Hon. Bruce A. Campbell
Commissioner
Department of Transportation
and Public Facilities

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Chitina-McCarthy Road
Width of ROW

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FOR DISCUSSION PURPOSES

On August 25, 1993, The Interior Board of Land Appeals decided **IBLA No. 89-614, Native Allotment AA-2520, John Billum.** The appeal was from a decision of the Department of the Interior. The decision granted the allotment subject to an easement for highway purposes of 100 feet, fifty feet each side of the centerline of the Chitina-McCarthy Road. The IBLA Affirmed the Decision. AAG John Athens argued the appeal on behalf of DOT/PF. In a memo dated October 7, 1993 to John Miller of the Northern Region Athens stated that reversal was unlikely. Acting upon his recommendation, the IBLA decision was not appealed. On June 2, 1994, you asked us to revisit the decision.

The procedure for appeal. This IBLA decision may be appealed to the Ninth Circuit Court of Appeals by a Petition for Review. The Statute of Limitations for appealing an IBLA decision is governed by Rule 15, Federal Rules of Appellate Procedure. Rule 15 sets forth a clear procedure for prosecuting an IBLA (and other agency appeals) but the exact time in which the appeal must be filed appears to be jurisdictional. This means that the court may

exercise its equity powers and grant or deny jurisdiction over agency appeals that are filed after the 60-day period set forth for ordinary appeals in Rule 4, FRAP. The governing rule is "laches", which in agency cases means that "the party challenging the petition must show that more time has elapsed than reasonably necessary and that it was prejudiced by the delay." This is a 7th Circuit standard that was specifically adopted by the 9th Circuit in Griffith Co. v. N.L.R.B, 545 F.2d 1194 (1976). In Griffith the petition was filed 79 days after the order, and was deemed timely. Nearly ten months have passed since the IBLA order in Billum. If a petition was filed at this late date that challenged John Billum's right to his allotment with only the 100-foot ROW as granted by IBLA, my guess is that the 9th Circuit would deny jurisdiction. It probably would not be possible to fashion a petition that left Billum's rights intact and dealt with the larger issue of the width of the ROW on the rest of the road. Although theoretically the court might agree to deal with the issue, once Billum is out of the case there may not be any case left to appeal.

The state's position and the IBLA response.

1. "The Chitina-McCarthy Road is part of the Copper River Highway." This position was based on the fact that the ROW of the entire Cordova-Chitina-McCarthy road originated with the ROW

granted to the Copper River and Northwest Railroad. The law judge noted strongly that the state historically separated the two roads, and in fact never considered the Chitina-McCarthy section part of the Copper River Highway. The judge noted that the purpose of the Copper River Highway was to connect Cordova with the road system, and that the state had even considered alternate routes connecting the Richardson Highway with the Cordova road, bypassing Chitina altogether. Therefore the state could not bootstrap a right to a ROW of a given width on the Chitina-McCarthy section on its rights to ROW on the Cordova Road.

2. "The state's rights to the 200' ROW granted to the railroad were preserved by Congress on July 15, 1941, when it authorized acceptance of the conveyance of the ROW." On July 15, 1941, Congress enacted 55 Stat. 594 (1941), which authorized the acceptance of the conveyance of the railroad ROW. The statute stated, in pertinent part:

> Sec. 2. The Secretary of the Interior is hereby authorized and empowered to accept . . . said properties to be used, operated, and maintained, as far as may be practicable or necessary, as a public highway, tramroad, or tramway . . . ."

55 Stat. 594 (1941) (emphasis added).

Based on this language the state argued that the statute acted as a dedication of the entire 200' railroad ROW, and required

the Secretary to use it for highway purposes. The 1941 Act is silent about the width of the ROW, neither providing that the highway should have the same width as the railroad ROW nor any other width. The state relied on the 1898 Act that granted a 200' ROW to the railroad as the basis of its claim that the ROW should be 200'.

The actual relinquishment of the railroad's ROW occurred nearly four years after the enabling statute, on March 29, 1945. The relinquishment was accepted by a Decision of the Commissioner, General Land Office, on May 11, 1945. That document states, in pertinent part:

> The relinquishment is found to be satisfactory and is hereby accepted. Accordingly, the easements for the railroad rights-of-way, terminal and station grounds have been noted **cancelled** on the records of this office. . . .

The judge held that

> [a] fallacy occurs in the State's reasoning when it assumes that the railroad right-of-way somehow survived relinquishment to the United States and was then quitclaimed intact to the State. That is not the case.

The judge held that the ROW ceased to exist when it was cancelled by the Commissioner, who was acting on behalf of the Secretary. Under the 1941 Act the Secretary was given discretion in the "practicable and necessary" language to use or not use the ROW for highway purposes, and by releasing the ROW he was acting

according to that discretionary authority. He was not required to build a highway there or keep the ROW for highway purposes, as the state argued. Additionally, because the ROW had been conveyed by the Secretary to the railroad in 1898 with the United States retaining the underlying fee, the acceptance of the ROW merged with the fee and the ROW was extinguished. No dedication occurred as a result of the 1941 Act. The Secretary could determine what portion of the ROW, if any, was practicable or necessary for use, operation and maintenance of the road as a public highway.

3. "The ROW should it be either 200' or 300'." The judge noted that the state had argued two alternative positions. One position was that the Chitina-McCarthy Road was entitled to a 300' ROW because it was part of the Copper River Highway by virtue of its sharing of the railroad ROW; the Copper River Highway was listed as a "through" road in the PLOs with a 300' ROW; and the Chitina-McCarthy portion, therefore, had an equal entitlement. The judge dismissed this argument because of the state's historic treatment of the two roads as separate and distinct, and because the Department listed the Copper River Highway as connecting with the Richardson Highway from Cordova through Chitina. Because the Secretary did not intend that the Chitina-McCarthy portion be included as part of the Copper River Highway as a "through" road,

and because it is not otherwise listed in D.O 2665, it must be considered as a "local" road with a 100' ROW.

On August 28, 1989, AAG Athens asked Richard Odsather, Chief of ROW in the Northern Region, DOT/PF to be able to limit the argument to 200'. He didn't want to cast the state in an "unsympathetic light." He also stated that he believed that a rational argument might be able to be made that the Chitina-McCarthy portion was a part of the Copper River Highway, but that the intent of D.O. 2665, insofar as it referenced the Copper River Highway, was to be sure that the access to Cordova had sufficient ROW width. The "access to Cordova" rationale which designated the Chitina-Cordova portion as a through road did not transfer well to the Chitina-McCarthy portion of the road. Athens' request was granted by the Region on September 6, 1989, and the 200' argument was floated as an alternative. The judge also dismissed this argument because there was nothing in the 1941 Act that specified the ROW width; the Secretary had discretion under the Act to use or not use the ROW for highway purposes; the Secretary in fact released the ROW in 1945 when the railroad conveyed the ROW to the Department; and there was insufficient legal basis to argue that the ROW does not disappear as a matter of law when it is conveyed to the owner of the underlying fee.

4. "Congress intended the ROW to be used for highway purposes, the Secretary had no authority to subvert that intent, and did not do so." This argument was based on the language of the 1941 Act, and the subsequent acceptance of the relinquishment. The intent of the Act was imputed from the language of the Act itself, to convey the ROW to the Secretary for use as a road. The state argued that the cancellation of the ROW in the acceptance document only cancelled the ROW as it related to the railroad, and the Secretary (through the Commissioner) did not cancel the ROW altogether because he could not. Congress had inserted the contingency in the Act which authorized the Secretary to accept the conveyance only for highway purposes.

The judge dismissed this argument. He cited a provision from the original legislation requested by the Secretary, which, if passed, would have authorized the Secretary to dispose of portions of the ROW which the Secretary deemed to be non-essential for highway purposes. The judge reasoned that, although Congress did not give the Secretary blanket authority to dispose of the property, the Act did grant discretionary authority to retain all or only a portion of the ROW for highway purposes and it was the clear intent of Congress that the Secretary have this authority.

Comment and conclusion.

1. Do not appeal this decision. We have waited too long to decide not to take John Athens' advice. The Decision is very well reasoned and the chances of reversal are slim. My guess is that the 9th Circuit will not grant jurisdiction to hear an appeal at this late date, nor will it be willing to hear the issue and render an advisory opinion absent a real case or controversy.

2. The cancellation of the railroad ROW by the Secretary in 1945, four years after the Act authorized acceptance of the conveyance, is going to be given great weight by any subsequent court. The argument that it was only a release of the railroad's rights to the ROW is not a strong argument. It is a critical document.

3. The judge did not think much of the state's two basic arguments, which were (1) that the road is entitled to a 300' ROW because it comes to the table with the same rights as the Copper River Highway; and (2) that the 200' railroad ROW was preserved as a matter of law. Even without the cancellation of the ROW the conveyance of the ROW to the owner of the underlying fee cancels the ROW unless it is otherwise preserved.

4. The Decision, although very strong precedent, does not preclude us from making the argument that the state is entitled to a 200' ROW on the road, should the issue come up again. Do we know how many more allotments there are that create potentially similar problems?

5. John Athens suggested that an analysis be done to determine if there are other documents that would affect title on other parts of the road, or different title documents. Has this been done, and if not, can it be?

6. The success of the state to assert a 200' ROW against Village and Regional Corporations, the National Park Service, and other landowners for those portions of the road that cross their lands is materially affected by this IBLA Decision. In his October 7, 1993, memorandum, John Athens stated he believed the Billum rationale "would be followed in another adjudication, and the state would be limited to a 100 foot wide right-of-way". I agree with his analysis. To be successful and avoid an action for trespass or an inverse condemnation action we will have to show that the 200' ROW somehow survived the cancellation and the merger with the underlying fee. At this point, I do not believe it can be done.

/THD:ebc