open federal public lands when PLO 601 and DO 2665 were issued in 1949 and 1951, respectively. The lands were not entered or selected until after 1951. Those patents that are not expressly made subject to the McCarthy road easement are impressed with the easement under Rule 4.

1. University Grant Lands:

Patent No. 1213491 (October 6, 1960); Application filed March 10, 1955
Patent No. 1216188 (January 6, 1961); Application filed November 6, 1958
Patent No. 1210774 (July 14, 1960) Application filed June 11, 1958

2. State of Alaska Grant Lands:

Patent No. 1230044 (December 14, 1962); Application filed March 16, 1960
Patent No. 1213736 (October 19, 1960); Application filed March 16, 1960
Patent No. 1213737(October 19, 1960); Application filed March 16, 1960
Patent No. 1220724 (June 20, 1961); Application filed April 27, 1960

Portions of these lands may have been subsequently conveyed by the State of Alaska, Dep't of Natural Resources (ADNR) to individuals or to the University of Alaska. The ADNR patents to these individuals and the university should be reviewed to determine whether ADNR reserved a right-of-way for the McCarthy road on those subsequently conveyed parcels that are crossed by the road.

The State of Alaska, as owner of the land, had the right to reserve any width for the road it deemed appropriate. If a State patent reserves a 200-foot width for the McCarthy road, then present landowners who had no rights in the land prior to its conveyance to ADNR can not be heard to complain that the width reserved in their ADNR patents should have been less than 200 feet. They had no interest in the land pre-dating the conveyance of the land to the State by BLM.

3. Native Corporation lands

a. Ahtna, Inc.

Patent No. 50-84-0795 (September 28, 1984)(subsurface estate)(patent subject to easements reserved in surface estate Patent No. 50-84-0794 to Chitina Native Corp.)

Interim Conveyance No. 948 (September 28, 1984)(subsurface estate)(subject to surface estate easements in Interim Conveyance No. 947 to Chitina Native Corp.)

Interim Conveyance No. 442 (October 28, 1981)(fee estate)(subject to McCarthy road easement)

b. Chitina Native Corporation

Patent No. 50-84-0794 (September 28, 1984)(surface estate)(subject to McCarthy road easement)

Interim Conveyance No. 947 (September 28, 1984)(surface estate)(subject to McCarthy road easement).

The McCarthy road crosses lands that were conveyed by BLM to Ahtna, Inc. and the Chitina Native Corporation in interim conveyances and patents issued under the Alaska Native Claims Settlement Act, 43 USC § 1601 *et seq*.. It also crosses lands that have been selected by Ahtna, Inc. but which have not yet been conveyed. For purposes of our analysis, we assume all Ahtna selected lands will be conveyed in the future.

Under ANCSA, Native regional and village corporations selected public lands which had previously been withdrawn from all forms of appropriation under the public land laws of the United States. 43 USC §§ 1610, 1611(a), 1611(c), 1613(a), 1613(e), 1621(j). Alaska Native corporation selections were made after December 18, 1971, the effective date of ANCSA, and were subject to valid existing rights for easements crossing the selected public lands. 43 USC § 1613(g).

4. Lands Patented to Individuals by BLM

Harley B. King: T. 6 S., R. 11 E., Sec. 1, SW¼ SW¼
Patent No. 50-72-0400 April 14, 1972) (40 acre homestead)
Entry Date: July 8, 1964 (patent silent as to McCarthy road)

Clifford P. Collins: T. 6 S., R. 11 E., Sec. 2, S½SW ¼; Sec. 11, N½NW ¼
Patent No. 50-68-0033 (August 22, 1967) (160 acre homestead)
Entry Date: September 5, 1961 (patent silent as to McCarthy road)

Lew Leo McFerren: USS 4848; Patent No. 50-72-0185 (March 1, 1972)
(160 acre homestead)
Entry Date: February 5, 1960 (patent silent as to the McCarthy road)

Jack E. Wilson: USS 5705; Patent No. 50-76-0080 (December 5, 1975)
(160 acre homestead)
Entry Date: August 2, 1966 (patent silent as to the McCarthy road)

Robert Marshall: USS 6092-2; Certificate No. 50-84-0341 (March 5, 1984)
(40 acre Native allotment)
Date of Occupancy: June/October 1967 (two applications for same land) (certificate subject to 100 foot McCarthy road easement)

Roy Eskilida: USS 8102; Certificate No. 50-99-380 (September 17, 1999)
(72 Acre Native allotment)
Date of Occupancy: April 15, 1967 (certificate subject to 100 foot McCarthy road easement)

Albert Charley: USS 12062; Certificate No. 50-99-0141 (February 5, 1999)
(80 acre Native allotment)
Date of Occupancy: April 16, 1967 (certificate subject to 100 foot McCarthy road easement)

John Billum, Jr.: USS 6092-1; Certificate No. 50-95-0009 (October 20, 1994)
(40 acre Native allotment)
Date of Occupancy: October 10, 1967 (certificate subject to 100 foot McCarthy road easement)[1]

Mary DeVaney: Native Allotment Application 7174 (pending adjudication)
Date of Occupancy: May/June 1967 (certificate not issued) [2]

Davis L. Dann: USS 4097; Patent No. 50-77-0083 April 1, 1977)
(40.85 acre homestead)
Entry Date: March 9, 1967 (patent silent as to the McCarthy road)

George Everett Nelson: USS 5365-2; Patent No. 50-81-0084 (April 1, 1981)
(160 acre homestead)
Date of Entry: June 13, 1968 (patent silent as to the McCarthy road)

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[1] The IBLA ruled in *State of Alaska (Billum)*, 127 IBLA 137 (1993), that the right-of-way is 100 feet wide where it crosses Billum's allotment. The IBLA's ruling is consistent with our conclusion, although our legal analysis is different than the IBLA's analysis.

[2] Since the 1993 *Billum* decision, the BLM has consistently made allotments that are crossed by the McCarthy road subject to 100 foot road easements. Ms. DeVaney's allotment should be impressed with a 100 foot right-of-way for the McCarthy road if it is approved because she claims her occupancy commenced in 1967. If the decision approving her allotment either ignores the McCarthy road or cancels the right-of-way where it crosses her allotment, the decision should be immediately appealed to the IBLA.

B. PARCELS SUBJECT TO A 100-FOOT RIGHT-OF-WAY BY OPERATION OF THE INTERPLAY BETWEEN THE ACTS OF 1898, 1922 AND 1941 AND PLO 601 and DO 2665.

The entry and patent dates for each of the following homesteads precede the 1941 dedication of the McCarthy road. Ordinarily, under Rule 2, these individually patented lands would not be subject to the McCarthy road right-of-way. However, in our May 17, 2002 memorandum, we concluded that, by virtue of the interplay between the Acts of 1898, 1922 and 1941, parcels crossed by the McCarthy road that were first entered and patented after 1914, but before PLO 601 was issued in 1949, are nevertheless impressed with a 100 foot right-of-way under PLO 601 and DO 2665. Each of the homestead entries listed below were made after completion of the railroad construction in 1911 and after the railroad's preliminary survey plats and 1914 definite location maps for the Chitina - McCarthy branch line were filed with the General Land Office in Juneau. The following parcels of property are included in this analysis and, in our opinion, are subject to a 100-foot right-of-way for the McCarthy road:

Frank A. Iverson: T. 5 S., R. 13 E., Sec. 23, W½SW ¼, NE¼SW ¼, SW¼NW¼; Patent No. 907494 issued May 25, 1923 (160 acre homestead)
Entry Date: October 16, 1922 (patent silent as to Copper River Railway right-of-way)

Olav Hatlet: T. 5 S., R. 13 E., Sec. 23, E½NW¼, NW¼NE¼; Patent No. 908113 issued June 2, 1923 (120 acre homestead)
Entry Date: November 22, 1922 (patent silent as to Copper River Railway right-of-way)

Simeon Ed Mullen: T. 6 S., R. 11 E.., Sec. 1, W½NW¼, NW¼SW¼ & Lots 2, 5; Sec. 2, E ½ NE ¼; Patent No. 1060417 issued January 23, 1932 (266 acre homesite)
Entry Date: November 12, 1919 (patent silent as to Copper River Railway right-of-way)

George E. Anderson: T. 5 S., R. 13 E., Sec. 22, SE¼SE¼; Sec. 26, NW¼NW¼; Sec. 27, NE¼NE¼; Patent No. 906839 issued May 19, 1923 (120 acre homestead)
Entry Date: October 16, 1922 (patent silent as to Copper River Railway right-of-way)

Oscar N. Anderson: T. 6 S., R. 11 E., Sec. 2, SE¼; Patent No. 936939 issued April 24, 1924 (160 acre homestead)
Entry Date: November 12, 1919 (patent silent as to Copper River Railway right-of-way)

We are unaware of any court or agency that has addressed our argument concerning the interplay of the 1898, 1922 and 1941 acts and PLO 601 and DO 2665. There is a possibility that the courts would reject our analysis and conclude that the State has no interest in the McCarthy road across those parcels. In that event, the State may still be able to establish a 100-foot wide right-of-way on these parcels under Rule 3 of our

memorandum or based on prescriptive rights. The Rule 3 and prescriptive easement analysis follows.

Rule 3 Analysis

This legal analysis is a variation on our primary conclusion concerning the interplay between the Acts of 1898, 1922 and 1941. It seeks to "fit" the general fact pattern of these parcels under Rule 3 (the "physical appropriation" rule of *Green*).

Under Rule 3, if a PLO easement can not be established on patented land because the land was entered before issuance of PLO 601 or DO 2665, a right-of-way may still be impressed on the land if initial entry occurred after the date of actual road appropriation. The width of the road in such circumstances depends upon the evidence of appropriation as of the date of entry. In *Green*, 586 P.2d at 606 & n. 33, the supreme court indicated that the "planned width" of rights-of-way and other administrative materials may be taken into consideration in determining the width of the right-of-way, although the court declined to establish precise criteria.

The State may be able to convince the courts that the actual construction of the railroad, the 200-foot right-of-way set by the Act of 1898 and the public filing of the railroad's definite location maps in 1914 were sufficient to establish a road width of 200 feet from 1914 to 1945. The Act of 1941, and the exercise by Interior of the congressional grant of authority to establish the road, may then be sufficient to impress a 100-foot right-of-way on these parcels in light of the fact that Congress acted under its unlimited constitutional authority to extinguish any expectation patentees may have had to receive the lands within the former railroad right-of-way under the Act of 1922.

Prescriptive Easement Analysis

A court may rule that the State has no easement under either theory expressed above. In that event, the State may be able to establish a 100-foot right-of-way for McCarthy road across these parcels by prescription.

Public roads may be established by prescription. *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 416 (Alaska 1985). The period of prescription is seven years. AS 09.45.052 (claim under color of title). In order to establish a public road by prescription the State must establish the following

> (1) the possession must have been continuous and uninterrupted; (2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and (3) the possession must have been reasonably visible to the record owner.

Dillingham, 705 P.2d at 716-17. *See also Swift v. Kniffen*, 706 P.2d 296, 302-05 (Alaska 1985); *Alaska National Bank v. Linck*, 559 P.2d 1049, 1052-54 (Alaska 1977). Where the State is involved, the prescriptive use must have been in good faith, meaning the State must have had "an honest and reasonable belief in the validity of [its] title." *Ault v. State*, 688 P.2d 951, 956 (Alaska 1984).

A detailed analysis of prescription is beyond the scope of this draft appendix. However, the long public use of the McCarthy road, the expenditure of money on conversion and maintenance of the road, first as a tramway in the 1940s and 1950s and as a highway in the 1960s, and the confirmation of the road's existence and 100-foot width in the *Billum* decision, and in other federal patents, appear sufficient to establish both prescriptive use and the State's good faith belief in the validity of title to a 100-foot wide easement.

C. PARCELS REQUIRING ANALYSIS UNDER OTHER LEGAL PRINCIPLES

Davis L. Dann: USS 6626; Patent No. 50-84-0084 (4.62 acre headquarters site) Entry Date: July 5, 1967

Mr. Dann located a headquarters site on July 5, 1967. His entry occurred after the appropriation of the McCarthy road in the 1940s and the issuance of PLO 601 and DO 2665 in 1949 and 1951, respectively. Mr. Dann's patent contains no reservation for the McCarthy road.

Mr. Dann's property is located on the easterly side of the Gilahina River. A trestle for the abandoned railroad runs through his land. The McCarthy road was re-routed around the trestle at some point. Although the precise date of the re-routing is unknown, Mr. Dann's notice of location describes the Chitina-McCarthy road as adjacent to his property, thus establishing that the road was in its present location before his entry. In fact, the centerline of the road forms the southerly boundary of this 4 acre site.

The McCarthy road may now be outside of the 100 foot PLO right-of-way as a result of being re-routed around the trestle, the centerline of which formed the centerline of the tram road when withdrawn in 1949 by PLO 601. There may also be some question as to the present width of the road over this property under DO 2665 because of the re-routing.

However, we believe there is a strong legal argument for a 100 foot wide easement on the re-routed road even if the road is outside of the 100 foot wide DO 2665 easement. Establishing roads over open, unreserved federal public lands was authorized under RS 2477 up until its repeal on October 20, 1976. Moreover, in 1963, AS 19.10.015(a) impressed all public roads in Alaska, including those established under RS 2477, with at least a 100 foot wide easement. AS 19.10.015(a) provides, in relevant part:

> It is declared that all officially proposed and existing highways on public land not reserved for public uses are 100 feet wide. . . .

Our review of Mr. Dann's BLM file indicates that this property was unreserved public land before 1967, except possibly for a brief time in 1964-65 when it was subject to a power site withdrawal. Mr. Dann's application establishes that the McCarthy road was re-routed to its present location before he entered the land, as stated above. Thus, there is an RS 2477 for the McCarthy road in its present location. The easement width of the re-routed road is 100 feet because the land was open, unreserved land at some point on or after April 6, 1963, the effective date of AS 19.10.015(a). We conclude that a 100 foot wide RS 2477 road was located on Mr. Dann's property before his 1967 entry.

Patrick Bell; USS 3675; Certificate No. 50-84-0335 (February 23, 1984)
(160 acre Native allotment)
Date of Occupancy: 1948
(certificate subject to 100 foot McCarthy road easement)

Mr. Bell filed a Native allotment application for his allotment claiming occupancy in 1948.[3] Mr. Bell's occupancy began after the appropriation of the McCarthy road under either the dedication or RS 2477 theory. However, his occupancy pre-dates PLO 601's 1949 100 foot withdrawal for local roads. Mr. Bell's 1984 allotment certificate contains a 100 foot wide easement for the McCarthy road, as noted above.

Under Rule 4, Mr. Bell's allotment would ordinarily be impressed with an easement for the McCarthy road based on its actual staked, cleared or constructed width as of 1948. That width may be less than 100 feet. However, the result in this case is different because the combined effect of the Alaska Native Allotment Act, the Act of 1941 and PLO 601 is to impress the road with the 100 foot PLO right-of-way.

The right-of-way for the railroad was 200 feet wide at the time the Chitina-McCarthy branch of the railroad was congressionally dedicated to tram road and public highway use in 1941. There is a good argument that the right-of-way for the tram road was co-extensive with the railroad right-of-way until 1949 when the Secretary of the Interior took action to reduce it to 100 feet under PLO 601. Thus, at all times from at

[3] Mr. Bell's final proof of occupancy stated that he used the land beginning in 1938. We assume that 1948 is the correct date and that Mr. Bell's heirs would now be estopped to assert an earlier date of occupancy than that asserted by Mr. Bell in his 1955 allotment application. *See*, *e.g.*, *Silas v. Babbitt*, 95 F.3d 355, 358 (9th Cir. 1996)(rejecting applicant's attempt to insert an earlier occupancy date on a Native allotment application rejected 14 years earlier).

least 1911, an area 50 feet on either side of the McCarthy road centerline has been land appropriated to either railroad or highway use.

Under the Alaska Native Allotment Act, 43 U.S.C. § 270-1, *repealed with savings provision*, 43 U.S.C. § 1617(a) (December 18, 1971), the Secretary of the Interior was limited to approving allotments of up to 160 acres "of vacant, **unappropriated and unreserved** nonmineral land in Alaska" to qualifying Alaska Natives. (emphasis added) Mr. Bell could not have obtained an interest in the land within 50 feet of either side of the McCarthy road centerline at any time after it was appropriated for public use in 1911. *State of Alaska (Goodlataw)*, 140 IBLA 205, 215 (1997)(An Alaska Native allotment applicant obtains no rights in land that was appropriated for highway purposes prior to the date the allottee's occupancy of the land began.) Therefore, there is a good legal basis for asserting the 100 foot PLO right-of-way for the McCarthy road on Mr. Bell's land. At no time since Mr. Bell's 1948 entry has the land within 50 feet on either side of the McCarthy road centerline been open to Native occupancy.

Moreover, Mr. Bell's patent is made subject to a 100 foot right-of-way for the McCarthy road, as stated above. Mr. Bell's successors in interest may now be precluded from attacking the 100 foot easement for the McCarthy Road to which the allotment is expressly made subject. (*See* discussion below concerning the ability of Native allottees to attack their own patents more than six years after issuance.)

If a court were to reject the State's dedication argument and the allotment certificate's reservation for the McCarthy road, the State may be left with an RS 2477 easement for the road at the actual constructed width as of the date of Mr. Bell's entry in 1948, or, if it can be proven, the actual staked and cleared width of the right-of-way as of that date. *Boyer v. Clark*, 326 P.2d 107, 109 (Utah 1958); *Clark v. Taylor*, 9 Alaska 298, 313 (D. Alaska 1938); *Green*, 586 P.2d at 606; *823 Sq. Feet of Land (Goodman)*, 660 P.2d 443. Under an RS 2477 analysis, the McCarthy road would have been impressed with an easement in 1945 when the railroad right-of-way was cancelled (thereby returning the land to the public domain) and qualifying public user and road commission maintenance of the tram road commenced. However, in the absence of a congressional dedication, no specific right-of-way width would attach to the road between 1945 and August 1949, when PLO 601 was issued. Thus, the easement would arguably have been only as wide as the actual surveyed, staked, cleared or actual constructed roadway.[4]

[4] It is entirely possible that the actual surveyed, staked and cleared width of the right-of-way was 200 feet at the time of Mr. Bell's entry. The railroad right-of-way may have been staked and cleared at the full 200 width. Furthermore, the maps of definite location for the Chitina to McCarthy branch line were filed in the General Land Office as of February 21, 1914. *See*, Relinquishment signed by CR&NW Railway Co., dated March 29, 1945 at paragraphs 8-10. Therefore, it may not make a difference if the State is limited to reliance on an RS 2477 theory for the 1945 to 1949 period. The original

Because Mr. Bell occupied his allotment between 1945 and 1949, when before PLO 601 was issued, the 100 foot PLO width for local roads would not apply to Mr. Bell's land, although there would still be an easement for the road through the allotment at some other width.

In any event, we believe there is a good legal argument, based on the 1941 dedication of the McCarthy road, that Mr. Bell's allotment is impressed with a 100 foot PLO easement for the McCarthy road in the location shown on U.S. Survey No. 3675. The BLM properly reserved a 100 foot wide easement for the McCarthy road in Mr. Bell's allotment certificate under PLO 601 and DO 2665. The State may rely on that patent reservation until a court of competent jurisdiction rules otherwise.

Joe Eskilida: Native Allotment Application AA 6457, Parcel A; Certificate pending (56 acre Native allotment)
Occupancy Date: 1930

Mr. Joe Eskilida's allotment has been approved and is awaiting re-conveyance of the lands embraced by his allotment from the University of Alaska. Mr. Eskilida's allotment is subject to the same dedication analysis and RS 2477 caveat stated above for Mr. Bell's allotment. The area within 50 feet on either side of the McCarthy road centerline has been dedicated to railroad or highway use since at least 1911. This area remained appropriated to railroad or highway use until it was reduced to 100 feet in 1949 under PLO 601 and has thereafter remained appropriated to the State of Alaska.

Mr. Eskilida's patent, once issued, should be made subject to a 100 foot right-of-way to the McCarthy road. DOT should request notice as to whether BLM intends to make the patent subject to the McCarthy road. If not, we need to request a decision or take other administrative action to preserve our interest in the right-of-way. It will be difficult to obtain judicial redress if BLM makes a mistake in this patent because the United States has been largely successful in arguing that its Native allotment administrative decisions are immune from judicial review under the Quiet Title Act, 28 U.S.C. § 2409a. *State of Alaska v. Babbitt (Albert)*, 38 F.3d 1068 (9th Cir. 1994); *State of Alaska v. Babbitt (Foster)*, 75 F.3d 449 (9th Cir. 1995), *cert. denied*, 117 S.Ct. 70 (1996); *Cf.*, *State of Alaska v. Babbitt (Bryant)*, 182 F.3d 672 (9th Cir. 1999)(There is no immunity from judicial review where agency does not have a colorable claim that an approved Native allotment is in fact Indian land.)

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definite location maps should be obtained from BLM if possible. Should the State be limited to an RS 2477 easement in the future, the original maps may help to establish the staked width of the right-of-way.

William H. Buck: USS 6147; Certificate No. 50-83-0097 (60 acre Native allotment) Occupancy Date: June 1953 (patent is subject to 200 foot right-of-way)

Lorraine Anna Dummler: USS 6119; Certificate No. 50-83-0090 (160 acre Native allotment); Occupancy Date: June 1961 (patent is subject to 200 foot right-of-way)

Mr. Buck filed a Native allotment application claiming occupancy as of June 1953.[5] Ms. Dummler's occupancy began in June 1961.[6] Both Mr. Buck's and Ms. Dummler's occupancy began after the appropriation of the McCarthy road and the issuance of PLO 601 and DO 2665 in 1949 and 1951, respectively. Therefore, under Rule 1, there is a 100 foot easement for the McCarthy road impressed on both allotments.

However, both the Buck and Dummler allotment certificates reserve a **200 foot** easement for the McCarthy road rather than the 100 foot wide PLO easement. A review of the BLM files for these allotments reveals no apparent factual or legal distinction which justifies subjecting these allotments to a 200 foot wide easement rather than the 100 foot PLO easement impressed on similarly situated patented lands. The easement for the McCarthy road was reduced from 200 feet to 100 feet under PLO 601 years before Mr. Buck and Ms. Dummler started using their allotments.

The issue is whether the State may rely on the patents in asserting a 200 foot right-of-way across these allotments under legal principles concerning issue preclusion or the statute of limitations.

Generally, a patent is conclusive as to title after the six years for bringing an action to annul or vacate it passes. *State v. First National* Bank, 689 P.2d at 486 n. 12; 43 U.S.C. § 1166. However, the statute of limitations for vacating patents does not apply to actions brought by the United States which seek to vindicate property interests of Indians in Indian trust lands. *United States v. Minnesota*, 46 S.Ct. 298, 301 (1926); *Cramer v. United States*, 43 S.Ct. 342, 346 (1923). In addition, the State has no Eleventh Amendment immunity from an action brought by the United States in federal court. *Bethel Native Corp. v. Dep't of Interior*, 208 F.3d 1171, 1173 (9th Cir. 2000). Therefore, the United States, acting in its capacity as guardian for Alaska Natives, could sue the State to quiet title to the land outside of the 100 foot PLO right-of-way for the McCarthy road if the State relied on the patent's 200 foot reservation.

The likelihood of such an action being filed is unknown, although we note that 17 years have passed since the allotment certificates were issued with no action being filed.

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[5] The McCarthy road "clips" the northeasterly corner of Mr. Buck's allotment. It appears that very little of the McCarthy road is within Mr. Buck's allotment.

[6] The McCarthy road bisects Ms. Dummler's allotment.

However, actual construction outside of the 100 foot area may prompt the filing of an action.

The more difficult question is whether the allottees or their Alaska Native successors could bring an action in federal court against the State challenging their own patent as to the 200 foot patent reservation.[7] Under 25 U.S.C. § 345, federal courts have jurisdiction over actions brought by an individual Indian seeking to vindicate "the interests and rights of the Indian in his allotment or patent after he has acquired it." *United States v. Mottaz*, 106 S.Ct. 2224, 2231 (1986)(citation omitted).[8]

However, both the supreme court in *Mottaz* and the ninth circuit have held that section 345 actions are subject to applicable federal statute of limitations at least insofar as actions brought against the United States are concerned. *Id.* at 2229-32; *Christensen v. United* States, 755 F.2d 705, 707 (7th Cir. 1985); *Big Spring v. BIA*, 767 F.2d 614, 616-17 (9th Cir. 1985).[9] If a section 345 action were filed against the State by the current Alaska Native owners of the allotments challenging the 200 foot width of the McCarthy road right-of-way reserved in their patents, the State may prevail in a motion to dismiss based on the expiration of the six year statute of limitations for bringing actions challenging patents. 43 U.S.C. § 1166.

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[7] An action could not be filed in State court because State courts have no jurisdiction over issues concerning the ownership or other interests in Indian trust property. *Foster v. State*, 34 P.3d 1288 (Alaska 2001); *Heffle v. State*, 633 P.2d 264, 267 (Alaska 1981).

[8] In *Big Spring v. BIA*, 767 F.2d 614 (9th Cir. 1985), Indian patentees brought a section 345 action seeking to obtain mineral rights in lands which were expressly reserved to the government in their patents. *Id.* at 615. Thus, a civil action filed in federal district court by the Buck successors seeking to reduce the 200 foot right-of-way for the McCarthy road to 100 feet would be a viable action under section 345, except for possible statute of limitations defenses or the jurisdictional bar of the Eleventh Amendment.

[9] *Christensen* and *Big Spring* also held that section 345 waived the immunity of the United States where individual Indians filed suit concerning their allotments after issuance of patent therefor. However, in *Mottaz*, the Supreme Court held that the federal government's immunity from suit is waived under section 345 only for actions seeking an original allotment. 106 S.Ct. at 2231. In *Pinkham v. Lewiston Orchards Irrigation District*, 862 F.2d 184, 187 (9th Cir. 1988), the ninth circuit recognized that its decisions in *Christensen* and *Big Spring* -- holding that the sovereign immunity of the United States is waived for all actions under section 345 – were overruled by implication in *Mottaz*. However, the holdings in *Christensen* and *Big Spring* regarding the applicability of federal statutes of limitations to section 345 actions remain undisturbed and, in fact, are supported by the *Mottaz* decision, which applied the Quiet Title Act's statute of limitations to a section 345 action filed by an Indian allotee.

Moreover, even if a section 345 claim were not time barred, the State's Eleventh Amendment immunity from private actions filed in federal court will bar a section 345 action, at least to the extent that it seeks retroactive monetary compensation from the State or where the sole purpose for obtaining declaratory relief in federal court against the State would be to use the declaratory judgment to obtain retroactive damages in State court. *Edelman v. Jordan*, 94 S.Ct. 1347, 1358 (1974); *Green v. Mansour*, 106 S.Ct. 423, 427-28 (1985); *Bethel*, 208 F.3d at 1173(Eleventh Amendment bars suits against State in federal court by her own citizens including those brought by members of Indian tribes).[10]

The allottees may also be precluded from attacking their own patent under the principle of administrative finality, the equivalent principle to *res judicata* in the courts. The allottees and their successors and any successors have been on notice of the true width of the right-of-way across their lands under PLO 601 and DO 2665 since 1951. The failure of the allotees to file a timely appeal to the IBLA from the BLM decision making their patents subject to a 200 foot right-of-way for the McCarthy road may now preclude them or their successors from challenging the width of the right-of-way expressed in the patents.

The State may choose to rely on the 200 foot wide easement for the McCarthy road reserved in these patents. However, if DOT does so, it must be aware that the substantive basis for those reservations is lacking and, if the courts allow either the federal government or the allottees or their successors to pursue a federal action to correct the patent, then the State would have little chance to prevail. We recommend that, unless absolutely necessary, DOT refrain from asserting a right-of-way greater than 100 feet across Mr. Buck's or Ms. Dummler's allotments unless there is some other basis for asserting a greater width, such as, a common law dedication by plat.

Katalla Corp.; USS No. 211; Patent No. 375046 issued January 5, 1914 (homestead claim assigned to corporation) (patent is subject to railroad right-of-way)
Date of Entry: July 13, 1912

This parcel is subject to the analysis immediately above. However, we have been made aware of a subdivision plat for USS No. 211 that was recorded on July 22, 1987 as Plat No. 87-8. The owner of USS 211 dedicated all easements and rights-of-way shown on the plat to the public. The right-of-way for the McCarthy road is shown extending 100 feet south of the McCarthy road centerline.

[10] However, the State is not immune from federal injunctive actions brought by individuals that merely require the expenditure of State funds to secure future compliance with an injunction. *Edelman*, 94 S.Ct. at 1358.

In our opinion, PLO 601 and DO 2665 notwithstanding, the plat constitutes a common law dedication of the area outside of the 100 foot wide PLO right-of-way for the McCarthy road. Specifically, the McCarthy road is 100 foot wide south of the McCarthy road centerline under the common law dedication and 50 feet wide under the PLO right-of-way on the northerly side of the McCarthy road centerline.