

# MEMORANDUM

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**State of Alaska**  
**Department of Transportation & Public Facilities**  
**Northern Region Design & Engineering Services**

**TO:** John Athens  
Assistant Attorney General  
Transportation Section – Fairbanks

**DATE:** July 21, 2000

**FILE NO:**

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**FROM:** John F. Bennett  
Chief, Right of Way  
Northern Region

**SUBJECT:** McCarthy Road Right of Way

## CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION

Ten years have passed since your initial involvement in an appeal of a BLM allotment decision regarding the width of the McCarthy road. The Department continues to develop projects along the McCarthy road without a conclusive determination as to the nature of our highway interest or the width of the right-of-way. The time has come to reach a conclusion, good or bad, that will be used as the basis for future projects and property management activities. You recall that our appeal of the BLM decision resulted in an IBLA ruling against the Department. Subsequently, DOT requested a formal opinion from the Department of Law regarding the McCarthy road right-of-way. This request languished through the terms of three DOT Commissioners and we are still uncertain of our position. It is time to transfer the remaining legal support back to your office.

The purpose of this memo is to document the twists and turns of this issue commencing with the 1989 BLM appeal and to request additional legal analysis on a few remaining points that have either not been fully addressed or that I have not completely understood. We also have concerns regarding conflicts possibly created by past projects and property management actions if we accept the conclusion that our right-of-way is narrower than we have traditionally believed. Work you perform on this request can be charged to the McCarthy Road Location Study, LC 30833822.

**Location:** The McCarthy road is listed in the June 30, 1959 "Omnibus Act" Quit Claim Deed as Federal Aid Secondary Class "A" Route No. 850 and is described as being "*From junction with FAS Route 851 at Chitina easterly to McCarthy.*" The system mileage is listed as 59.0 miles. The referenced junction with FAS Route 851 is the junction at Chitina where the Copper River Highway, the McCarthy Road and the Edgerton Highway intersect. The intersection is graphically depicted in the ROW plans for Chitina East, S-0850(6).

**Land Status:** Of the 60-mile road length, approximately 36 miles adjoins ANCSA native corporation select or conveyed lands or other private lands. Approximately 20 miles of the road adjoins state owned lands and approximately 3 miles of the road adjoins National Park Service lands.

**Projects & Mapping:** The importance of resolving the ROW status for the McCarthy road is borne out by the number of projects either constructed in the past few years or currently proposed along the Chitina-McCarthy corridor. The resolution may also have a significant impact on maintenance and property management activities. Relevant projects include:

1. McCarthy Airport – completed 1996
2. McCarthy Road MP 44-47 STP-0850(20)/66546 – completed 1996
3. McCarthy Footbridge TE-0002(39)/66387 – completed 1997
4. Chitina Wayside TEA-0850(21)/66674 – completed 1998
5. McCarthy Road Location Study MGE-STP-0850(19)/66008 – planning phase
6. McCarthy Road Kennicott River Wayside STP-0650(24)/60939 – proposed 2001
7. Copper River East to Kuskalana River (Sections) S-0850(7) – ROW plans approved 7/14/70 – Note: this project was not constructed. It depicts a sum total of 3 miles of right of way claiming a 200' width.
8. Chitina East S-0850(6) – plans approved 5/29/70, Recorded as Plat 76-8 on 8/19/76, Chitina Recording District. Plans depict 1 mile of road with an existing ROW width of 200 feet.

In addition to the above noted projects, due to the cuts and fill along the road and the need for sidehill borrow, our maintenance activities regularly extend beyond 50-feet on each side of centerline.

#### **Chronology of request for legal advice:**

The following is a chronology of events in our pursuit of an Attorney General's legal opinion regarding the status of the Chitina-McCarthy road right of way:

- 4/18/89: Assistant AG Jack McGee issues an opinion regarding the status of the Copper River Highway right of way as a part of a Toll Road Feasibility Study. This opinion suggested that the Chitina-McCarthy road was subject to a 300-foot wide right of way as a part of the Copper River Highway and at least a 200-foot wide right of way by virtue of it being the original corridor for the Copper River & Northwestern Railroad.
- 7/5/89: BLM issues a Decision approving the allotment of John Billum, Jr. and making it subject to an easement for highway purposes extending 50-feet on each side of the centerline of the Chitina-McCarthy road. The Decision is forwarded to the Northern Region AGO office for appeal. Our appeal argues that the State's right of way at least consists of the 200-foot wide corridor originally reserved for the Copper River & Northwestern Railroad.
- 8/25/93: IBLA Decision No. 89-614 declares that the Chitina-McCarthy road is neither a part of the Copper river Highway nor entitled to a 200-foot wide right of way based upon the original railroad right of way. The Decision limits the road right of way to 50-feet on each side of centerline based on Public Land Order No. 601.
- 10/7/93: AAG John Athens recommends against judicial review of the IBLA Decision believing that it is unlikely to be reversed with regard to the Billum allotment. However, he recommends that a complete title and legal analysis be performed before the State officially concedes to the 100-foot width for the entire route.
- 3/2/95: Memo from John A. Miller, Chief, Right of Way to Stephen Sisk, Regional Director requesting a formal AGO opinion regarding the Chitina-McCarthy right of way. The memo also stated that until directed otherwise we would operate under the theory that the right of way is only 100-feet.

- 3/17/95: Memo from Rod Platzke, Director, D&C to John A. Miller acknowledging the IBLA Decision and concurring in the acceptance of the 100 foot right of way width.
- 3/20/95: Memo from M. Clyde Stoltzfus to Rod Platzke noting that prior research performed by AAG Thomas Dahl refutes the IBLA Decision. As he considers the width of the McCarthy road right of way to be an important State policy decision, Stoltzfus recommends seeking an official AGO opinion on the matter.
- 3/29/95: Memo from AAG Thomas Dahl to Boyd Brownfield in support of an effort to pursue the State's claim of a right of way in excess of 100-feet in width.
- 3/30/95: Memo from AAG John Athens to Rod Platzke stating that as he believes litigation would be unsuccessful, another AAG should be assigned to write an opinion.
- 5/16/95: Memo from Commissioner Perkins to Attorney General requesting a legal opinion regarding the State's rights in the Chitina-McCarthy road.
- 9/13/95: Phone message from John Miller to Clyde Stoltzfus: AAG Thomas Dahl has been assigned to write the opinion. The opinion should be issued within a month.
- 3/12/99: Memo from Tony Johansen to Boyd Brownfield reaffirming our need for a legal opinion.
- 7/24/99: E-mail from Mike Downing to Dave McCaleb citing Brownfield's approval to proceed with the legal opinion if the costs were eligible under the McCarthy Location Study project.
- 7/28/99: Memo from Craig Black to John Bennett providing a status update of our request. Craig refers to opinions prepared by Juneau AGO in 1994. Suggested that given the controversy, we might want to reconsider our request for an opinion.
- 8/26/99: E-mail Bennett to Black requesting copies of 2 – 1994 opinions by Tom Dahl.
- 9/8/99: Letter from AAG Doug Gardner to John Bennett transmitting Dahl's 9 page opinion dated 6/16/94 and 34 page draft opinion dated 7/14/94 regarding the Chitina-McCarthy ROW.

**Remaining Issues:**

1. Basis & width for existing mainline ROW [PLO, RS2477, Transfer of Railroad ROW][100', 200']

Your Billum memo dated 10/7/93 stated that the IBLA rationale appears to be applicable to the rest of the right of way. However, you also said that before the State takes any action to officially accept the 100 foot ROW width, that an analysis should be done to determine if there are other documents which could affect the title of other parts of the road. AAG Tom Dahl did a lot of work toward this end in 1994, however, we have only recently been provided with copies of his memos.

Dahl's first memo dated June 16, 1994 (attached, 9 pages) is a review of the IBLA (Billum) decision and considers the possibility of an appeal. He concludes that we should follow your advice and not pursue an appeal. Also, he agrees that the IBLA decision would carry a good deal of weight should other property owners contest the issue.

Dahl's second memo dated July 14, 1994 (attached, 34 pages) poses additional arguments in support of a 200-foot wide ROW. In particular, he argues that the state could claim the ROW under RS-2477. I suspect he drew upon the briefs filed for the Ahtna, Inc. v. State of Alaska trespass case on the Copper River Highway back in 1992. The State's brief (March 2, 1992 brief attached), argued that the State received the ROW for the Copper River Highway (also based upon the railroad ROW) by virtue of a dedication by the federal government, as an RS-2477 ROW, or as a Public Land Order ROW. The Superior Court issued a partial summary judgement on April 3, 1992 stating that the "State of Alaska acquired through quit-claim deed from the federal government a 300-foot wide easement through the lands that are the subject matter of the plaintiff's complaint." Although the summary judgement did not state how that ROW was created, of the three arguments, only the PLO argument called for a 300-foot wide ROW.

Although all of this information may not tempt you to change your opinion of the width of the McCarthy road ROW, there are a couple of issues that continue to bother me and perhaps you can set me straight.

- The IBLA decision (127 IBLA 140) stated that upon relinquishment, the railroad ROW merged with the federal government's fee title and disappeared. "The result could not be otherwise since the United States could not hold both fee title to the public lands" ....."and a right-of-way over those lands." I thought I understood the concept of "merger of title". But if it is as absolute as the IBLA decision claims, how was it possible for SO 2665 to establish highway easements for the benefit of the federal government across public lands and yet survive "merger of title". At the time of SO 2665, the Department of the Interior managed both the Alaska Road Commission and the federal public lands.
- The other issue I am having difficulty grasping is the federal legislative intent of 1941 Act authorizing CRNWRR to relinquish its ROW. Dahl discusses this issue extensively. The IBLA states that the railroad ROW was not preserved intact and the only method DOI had available to create a highway ROW was pursuant to the Act of June 30, 1932 (PLO authority). The railroad ROW was issued under the Act of 1922. This act was also designed to protect the rights of adjoining landowners in the event that the railroad abandoned its ROW. This protection was intended to prevent the situation where the relinquishment of a railroad ROW would create a strip of federal land down the middle of a homestead entry that straddled the ROW. In the event of a relinquishment, the entryman would have rights to the old railroad ROW. However, in this case, Congress wanted to ensure that upon relinquishment, the railroad ROW would not be encumbered by topfiled claims of adjoining entrymen. One of the 1941 Act's provisions prevented this from occurring and allowed the full 200-foot width to remain available for use as a highway. If Congress had intended the highway ROW to be less than 200 feet, they would have created the same problem that they had tried to eliminate in the Act of 1922. That is, a strip of unencumbered federal land would exist between the new highway ROW and the homestead entry. I guess this is less a question than a comment. It appears clear to me that the entire 200-foot wide railroad ROW was to become the new highway ROW.
- Finally, with respect to the main line ROW, I am interested in your opinion of an assertion of the 200-foot width against lands subject to State law. I recognize that we are well past any appeals of Billum. However, my understanding is that the IBLA decision only directly applies to the Billum allotment and that we would have an opportunity to raise other arguments in an appeal of another McCarthy road allotment decision. There is about 3 miles of federal lands (NPS) adjoining the McCarthy road and possibly a few more allotments. Assuming there would be little benefit of appealing the ROW width against other federal lands, the next question is whether we have sufficient support to pursue the 200-

foot width for the other 57 miles of road. Most of these lands are or will eventually be held by ANCSA corporations, DNR and a few private individuals. Given Dahl's argument for a claim of a 200' wide RS2477 ROW and our State's greater acceptance of assertions of RS 2477 rights of way, could this be a successful option? Could it be initiated as a quiet title action?

2. Terminus issues:

- McCarthy: Without regard to the effect of RS 2477, PLO's or the original railroad grant on the highway ROW, we have some additional issues that we need to resolve. One of the more difficult ones we have is where McCarthy Road ROW was dedicated by plat. At the McCarthy end of the road at the Kennicott River, the road is straddled by the McCarthy West subdivision. (Plat 77-7) At the time of subdivision, this land was in the Unorganized Borough and therefore, not subject to platting review. The plat withheld a 200-foot wide ROW for the McCarthy road and was accompanied by a Certificate of Ownership and Dedication. In recent years the owner of the subdivision has claimed that the state can claim no more than the 100 foot width noted in Billum and attempts to manage anything beyond the 100' width as his own property. I won't go into all of the property management headaches we have had with this owner, but he has leased parts of the ROW for business operations and insists on charging fees for parking in the ROW. He has claimed that he was misled and that the State had "taken" his land without compensation by asserting a ROW width larger than we are entitled to. In the State's defense and without regard to our eventual decision on the mainline ROW, the State has made a good faith assertion for over a half of a century that we owned and managed a 200-foot wide ROW based on the original railroad ROW grant. Even if we now acknowledge that the McCarthy road ROW is only 100-feet wide and based upon a PLO, that should have no effect on a dedication of public ROW performed 23 years ago. I continue to argue that the State maintains management of the full 200-foot width through the McCarthy West subdivision and that the only method of reducing that ROW would be through the vacation process. The Department of Natural Resources is currently the Platting Authority in the Unorganized Borough and would manage the public process of vacation for this ROW. DOT, however, does not intend to vacate this ROW, as a wider ROW is necessary at the end of the road. I suspect a similar situation exists across the river in the McCarthy Townsite. Several years ago a quiet title action was initiated with one of the results being a judgement that the McCarthy road through the townsite was 200 feet in width. My position is that a quiet title action and a dedication of public ROW locked these rights of way into 200-foot widths even if we reverse our width assertion on other portions of the road. Please advise whether you agree with this position.
- Chitina: From the intersection of the Copper River Highway/McCarthy Road/Edgerton Highway, the McCarthy road heads east along the southerly boundary of the Chitina Townsite. It is along this portion of the road that we constructed the Chitina Wayside in 1998. The project utilizes the ROW out to 100-feet from centerline. Our 1970 plans for the Chitina East project asserted the 200-foot wide ROW and identified another 50-foot wide strip of land between the southerly boundary of the McCarthy Townsite and the 100 foot from centerline ROW limit. This additional 50-foot wide strip was apparently used in conjunction with the Chitina Station Grounds for the Copper River railroad. Our 1970 ROW plan did not claim this 50-foot wide strip and where its use was necessary for the 1970 project; it was acquired by negotiation or condemnation. I have attached a November 13, 1996 file memo that discusses the status of this 50-foot wide strip. Although we are not laying claim to this 50-foot wide strip, a decision that we had only received a 100-foot wide PLO ROW for the McCarthy road places the status of the 1970 project and the more recent Wayside project into question. If our conclusion is that the McCarthy road ROW extends only 50-feet on each side of centerline by virtue of

a "local" road PLO, I would argue that the 200-foot wide ROW as depicted upon our 1970 Chitina East ROW plans controls as a claim of easement by prescription or by some other doctrine. Please advise whether you agree with this position.

I have only copied you the items so noted. I have a fairly large collection of documents and maps, but I don't want to overwhelm you with paper until I get a feel for what you think might be important. Also, I suspect that as a part of Tom Dahl's research, he likely has a more complete set of references than do I. If you think that the best route is to obtain all of his files, you will probably want to talk to Doug Gardner. I believe I had mentioned to Doug at the beginning of this year that this issue had come full circle and that it should be wrapped up in the office in which it started. Unfortunately, the request has been sitting on my desk for the past several months due to other priorities. Once you get a chance to wade through all of this, I would like to know what kind of schedule you will be able to set for a response.

PS: I have also included a copy of a ROW summary from Ross Kopperud prepared for the McCarthy Airport acquisition and the 4/18/89 Opinion regarding the Copper River Highway by Jack McGee.

Attachments: as stated