

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities

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TO: Boyd J Brownfield
Deputy Commissioner
DOT&PF

DATE: February 2, 1999

FILE NO:

TELEPHONE NO: 451-2210

FROM: Anton K. Johansen
Regional Director
Northern Region

SUBJECT: Request for Legal Opinion
Regarding the State's
Right of Way for the
Chitina-McCarthy Road

As a part of BLM's land conveyance program, decisions having a potential impact on DOT&PF managed facilities are regularly copied to the Regional Right of Way offices. Decisions that have an adverse impact on our facilities due to a misinterpretation of the legal basis for the right of way are forwarded to the AGO for review and appeal. 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: Assistant AG 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 Assistant AG 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 Assistant AG 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 Assistant AG John Athens to Rod Platzke stating that as he believes litigation would be unsuccessful, another Assistant AG 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: Assistant AG Thomas Dahl has been assigned to write the opinion. The opinion should be issued within a month.

Three and one-half years have passed since the Commissioner requested this opinion from the Department of Law. Beyond this chronology we were told that the opinion had been re-assigned to Assistant AG Craig Black. Unfortunately, higher priorities prevented him from spending any significant amount of time on this project. While waiting for this opinion, we have completed the McCarthy airport reconstruction, Chitina Wayside, McCarthy Road MP 44-47 Slide Repairs and the McCarthy Footbridge projects all under the assumption that the Department controls a 200-foot wide right of way. Property management and maintenance activities also operate under the presumption that a 200-foot wide right of way exists. Until shown the contrary, the current McCarthy Road Location Study will also be based upon the claim of an existing 200-foot wide right of way. Although an opinion limiting the right of way width to 100 feet would cause serious repercussions, at least any further problems could be limited by dealing with this issue in a conclusive manner.

Therefore, we request that the Department of Law be notified that a need still exists for a resolution to the McCarthy road legal question.

Attachments: IBLA 89-914