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Hon. Michael Barton
Commissioner
Department of Transportation
and Public Facilities

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465-3603

Chitina-McCarthy Road
Width of ROW

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CONFIDENTIAL--DRAFT
ATTORNEY/CLIENT PRIVILEGE
FOR DISCUSSION PURPOSES

Commissioner Campbell asked me to revisit my memo of June 16, 1994, regarding the Native Allotment Application of John Billum, AA-2520, Parcel A, which restricted a right of way along the Chitina-McCarthy Road to 100' where it crossed the allotment. His position was that between the time the railroad closed the mine and abandoned the railroad, and especially between 1941 when Congress passed the Act that allowed the right of way to be conveyed and 1945 when the Department issued its Decision, the public gained an interest in the right of way, and the nature of the interest was the same as that held by the railroad, 200'.[1] He supported his position with the fact that a tramroad was actually established and used over that route during the period before 1945, and that the public land order establishing a 100' right of way occurred much later and did not effect the width of that right of way. He asked me to look again at the Congressional intent of the

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[1] The Alaska Right of Way Act of 1898, 30 Stat. § 409, et seq., formerly codified 43 U.S.C.S. § 942-1, states in pertinent part, "Sec 2. That the right of way through the lands of the United States in the District of Alaska is hereby granted to any railroad company, . . . to the extent of one hundred feet on each side of the center line of said road; . . . ."

1941 Act and see if there is anything that can be found, either there, or in the usage of the right of way as a tramroad, that would give the result that the 200' right of way was preserved.

In order for the 200' right of way to have survived the cancellation in the 1945 Decision, the railroad by that time would have had to have abandoned the right of way or be divested of its ownership interest in it, and the Alaska Road Commission would have had to have succeeded to that interest. Divestment of a property right would normally have been able to occur only as a result of appropriation by adverse possession of a prescriptive easement over the property[2], by transfer of the interest of the railroad through a grant to a third party, or by purchase and sale. Because of the strong policy of public ownership inherent in the grant, none of these traditional methods of transferring property interests apply to railroad rights-of-way.

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[2] It is not possible to obtain title by adverse possession against the government. Even if the requisite elements giving evidence of hostility to the railroad's interest were present here, which they are not, adverse possession against a railroad's interest in its right-of-way is not possible because of the strong interests of the public that were inherent in the grant of the right-of-way to the railroad. Northern Pacific v. Townsend, 190 U.S. 267, 23 S. Ct 671, 47 L.Ed. 1044 (1903). Railroad rights-of-way have been granted as a public good, and a right of reverter is retained by the public as a condition of the grant. Barnes v. Southern Pacific, 16 F.2d 100 (9th Cir. 1926). The ICC report indicates that the railroad gave permission for use of the ROW as a tramroad.

Cases construing 43 U.S.C. § 934, which granted rights-of-way to railroads, have held that railroads got more than an easement but less than a fee.[3] In Northern Pacific v. Townsend, 190 US 267, 23 S. Ct 671, 47 L.Ed. 1044 (1903) the U.S. Supreme Court called the interest a "limited fee" because of the right of the railroad to exclusive use of the right of way, and because of the right of reverter to the public.[4] This unique status meant that the railroad had no power to abandon any portion of the width of the right of way, nor could it voluntarily alienate any part of it. Richardson Real Estate Mining and Commercial Corp. v. Southern Pac. Co., 260 P. 195 (Ariz. 1927). The railroad was not, however, precluded from abandoning all or portions of the entire width of the right-of-way, provided it complied with the public process established for that purpose.

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[3] Mar. 3, 1875, 18 Stat. § 482. The Alaska Right of Way Act of 1898 contains similar and expanded language. Both contain language establishing the right of way 100' on either side of the centerline. The 1898 Act refers specifically to railroads in Alaska.

[4] See also Rio Grande Western Ry. Co. v. Stringham, 239 U.S. 44 (1915). In Great Northern Railroad Co. v. U. S., 315 U.S. 262, 86 L.Ed. 836 (1942) the Court denied a claim of a railroad to the mineral estate under its right of way based on its interpretation of "limited fee." The Court in Great Northern Railroad overruled the Stringham line of cases, saying they were based on a policy of past lavish treatment of railroads, and held that railroads that were granted rights of way under the 1875 Act were granted only an easement. Whether only an easement or limited fee, railroads took the right of way subject to the Government's right of reverter and their own right to exclusive use, and with considerable legal limitations on alienation.

A. SUMMARY AND RECOMMENDATION.

1. The Transportation Act of 1920 gave authority to the Interstate Commerce Commission to issue a certificate of public convenience and necessity to the Copper River and Northwestern Railroad to abandon its property.

2. The ICC issued the certificate on April 21, 1939, authorizing the abandonment of the "entire line of railroad." As early as the summer of 1938 the Alaska Road Commission operated a tramroad on the Chitina-McCarthy right of way.

3. The railroad ceased operation in 1939. This act was all that was necessary to effect the abandonment of the right of way.

4. At the time of the abandonment, and at all times subsequent to it, the Alaska Road Commission operated a highway from Chitina to the Copper River, and a tramroad on the right of way from the river to McCarthy. All of the requirements of a RS § 2477 grant have been perfected.

5. The railroad was precluded by law from abandoning less than the full width of its right of way. There are two possible results inherent in the application of the 1922 Act. The first is that the right of way reverted to the adjacent owners, and the Alaska Road Commission was then granted a right of way that was later defined as 100′ under the public land laws. The second possibility is that the Alaska Road Commission was granted all of

the Chitina-McCarthy right of way that was owned by the railroad because the right of way that was to be used as a highway was not transferred to the owners of the underlying fee.

6. By the time the Act of 1941 became law the Chitina-McCarthy portion had already been granted to the Alaska Road Commission.

7. The 1945 relinquishment by the railroad and acceptance by Interior affected only those portions of the right of way that had not been previously granted to the road commission, along with all other railroad property.

8. The Billum case should be appealed based on the above argument.

B. THE EVENTS THAT OCCURRED BETWEEN 1938 WHEN THE MINE CLOSED AND THE RAILROAD CEASED TO OPERATE, AND JULY 15, 1941, WHEN CONGRESS AUTHORIZED THE RAILROAD TO CONVEY ITS PROPERTY TO THE SECRETARY, TEND TO SHOW THAT THE RAILROAD HAD ABANDONED THE RIGHT OF WAY AND THE ALASKA ROAD COMMISSION SUCCEEDED TO ITS USE.

1. The Interstate Commerce Commission.

The early events of that time period are summarized in the April 21, 1939 report of the Interstate Commerce Commission (ICC), which states that the railroad operated some of its equipment and used some of its facilities on a limited basis between Chitina and Cordova (but not between Chitina and McCarthy) during the previous summer (1938) to accommodate tourists. The report says that permission was given by the railroad to the Alaska

Road Commission to maintain the line as a tramroad, and to allow the public to use the rails with automobiles fitted with flanged wheels and "other means suitable to their convenience."

The April 21, 1939 decision of the ICC was to issue a certificate of public convenience and necessity that authorized the railroad to abandon its entire line, and cancel the tariffs effective forty days after the date of the decision. Two years later, in a letter dated April 11, 1941 to Senator Millard Tydings, Chairman of the Senate Committee on Territories and Insular Affairs, Joseph Eastman, Chairman of the Legislative Committee of the ICC, explained that the ICC had issued the certificate in 1939 in response to the railroad's application, and stated that "Operation was discontinued a few months later."[5]

2. The Transportation Act of 1920, 41 Stat. 457 et seq.

The authority of the Interstate Commerce Commission over railroads was given by Congress in the Interstate Commerce Act of 1887, 24 Stat. 379, et seq. That authority was substantially expanded in the Transportation Act of 1920, 41 Stat. 457, et seq, repealed by Act Oct. 17, 1978, P.L. 95-473, § 4(b), 92 Stat. 1466. The Act of 1920 prohibited a railroad company from abandoning "all or any portion of a line of railroad" without first obtaining a

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[5] The text of the letter is contained in the Report of the Senate Committee on Territories and Insular Affairs, dated June 5, 1941. The Report is part of the legislative history of the 1941 Act.

certificate of public convenience and necessity from the Commission. Upon receipt of an application for a certificate to permit abandonment, the Commission was required to send a copy of the application to the Governor and publish notices in an appropriate newspaper. The Commission could then, at its discretion, issue the certificate for all or a portion of the relief applied for by the railroad. Once the certificate was issued the railroad could abandon the property described in the certificate "without securing approval other than such certificate." 41 Stat. 478, Para. (20).

Issuance of the certificate by the ICC gave permission to the carrier to do the things it applied for, but it did not require the carrier to do those things.[6] The result is that the issuance of the certificate on April 21, 1939, gave permission to the Copper River and Northwestern Railroad to abandon its line, but it did not require the railroad to do so, nor did the mere issuance of the

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[6] 41 Stat. § 477, Para. (20) states, in pertinent part:

> From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction . . . .

certificate constitute the abandonment. In order for the line to be abandoned the railroad would have had to, as the certificate stated, "proceed with the abandonment," i.e., to take some affirmative step to give evidence not only of its subjective intent to abandon the line, but of its actual abandonment of the line. Ceasing operation, as reported by the ICC to the Senate Committee, would appear to have constituted such an affirmative step.

The Department of the Interior apparently believed that abandonment of the line was not enough to constitute relinquishment of the right-of-way. A. J. Wirtz, Acting Secretary of the Interior, in a letter to the President of the Senate dated March 13, 1941, said, "[T]here has been no voluntary relinquishment of the right-of-way by the company; nor has the abandonment or forfeiture of the right-of-way been declared or decreed by a court of competent jurisdiction." The letter was sent to support passage of the 1941 Act, as discussed below.

3. **The "Act of 1922 on the Abandoned Portions of Rights Of Way Granted to Railroad Companies" 42 Stat. § 414; 43 U.S.C.S. § 912.**

The Act of 1922 was designed to protect the rights of municipalities and private adjoining landholders in the event that a railroad abandoned its right-of-way. The Act contains the language, "abandonment or forfeiture of the right-of-way declared or decreed by a court of competent jurisdiction," and the Acting Secretary was quoting from that Act in his letter to the Senate

supporting the 1941 Act. Prior to the Act of 1922 the underlying fee of a railroad right of way was held by the grantor of the right of way, and a subsequent owner of the adjacent land would have no right of reverter unless it had been specifically preserved in the deed. The result was that, in the event of abandonment of the railroad right of way, the initial grantor of the right of way would suddenly come back into title, owning a fee interest in a strip of property as wide as the right of way across property that the grantor had previously sold. In the event of a homestead, the patentee might find the homestead divided by a vacant strip of land owned by the United States. This situation essentially forced a subsequent owner to buy the property twice.

The Act provided that when the "use and occupancy" of a railroad right of way "has ceased or shall hereafter cease," all right, title and interest of the United States, i.e., the reverter interest in the right of way, "then and thereupon" transferred to the successor to the interest in the adjoining property. The railroad's interest could cease in one of several ways; forfeiture, abandonment, a decree by a court of competent jurisdiction, or as declared by an Act of Congress. The transfer was designed to be immediate, by virtue of the interest of the owner of the adjoining patent. The authority of the Interstate Commerce Commission is not mentioned in the Act.

There were two significant exceptions to the Act. The first was that "such part thereof" (that is, of the right of way) "as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment" would not be transferred by operation of the Act. This protected the right of way from immediate entry by the adjacent landowner if a highway was to be built, but meant that the right of way would be forfeited for highway purposes unless a public highway was established on the right of way within one year of the forfeiture.

The second exception to the Act of 1922 excepts "such portions of its right-of-way as may be conveyed by a railroad if the conveyance is validated and confirmed by act of Congress prior to forfeiture or abandonment of the right-of-way by the railroad."[7]

4. **The Act of 1941 "Authorizing the Copper River and Northwestern Railroad to convey to the United States its railroad right-of-way and other railroad properties in Alaska, for use as a public highway, tramroad, or tramway, and for other purposes." 77**

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[7] This is the description by Acting Secretary A. J. Wirtz in his letter to the Senate in support of the 1941 Act. The actual language of the exception is: "Provided, That this Act shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may hereafter and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this Act affect any public highway now on said right of way." There was no public highway on the right of way as of the date of the 1922 Act.

Cong. 1st Session, P.L. 176; 55 Stat. 594, July 15, 1941.

The 1941 Act passed the Senate on June 9, 1941, designated S. 1289. It was introduced at the request of the Department of the Interior, and its passage was supported by the lengthy letter from Acting Secretary Wirtz. See n.7. The letter from the Secretary was included in the Report of the Senate Committee on Territories and Insular Affairs, dated June 5, 1941. The Secretary was under the impression that the right of way had not been "conveyed" as of the date of his letter, notwithstanding the ICC certificate and the subsequent acts by the railroad to cease operation. The letter explains that the portion from Chitina to Copper River Crossing would be used as a highway and the remaining 60 miles from the crossing to McCarthy would be a tramroad. The letter states:

> The area which would be served by the combined highway-tramway running from Chitina to Kennecott is of great scenic attraction and is also the location of a number of operating mines. It is considered essential that the proposed transportation facilities be provided. . . .

The Secretary was concerned that, unless Congress acted, the abandonment of the railroad right of way would be covered by the provisions of the 1922 Act, and the railroad right of way would not be preserved for highway purposes. After explaining that title to portions of the underlying fee remain in public ownership, the Secretary wrote:

> However, portions of the right-of-way traverse lands which were part of the public domain at the time of the grant but which since have been patented. Under the provisions of the act of March 8, 1922 (42 Stat. 414), upon abandonment or forfeiture of the right-of-way, the right, title, and interest of the United States in those portions of the right-of-way would vest in the patentees of said lands, except the portions of the right-of-way within the limits of a municipality, the title to which would vest in such municipality. . . .

The Act passed the Senate on June 9, 1941.[8] The House Committee on Territories held a hearing on the Senate Bill on June 24, 1941. Anthony J. Dimond, Alaska's Delegate to Congress, testified in support of the bill. Here is part of what he told the Committee:

> The operation of the mine no longer goes on, and since the railroad is no longer being operated, the company is willing to convey the railroad right-of-way and all of its property, including the terminals and everything connected with the railroad, to the United States Government, and the Secretary of the Interior wishes the United States Government to acquire the property in order that parts of the railroad right-of-way may be converted into a highway.
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> When this copper mine was in operation, the railroad was operated, but now, with the closing down of that service, there being no roads of any kind into that district, it is absolutely necessary that something be done to provide transportation facilities. Therefore, the people of Alaska very much desire to have this railroad property taken over by the United States. It does not cost a cent. Then, that part of the railroad which would serve this mining district would be converted into a highway, if Congress should appropriate money for

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[8] 87 Congressional Record, Part 5, p. 4870, 1941.

> it, or if funds can be obtained from any other source for that purpose. . . . [T]he passage of the bill would not mean that the Government would be bound to provide for the construction of a tramroad or railroad. Congress, of course, would do as it pleased about that. There seems to be every reason in favor of having the Government acquire the property, and then at the proper time, when funds are available, a part of the railroad could be converted into a highway.

The bill was passed out of the Committee on the Territories and reported to the House of Representatives on June 25, 1941. The Senate Report was incorporated in full in the House Report. Section 3 of the 1941 Act provides that the 1922 Act "shall not affect the right-of-way, or any portion thereof, or any other lands or properties donated, granted, or conveyed to the United States pursuant to the authorization contained in this Act." It was passed by the House and became law on July 15, 1941.

The testimony of Anthony Dimond to the House Committee on the Territories gave the clear impression that Congress needed to act definitively to preserve the right of way. It was assumed that, without the passage of the 1941 Act, the 1922 Act would take effect and the right of way would revert to the adjacent landowners, including the private landowners referred to by Secretary Wirtz, unless one or both of the exceptions in the 1922 Act took effect. The 1941 Act was intended by the Secretary to be the Act of Congress referred to in the second exception to the 1922

Act, which defeated the possibilities of claims by adjacent landowners, and protected the right of way for highway purposes.

The 1941 Act does not mention any width of the right of way. There is no reason to assume that Congress intended anything other than the entire 200' that had been granted to the railroad under the 1898 Act. There is no provision in law for the width of the right of way to be diminished, and in fact, the right of way could not be narrowed by abandonment as a matter of law. Either the railroad abandoned the entire width of its right of way for a given distance, or it abandoned none of it.

5. The Alaska Road Commission.

The record indicates that the Alaska Road Commission took steps to establish a tram road even before the railroad completely ceased operation.[9] The 1939 Annual Report of the Alaska Road

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[9] [The] applicant proposes to leave its railroad intact between McCarthy and Chitina to enable shippers to handle light freight and passengers thereover by means of automobiles fitted with flanged wheels or by any other means suitable to their convenience. The superintendent of highways in the Chitina district, whose work is under the supervision of the Alaska Road Commission, hereinafter called the road commission, testifies that he made a study of the transportation problems in that district and afterwards recommended that the road commission take immediate steps to maintain the railroad between McCarthy and Chitina and operate it by means of light equipment. The road commission has purchased a so-called speeder and some push cars for the purpose of experimenting with that method of transportation. There is an aerial-tram line, 1,200 feet long, stretched across

Commission, which covered the period ending June 30, 1940, lists the Chitina-McCarthy road as a project on which new work would be performed. This would have been almost immediately after, or even concurrent with, the time the ICC issued the certificate of public convenience and necessity, allowing the railroad to abandon its property. Work continued to be performed by the Alaska Road Commission after the railroad abandoned the property, in each subsequent year thereafter, through 1945 and beyond. The right of way continued to be used as a tram road in each of those years.

C. R.S. § 2477 OPERATED AS A GRANT OF THE ENTIRE 200' RIGHT OF WAY TO THE ALASKA ROAD COMMISSION, AND SUBSEQUENTLY TO THE STATE.

1. <u>The nature of an R.S. § 2477 grant</u>.

Congress by Act of July 26, 1866 granted a right-of-way for the construction of highways over unreserved public lands. The act provides as follows:

> **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, c. 262, sec. 8, 14 Stat. 253, codified as R.S. § 2477, later as 43 U.S.C. § 932, repealed by § 706(a), of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2743.

> the Copper River at or near Chitina, which has been used by the applicant for some years on occasions when the pile-trestle bridge was dismantled. The tram line, carrying a maximum load of about 800 pounds, would be used in connection with the experimental operation of the railroad. . . .

283 I.C.C. 111 (April 21, 1939).

Rights-of-way created under the former statute were specifically reserved in the repealing act. Sec. 701(a), Title VII, 90 Stat. 2793.

The operation of this statute in Alaska has long been recognized within the State and former territory. Clark v. Taylor, 9 Alaska 298 (D. Alaska 1938); Hamerly v. Denton, 359 P.2d 121 (Alaska 1961); Girves v. Kenai Peninsula Borough 536 P.2d 1221 (Alaska 1975).

The historical conditions leading to the enactment of this federal grant and the circumstances of its operation are set out and explained in Central Pacific Railway v. Alameda Co., 284 U.S. 463, 52 S. Ct. 225, 76 L.Ed. 402 (1932). The statute is an express dedication of a right of way for roads over unappropriated government lands, acceptance of which by the public results from "use by those for whom it was necessary or convenient." The U. S. Supreme Court has stated that the grant creates rights that cannot be destroyed or impaired by subsequent government action because government concurrence and assent to

> the establishment of these roads is so apparent and their maintenance so clearly in furtherance of the general policies of the United States that the moral obligation to protect them against destruction or impairment as a result of subsequent grants follows as a rational consequence.

Central Pacific Railway, 76 L.Ed at 404.

2. The right of way, once abandoned, was unreserved.

In order for land to qualify for a grant under R.S. § 2477, the land must be "unreserved". This means that it must be available for entry by the public. While the right of way was being used by the railroad it could not be considered unreserved, even when used concurrently as a tramroad by the Alaska Road Commission in 1938. Courts have been extremely reluctant to hold against the interests of railroads even though the use is slight and peripheral. Had the railroad asserted its ownership of the right of way against the rights of the public, no use by the public as a tramroad could cause the right of way to lose its reserved status. The actual cessation of operations by the railroad in 1939, which followed the application to the Interstate Commerce Commission and the issuance of the certificate of public convenience and necessity, demonstrates both the intent of the railroad to abandon the right of way and its actual abandonment. "There is a dedication when the owner of an interest in land transfers to the public a privilege of use of such interest for a public purpose." Hamerly v. Denton, supra., quoting 6 Powell, Real Property, § 934 at 346 (1958).[10]

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[10] See also Carroll v. Price, 1 Alaska Fed. 445. 450, 81 F. 137, 140 (D. Alaska 1896) and Harkrader v. Carroll, 1 Alaska Fed. 479, 480-481, 76 F. 474, 475 (D. Alaska 1896) Both cases stand for the proposition that upon abandonment land reverts to its status as part of the unoccupied public domain, and were cited by the Bureau of Land Management in its Answer to Statement of Reasons in the Billum case.

There is an argument that the actual abandonment did not occur until after the passage of the 1941 Act. The testimony of Anthony Dimond before the House Committee on Territories in support of the bill was that the railroad was

> willing to convey the railroad right-of-way and all of its property, including the terminals and everything connected with the railroad, to the United States Government, and the Secretary of the Interior wishes the United States Government to acquire the property in order that parts of the railroad right-of-way may be converted into a highway.

The abandonment of the right of way, that is, the surrender of the right to use the real property for a railroad after receiving permission to cease operation and actual ceasing operation, appears to be different from abandonment of the property incident to use of the right of way, that is, bridges, rails, buildings, equipment, and all the incidental paraphernalia that was left when the railroad left the country. So long as there was not a definitive transference of ownership of that paraphernalia, the extent of the claim of the railroad to its property might not have been known to the general public. It may have been that there was a general perception of trespass, or use of the right of way by consent of the railroad. It can be argued that the paraphernalia and parts of the right-of-way were the primary subjects of the 1941

Act, and that the references by Delegate Dimond to the Chitina-McCarthy right-of-way were simply excess and of no legal effect.[11]

There is no mention of the claim to an R.S. § 2477 grant in the testimony leading to the passage of the 1941 Act. The Alaska Road Commission was the appropriate public authority to act on behalf of the territory, it was manifesting an intention to use the right of way as a road, and the road was open to the public, at least to as much of the public that had access to equipment that could operate on the tramroad. This is the test for acceptance of an R.S. § 2477 grant set forth in Hamerly, and the test was met. There is no suggestion in any of the data that the railroad wanted the right of way to remain reserved. The testimony of Anthony Dimond was that the railroad wanted to give away its property, and the only thing that was keeping the right of way from becoming a highway and not a tramroad was an appropriation of funds from Congress.

3. **There is legal authority that the 200' right of way was preserved in the R.S § 2477 grant.**

The purpose of the discussion about the application of the R.S. § 2477 grant process as it may apply to the Chitina-McCarthy highway is to determine the time and the method by which the Alaska Road Commission, and ultimately the state, acquired the

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[11] The railroad's relinquishment dated March 29, 1945, which will be discussed later, lists the rights of way among the properties relinquished.

right of way. The major issue to be resolved, however, is whether the right of way for the highway is 200' or 100'.

The cases have held that the question of width of the right of way is a mixed question of law and fact. Where the right of way has been acquired by use, its width "must be determined in accordance with what is reasonable and necessary for the uses to which the road has been put." Boyer v. Clark, 326 P.2d 107,109 (Utah, S. Ct., 1958).

State statutes will usually determine the width of a right of way. The operative statute in Alaska at present is AS 19.10.015, which states that "officially proposed and existing highways on public land not reserved for public uses are 100 feet wide", unless a highway has been specifically designated to be wider than 100 feet.

In 1938 the U. S. District Court in Alaska decided Clark v. Taylor, 9 Alaska 298 (D. Alaska 1938), which dealt with a prescriptive easement for a road across a mining claim. The road was built by the Alaska Road Commission, and the right of way was claimed under R.S. § 2477. It was clear that the Alaska Road Commission had a right to accept a grant under the statute,[12] but the primary issue in the case was the width of the right of way. The court held that there were no laws fixing widths of rights of

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12 47 Stat. 446, 48 U.S.C. § 321(a).

way for roads built by the Alaska Road Commission, except on section lines.[13] There were territorial laws that limited widths of roads and trails built by the Territorial Road Commission to 60',[14] but the Alaska Road Commission was not subject to that restriction. Because there were

> no territorial laws fixing the width of the right of way of the road in question in this suit, the width of such right of way must be determined otherwise.

Clark at 312.

There are two possibilities for determining the width of rights of way other than by statute. The first is referred to in the cases as "user", which means the actual width that is used for highway purposes. In Clark v. Denton that width was 18' because there were no other factors affecting or proscribing the width.[15]

> Generally, the easement cannot, upon principle or authority, be broader than the user.

Clark at 313.

The second possibility relates to factors other than widths set by statute or by user.

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[13] Ch. 19 SLA 1923, and later, Ch. 123 SLA 1951, Ch. 35 SLA 1953.

[14] Ch. 36 SLA 1917.

[15] This opens the way for the traditional application of the public land orders and Secretarial Order 2665 (Oct. 16, 1951) and R.S. § 2477. Had these orders been in effect when Clark was decided, the width of the right of way granted in Clark would have been 100' because it would be classified as a local road.

> Other conditions, however, may be effective to extend the exterior limits beyond the thread or course of actual travel, as where inclosures may have been permanently maintained by persons affected with reference to the highway, or the use is referable to a survey and plat recognized and adopted by owners of lands over which the way extends . . . .

Id.

The determination of the width of the right of way by applying factors unique to the right of way in question has been applied in recent cases. In State v. Crawford, 441 P.2d 586, 7 Ariz. App. 551 (Ariz. 1968), on remand, 475 P.2d 515, 13 Ariz. App. 225 (Ariz. 1970), the Arizona Supreme Court indicated that it would have approved an R.S. § 2477 right of way of 400' if it had sufficient facts. S.O. 2665 did not apply to Arizona.

State v. Crawford was an inverse condemnation proceeding against the state for allegedly taking a 200' strip of plaintiffs' land in constructing a second lane of highway parallel to an existing highway. The original highway was built in 1920 over unreserved public lands, and plaintiffs' patent, issued in 1954, contained no express reservation of right of way for the highway. The physical roadway and necessary appurtenances never extended beyond 100'. In 1964 the state constructed additional lanes which consumed 200 more feet of right of way.

Arizona attempted to show that in 1940 the State Highway Engineer had prepared a map on which he drew a 400' right of way

for the road. The State Highway Commission had passed a resolution in 1942 which incorporated the map by reference, but was never able to produce a copy of the map. The result was that the state had to pay the patentee for the additional right of way. The case is significant because the court indicated that if the state could have produced a map or resolution that clearly manifested its intent to accept the additional right of way prior to plaintiffs' patent, the state would probably have prevailed even though actual construction did not take place until 22 years after the initial construction, and 10 years after plaintiffs' patent.

In Standage Ventures, Inc. v. State, 551 P.2d 74, 27 Ariz. App. 84 (Ariz. 1976) the Arizona Supreme Court dealt with the same issues on the same road as it had previously considered in State v. Crawford. In Crawford the map could not be found; in Standage Ventures the state produced not just one but two maps, one indicating a right of way of 200' in the privately owned sections and another indicating 400' across public lands, which was the area in question. The trial court had given judgment to the state, based on the fact that the map for the portion of the road in question had been produced. The Supreme Court reversed, holding that the existence of the second map made the reference to the map in the resolution "not unambiguous." The clear inference, however, is that had the map been unambiguous as to the width of the right of way in the state's original claim to an R.S. § 2477 grant, the

trial court would have been affirmed and the grant would have been declared to be the width of the right of way described on the map.

The reports of the Alaska Road Commission for the years 1939 and following indicating activity on the right of way may be sufficient to stake a claim that the entire 200' right of way was granted to the state.

C. THE 1945 RELINQUISHMENT DID NOT AFFECT THE RIGHT OF WAY PREVIOUSLY GRANTED TO THE ALASKA ROAD COMMISSION.

1. <u>The relinquishment by the railroad, March 29, 1945</u>.

The relinquishment document does not use the term "conveyance" as suggested is required in the 1941 Act. The lead paragraph of the relinquishment says:

> COPPER RIVER AND NORTHWESTERN RAILWAY COMPANY hereby relinquishes to the United States any and all rights that may have been obtained in and to rights-of-way, terminal and station grounds, by reason of the approval of the Department of the Interior or the acceptance for filing by the General Land Office, of maps filed under the Act of May 14, 1898 (30 Stat. 409), for railroad purposes in Alaska, including the following. . . .

That paragraph is followed by 32 paragraphs detailing the properties purported to be relinquished by the document, which include all the rights of way and support facilities.

2. <u>The Acceptance of the Relinquishment</u>.

On May 11, 1945, the Commissioner of the General Land Office of the Department of the Interior issued his decision to accept the relinquishment. The beginning paragraph of the decision references the rights-of-way granted under the 1898 Act "which were

abandoned in 1939 with the consent of the Interstate Commerce Commission."

The final paragraph of the decision states:

> 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 canceled on the records of this office. The Register of the District Land Office will make appropriate notations on the records of his office and file the attached copy of the relinquishment for future reference. The company will be informed by this office of the action taken.

3. **The Federal Position.**

In summary, the federal position is that the railroad had not terminated its claim to the right of way until it relinquished the property in 1945, and the width of the right of way was set by PLO 601 and the Land Orders that followed. Because the Chitina-McCarthy Road was not specifically mentioned in S.O. 2665, it has to be considered a local road with a right of way of 100', 50' on either side of the centerline. The administrative law judge in Billum gave great weight to the "cancellation" of the easements on the Department's records.

The Government supports its contention that the relinquishment was required by citing Frank M. Gallivan, A-27830 (February 4, 1959), and 43 C.F.R. 105.1 (1938). Gallivan is an unpublished appeal to the Solicitor from a decision of the Bureau of Land Management (BLM). The appellant had filed an offer to

lease for oil and gas purposes land that was determined to be unavailable because the land described in the lease appeared to be in a railroad right of way. Upon review, Gallivan was able to produce a copy of pages from the tract book that indicated the right of way had been relinquished. The notation of the relinquishment on one tract, however, occurred in 1926, 23 years before the railroad executed the deed conveying the property. The solicitor suspended the BLM order and remanded the matter "for determination of the facts respecting the notation of relinquishment in the tract book and the status of the land and further action on the offer on the basis of such determination."

Although Gallivan does support the fact that relinquishment of a right of way is an "appropriate" mode of terminating a right of way, the case clearly supports the idea that other possibilities for divestment exist.

The regulation cited by the solicitor in Billum, 43 C.F.R. § 105.1 (1938),[16] also supports the contention that

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[16] **Section 105.1 Acceptance of conditional relinquishments discontinued; exceptions.** The register will advise all parties that (except as noted below), the filing of a relinquishment of an entry or claim will be treated as absolute, the cancellation thereof at once noted of record, and the tract embraced therein will be subject to disposition under existing laws.

The only exceptions to this rule are relinquishments of approved rights of way, conditioned upon the approval of a subsequent

relinquishment is not the exclusive method for surrender of rights to a right of way. The regulation says, in summary, that if a relinquishment is filed it will be treated as final, except in certain circumstances. None of the authorities cited by the Government in Billum speak to the issue of the effect of a relinquishment where divestment actually occurred at an earlier date.

The solicitor in Billum argued that, if the railroad got a limited fee interest in the right of way, the only way that interest could be conveyed was by a deed. The solicitor speculates

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> application, filed as an amendment to the approved right of way, or as an independent application, but conflicting in whole or in part with the approved right of way. Such relinquishments should not be noted by the register until he has been advised of their acceptance by the General Land Office.
>
> Many applications for amendment of entries are accompanied by relinquishments of the tracts sought to be excluded. This is unnecessary, and the register should advise such applicants that if the relinquishment is filed it is his duty to at once make the same of record.
>
> This section applies only to cases wherein the entry shall have been relinquished in its entirety. It in no wise modifies § 217.19 which relates solely to applications for repayment of moneys paid in connections with commutation entries, final homestead entries, final desert-land entries, and other final certificates where it is the intention of the applicant for repayment to merely suffer cancellation of the final entry, leaving the basic entry intact subject to future compliance with the public land laws. (Citations omitted).

that, because Great Northern Ry. Co. v. U.S[17] was decided in 1942, after the passage of the 1941 Act but before the railroad took any formal steps to relinquish the right of way, the reference to "conveyance" in the 1941 Act became a nullity in that the interest was determined not to be a fee but an easement. According to the solicitor, fee interests had to be conveyed; easements could be relinquished.

The problem with this reasoning is inherent in the facts of Great Northern Ry. Co. The railroad had attempted to stretch its "limited fee" interest into a right to drill for oil in its right of way. The U. S. Supreme Court held that the interest was in the nature of an easement, that is, the right to use the land for a railroad, and even though the right was exclusive it did not carry with it the right to mine the subsurface estate. Although the "limited fee" language in prior cases was overruled, the rights inherent in the grant to railroads did not change. See n.4. Because of this, the government's attempt to create a conveyance based on the ownership interest granted with the right of way is a considerable stretch. The judge in Billum paid little attention to the attempt to draw a distinction between a conveyance and a relinquishment, and focused his attention on the language of the

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[17] 315 U.S. 262, 86 L.Ed. 836 (1942).

department's acceptance of the relinquishment, which purported to "cancel" the right of way.

D. FEDERAL LAW IS INCONSISTENT.

The question that arises in the federal statutory scheme is whether the 1866 statute, RS § 2477, has been superseded by the 1945 relinquishment of the right of way by the railroad and acceptance by Interior. Framed another way, if the right of way way granted under RS § 2477, when did the grant occur?

A similar situation arose in Wilderness Society v. Morton,[18] where it was argued that RS § 2477 was superseded in part by Section 28 of the Mineral Leasing Act of 1920, 30 U.S.C. 185. Finding that the rights-of-way at issue qualified for an RS § 2477 grant in spite of the later legislation, Judge J. Skelly Wright, for the court, rejected the argument with the following language:

> A differently phrased yet similar principle of statutory construction is that where there are two acts on the same subject -- here rights-of-way in federal lands -- effect should be given to both if possible . . . . This doctrine should be of special significance when we deal with allegedly conflicting public land laws. As a cursory glance at those sections of the United States Code which deal with public lands will indicate, these laws are hardly a model of neat organization and uniform planning . . . . This is an area of the law where

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[18] 156 App. D.C. 121, 479 F.2d 842 (D.C. Cir. 1973), cert. denied 411 U.S. 917, 36 L.Ed.2d 309, 93 S. Ct. 1550 and later app 161 App. DC 446, 495 F.2d 1026, rev'd on other grounds 421 U.S. 240, 44 L.Ed.2d 141, 95 S. Ct. 1612.

> it truly can be said that most statutes are sui generis. It is an area of the law where it is extremely doubtful that Congress, when passing certain legislation, was aware of, let alone intended, inconsistencies with prior legislation. . . . However understandable this ignorance [of prior legislation] may be, it indicates that in this area of the law we should be especially hesitant to arrive at inferences with respect to congressional intent to have one statute supplant, modify or supersede another.

479 F.2d 842, 881.

One of the problems in the Billum case is that the 1945 relinquishment and acceptance was assumed to apply to the Chitina-McCarthy right of way. A strong argument can be made that when the Congress attempted in the 1941 Act to give the Secretary authority to accept the conveyance of railroad's property, there was no right of way between Chitina and McCarthy left to convey because that portion of the railroad's right of way had been granted to the Alaska Road Commission in 1939 pursuant to RS § 2477 when the railroad ceased operation and the Commission took over the right of way as a tramroad. That argument is strengthened by the fact that the authority which was granted to the Interstate Commerce Commission in 1920 to allow the railroad to abandon its property "without securing approval other than such certificate" was not mentioned either in the Act of 1922 or in the 1941 Act.

E. THE PROBLEM: DID THE RIGHT OF WAY REVERT TO THE UNITED STATES BETWEEN THE TIME OF THE ABANDONMENT AND THE RS § 2477 GRANT?

Assuming that the RS § 2477 grant could have occurred in 1939 when the railroad ceased operation and the ICC issued its certificate, the Act of 1922 was applicable law. The Act provides, in pertinent part:

> **§ 912. Disposition of abandoned or forfeited railroad grants.**
>
> Whenever public lands . . . have been granted to any railroad company for use as a right of way . . . and use and occupancy of said lands for such purposes has ceased . . .then and thereupon all right, title, interest, and estate of the United States in said lands shall, **except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment**[19] be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted. . . .

43 U.S.C. § 912 (emphasis added).

The statute suggests at least two possibilities for the right of way upon abandonment. First, in those portions of the right of way where the United States remained the owner of the adjacent fee, if the right of way even momentarily reverted to the United States upon abandonment, then the right of way would merge with the underlying fee and be extinguished. The subsequent RS § 2477 grant would be subject to the width definition in the later public land laws, 100', and the savings clause in the 1922 Act

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[19] There is no comma here in the original. It would appear to be the logical end of the parenthetical phrase, with the verb form being "shall be transferred."

("except such part thereof as may be embraced in a public highway . . ."") would have no force or effect against the Government. The clause presumably would have some application against private landowners who had received patents to adjacent land subsequent to the grant to the railroad. In those cases the right of way might revert to the adjacent landowner contingent upon a highway being built within one year. The width of the right of way would still be in question, but would most likely be based on user (or 100') rather than the entire width of the railroad's right of way. The Government may be expected to assert this position.

The second possibility is that the savings clause may hold the right of way in the possession of the railroad preventing the reverter from occurring for one year after abandonment in the event a highway is built during that time. This possibility is supported by the language of the statute, which says that upon abandonment "then and thereupon" the title to the right of way is transferred to the adjacent owner, "except such part thereof as may be embraced in a public highway legally established within one year. . . . " The inference is that the part of the right of way over which a highway will be legally established is not transferred to the adjacent owner (who is either the original owner or the grantee of the fee underlying the right of way), but is held for highway purposes for one year. If the highway is not legally

established within that one year period, then the remainder of the right of way will be transferred to the adjacent owner.

The problem is that an RS § 2477 grant is made by the United States only from "unreserved" lands. If the effect of the 1922 Act is to keep the right of way from reverting to any adjacent owner, including the United States, subject to a road being built within one year, then the Government may claim that the land is not "unreserved". It is possible that an RS § 2477 grant may not be available without the right of way first reverting to the United States. It is also possible that, so long as the underlying fee is unreserved and the right of way has been abandoned, the grant may have occurred as a result of the Alaska Road Commission claiming the right of way by building the road.

F. CONCLUSION

If it can be shown that the Act of 1922 was applicable law in 1939, that the right of way was abandoned in 1939, that the tramroad established by the Alaska Road Commission was sufficient to claim an RS § 2477 grant of the right of way, that the RS § 2477 grant could legally be made without the right of way reverting to the United States, that the entire width of the right of way was withheld for highway purposes by the savings clause of the 1922 Act, and that the 1941 Act was a nullity as to the Chitina-McCarthy portion of the right of way because it had already been granted to the Alaska Road Commission, the Billum result might be reversed and

the 200' right of way preserved. The procedural problems inherent in the appeal are not addressed in this memorandum.

/THD:ebc