

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities

TO: Stephen C. Sisk, PE *SS*
Regional Director
Northern Region

DATE: March 2, 1995

FILE NO:

TELEPHONE NO: 474-2402

THRU: *Rodney R. Plazke*
Rodney R. Plazke, PE
Director, Design & Construction
Northern Region

SUBJECT: Request for AGO Opinion
McCarthy Road Right of
Way - Interest & Width

FROM: *John A. Miller*
John A. Miller
Chief Right of Way Agent
Northern Region

DEC

cc'd 3-17-95

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In the past two years we have had the opportunity to review the status of the right of way for the Chitina-McCarthy road as a part of the McCarthy road location study, the Kennicott river footbridge and the McCarthy airport projects. In that time we have also received numerous requests from M&O and private citizens interested in the nature and width of the McCarthy road right of way.

To date we have not prepared a comprehensive set of right of way plans for this road and most of our responses have been on a piecemeal basis.

The controversy in this situation is that the right of way has in the past been interpreted as 100', 200' or 300' in width. These varying widths depend on whether the McCarthy road right of way is to be based upon it being a part of the Copper River Highway (PLO "Through" road), the original right of way for the Copper River Railroad, or a Public Land Order "Local" road.

On April 18, 1989, Assistant AG Jack McGee of the Juneau office issued an opinion which discussed the status of the "Right of Way of Copper River Highway" as a part of a Toll Road Feasibility Study. In this opinion McGee included the Chitina-McCarthy road in the "Copper River Highway" suggesting a 300' width by PLO, then stated that without regard to the PLO easement, the "original 200-foot right-of-way for the entire Copper River Highway, as it is described in appendix 4, remained intact and unaffected by the public land orders."

In 1989 BLM issued a decision regarding a native allotment that straddled the McCarthy road. In this decision they stated that the allotment was only subject to a 100' wide PLO local road easement. John Athens of the Fairbanks AG office was requested to appeal that decision and argue a case for the 200 or 300 foot wide right of way. On August 25, 1993, the IBLA issued decision no. 89-614 which upheld the BLM decision. The IBLA stated that the 300' wide PLO "Through" road right of way was inappropriate as the Copper River Highway described by the 1959 Omnibus Act Quitclaim Deed extended from Cordova to Chitina, and then along

the Edgerton Cutoff to the Richardson highway and therefore, did not include the McCarthy road. The IBLA also ruled that the original Copper River Railroad right of way was not conveyed to the State of Alaska intact but was extinguished by merger of title when it was relinquished to the federal government. The IBLA further stated that the only classification available to establish a PLO right of way for the McCarthy road was as a "Local" road since it was not named as a "Through" or "Feeder" road in any of the PLO's. John Athens concurred with the logic of the IBLA decision and advised us that absent some yet undiscovered document which clearly conveyed the original railroad right of way to the state, it would be unlikely that we could sustain a right of way claim greater than 100 feet. We agree.

The few subdivisions which have been platted along the road have dedicated a 200' wide right of way (probably based largely upon past assertions by DOT&PF). A quiet title action in the McCarthy townsite also reserved an easement of 200' for the McCarthy road.

Recently, we have discussed the situation with Ross Kopperud of the Anchorage AG's office as he is involved in certain condemnation actions on the new McCarthy airport which partially adjoins the road right of way. Ross recommended that due to the ambiguities related to this case, that a request for a formal opinion was in order.

It is critical that we expeditiously receive firm and clear direction on this issue in order to keep our projects on schedule, allow M&O to make clear management decisions and provide the public with consistent information.

Therefore, we request that this issue be forwarded through the Commissioner's office to the Department of Law for an opinion.

We recognize that even if our request for an "official" A.G. opinion is favorably received, it will be some time before it is issued. Therefore, until we receive an opinion or direction to the contrary, we will act according to the advice of Assistant AG John Athens and the IBLA decision that the McCarthy road right of way is 100 feet in width.

- cc: George A. Levasseur, Southcentral District, M&O Manager
- John Athens, AGO, Fairbanks
- Ross A. Kopperud, AGO, Anchorage
- Jack B. McGee, AGO, Juneau

*I agree
Road
slb*

Steve —

I don't see that there is any big question here. The attached IBLA shows pretty convincingly to me, I recommend we accept the 100' ROW of PLO's accordingly. Done