

# MEMORANDUM

State of Alaska 50

Department of Law

RECEIVED W.L.

TO: Boyd J. Brownfield  
Deputy Commissioner  
Department of Transportation  
and Public Facilities

DATE: March 29, 1995

APR 08 1995

FILE NO.: 663-95-0441

TEL. NO.: 465-3600

SUBJECT: McCarthy Road Right  
of Way - Interest and Width

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| <input checked="" type="checkbox"/> | ENGINEERING            |  |
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FROM: Thomas H. Dahl  
Assistant Attorney General  
Transportation Section-Juneau

You will recall we discussed this issue in your office several weeks ago. The subject has now become current with John Miller's March 2 Memorandum to Stephen Sisk; Rodney Platzke's March 17 Memorandum to John Miller requesting input from the Distribution, and Clyde Stoltzfus' March 20 Memorandum asserting that the decision to accept the McCarthy Road right of way at 100' is a state policy decision.

Miller has stated that until he receives direction to the contrary he will act as if the McCarthy Road right of way is 100'. I suggest that, although the ultimate result may be that the state should acquiesce to the 100' right-of-way, for the present DOT&PF should do nothing to jeopardize the state's right to assert its claim that the right of way width is 200'.

The result of extensive research last summer is that the state may be able to show that in 1939, under authority of the Interstate Commerce Commission, the railroad abandoned its 200' right-of-way and the Alaska Road Commission was immediately granted all or part of that right of way under RS 2477.\*

## THE BILLUM DECISION

On August 25, 1993, the Interior Board of Land Appeals decided that a Native Allotment that straddled the McCarthy Road was subject only to a 100' right of way. In 1945, in response to an Act of Congress passed in 1941, the railroad relinquished its right-of-way and other property and equipment. Interior accepted the relinquishment and the right-of-way was cancelled from its records. The Administrative Law Judge relied on the relinquishment

\* RS 2477 states: **The right-of-way for the construction of highways over public land, not reserved for public uses, is hereby granted.** Act of July 26, 1866, repealed by Sec. 706(a) of the Federal Land Policy and Management Act of 1976, with rights-of-way created under the former statute specifically preserved.

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and cancellation as evidence that the railroad's 200' right-of-way did not survive. The decision was not appealed.

In order to prevail on a claim that the Alaska Road Commission acceded to the railroad's right-of-way in 1939 under RS 2477, the state will have to show there was no right-of-way ownership remaining with the railroad in 1941 because it had been abandoned and granted to the Road Commission in its entirety in 1939. Several presumptions of the validity of legislation will have to be overcome.

OTHER ISSUES ARE:

- Assuming the railroad abandoned its right-of-way in 1939, what did it own and what could it abandon under ICC authority? Was the right-of-way an easement or a "limited fee", and does it matter?
- Was any or all of the right-of-way available as "public land not reserved for public uses" at the time of the abandonment?
- What effect did the Public Land Orders of 1949 and 1951 have on the width of the right-of-way? Does an RS 2477 grant restrict the width of the right-of-way to "user", or did the grant include the full width of the railroad's right-of-way?
- What procedural problems are there? How does the state assert its rights given it did not appeal Billum?

Considerable work has already been done to find answers to these questions. We are prepared to respond with an opinion should you request one.

THD/bap

cc: John A. Miller, PE, Chief, Right of Way, FBX  
Rodney R. Platzke, PE, Director, Design & Construction, FBX  
Stephen C. Sisk, PE, Regional Director, Northern Region, FBX  
Clyde Stoltzfus, Special Assistanct, Juneau, DOT&PF  
George Levasseur, M&O Manager, Southcentral District, Valdez