



IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

ATTORNEY GENERAL

AUG 30 1993

4th JUDICIAL DISTRICT
STATE OF ALASKA



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STATE OF ALASKA DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES

IBLA 89-614

Decided August 25, 1993

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application AA-2520 (parcel A).

Affirmed.

1. Alaska: Native Allotments--Rights-of-Way: Generally--
Rights-of-Way: Cancellation

In approving a Native allotment application, BLM properly reserved a 100-foot-wide easement across the allotment for an existing public road constructed along the route of a relinquished railroad right-of-way where the land had, prior to the Native's use and occupancy, been established by the Secretary of the Interior as part of a 100-foot-wide public highway pursuant to the Act of June 30, 1932, ch. 320, 47 Stat. 446, and then been quitclaimed to the State of Alaska. Reservation of an easement conforming to the width of the relinquished right-of-way was not required because that right-of-way ceased to exist when the relinquishment was accepted.

APPEARANCES: E. John Athens, Jr., Esq., Office of the Attorney General, State of Alaska, Fairbanks, Alaska, for the State of Alaska; James R. Mothershead, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Alaska, Department of Transportation and Public Facilities (State), has appealed from a July 5, 1989, decision of the Alaska State Office, Bureau of Land Management (BLM), approving parcel A of the Native allotment application AA-2520 of John Billum, Jr. Concluding that the weight of the evidence established that, commencing in 1967, Billum had substantially used and occupied the land to the potential exclusion of others for 5 years as required by the Act of May 17, 1906, 1/ and its implementing regulations at 43 CFR Subpart 2561, BLM provided that the

1/ Repealed effective Dec. 18, 1971, subject to pending applications, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1988).

certificate of allotment, when issued, would be subject to the following easement:

An easement for highway purposes, extending fifty (50) feet each side of the centerline of the Chitina-McCarthy Road and transferred to the State of Alaska pursuant to the quitclaim deed dated June 30, 1959, and executed by the Secretary of Commerce pursuant to the authority of the Alaska Omnibus Act, Pub. L. 86-70, 73 Stat. 141 [(1959)]. [Emphasis added.]

The State then filed this appeal, asserting that BLM must reserve an easement 100 feet on each side of the centerline of the Chitina-McCarthy Road, for a total easement 200 feet wide. BLM defends its decision to provide for the reservation of a 100-foot-wide easement. Consequently, the sole issue on appeal concerns the proper width of the reserved easement.

In a preliminary procedural motion, the State has objected to BLM's late-filed answer, moving to strike it. BLM filed its answer on November 23, 1990, more than a year after receiving the State's statement of reasons for appeal (SOR). The State contends that Departmental regulations set a mandatory deadline for filing an answer of no more than 30 days following receipt of an SOR, and 43 CFR 4.414 requires an answer to be filed within 30 days after an SOR is served. Nonetheless, the regulation makes limited provision for the appropriate sanction in the event of a late-filed answer, stating only that an answer "may be disregarded" when filed untimely. *Id.* (emphasis added). Therefore, under the regulations, we have discretionary authority to consider late-filed answers and will do so where there has been no showing that the appellant was prejudiced by the delay in filing. *See American Gilsonite Co.*, 111 IBLA 1, 9-10, 96 I.D. 408, 412-13 (1989). The State has made no such showing in the present case. Nor could it. It had ample opportunity to reply, and did so on January 29, 1991. Accordingly, we will consider BLM's answer for what bearing it may have on adjudication of the State's appeal. The State's motion to strike is denied.

[1] The State's contention that BLM is required to reserve a 200-foot-wide easement is based on the following analysis concerning the genesis of the Chitina-McCarthy Road. The State states that, pursuant to section 2 of the Alaska Right of Way Act, ch. 299, 30 Stat. 409 (1898), formerly codified at 43 U.S.C. § 942-1 (1970), ^{2/} enacted May 14, 1898, the United States originally granted a "right of way" for the construction of a railroad to any duly organized railroad company. The grant encompassed "one hundred feet on each side of the center line of [the designated railroad]." *Id.* Subsequently, the Copper River and Northwestern Railway Company (Copper River) was formed and a railroad, running 195.2 miles between Cordova, Alaska (on the coast), and Kennecott, Alaska, was completed by the company in 1911. The primary purpose of the

^{2/} Repealed effective Oct. 21, 1976, subject to valid existing rights, by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2793.

railroad was to transport copper ores from the mines of the company's parent corporation. A portion of the railroad ran between the towns of Chitina and McCarthy. Thereafter, Copper River sought to abandon the railroad in September 1938 and approval was obtained from the Interstate Commerce Commission on April 21, 1939. See generally "Appendix 1" attached to SOR at 1. Dismantling of the railroad and construction by the United States, acting through the Alaska Road Commission, of the Chitina-McCarthy Road, over the route of the abandoned railroad, appears to have begun sometime after September 1938 since a reference to allocating funds to the road as a "new project" appears in a 1939 report of the Alaska Road Commission ("Appendix 6" attached to SOR). See also "Attachment 5" to BLM Answer. In 1940, the route of the old railroad was, according to the Commission, usable as a "tram road," a term then considered by the Department to include wagon or motor-truck roads used in connection with mining. See 43 CFR 244.49 (1938); "Attachment 6" to BLM Answer. Subsequent reports show expenditures for maintenance during the period from 1941 through 1945, when Copper River formally relinquished its right-of-way. See SOR at 4-5; "Appendix 7" attached to SOR. The record further indicates that about one mile of the road, running east and then northerly from the town of Chitina, had been constructed as of June 30, 1959, when the entire route was quitclaimed to the State. See "Research on the Chitina-McCarthy Road" (Research) attached to BLM Answer at 6; "Attachment 2" to BLM Answer at 5, 6, 9. The remainder of the route was apparently still being maintained as a tramroad. (On a 1986 American and Canadian Automobile Association map of "Alaska and Northwestern Canada" ("Attachment 3" to BLM Answer), the route from Chitina to McCarthy appears as a gravel road running easterly for about 10 miles from Chitina and then as an earthen road from there to McCarthy.) Construction and maintenance of the road was undertaken pursuant to the Act of June 30, 1932, ch. 320, 47 Stat. 446, formerly codified at 48 U.S.C. §§ 321a-321c (1958). That Act afforded the Secretary of the Interior, as the successor to the Secretary of War, the authority, under section 2 of the Act of January 27, 1905, as amended, 48 U.S.C. §§ 322 and 324 (1958), to locate, construct, and maintain roads in the Territory of Alaska where, in his judgment, they were needed and would be of permanent value for the development of the Territory. 3/ See 47 Stat. 446 (1932); Lloyd Schade, supra at 204.

3/ The authority of the Secretary of the Interior under the Act of June 30, 1932, passed to the Secretary of Commerce upon passage of section 107 of the Federal-Aid Highway Act of 1956, P.L. 627, 70 Stat. 377. With enactment of section 21(a) of the Alaska Omnibus Act, P.L. 86-70, 73 Stat. 145 (1959), on June 25, 1959, the Secretary of Commerce was directed to convey to the State all land encompassed by public roads, which the Secretary dutifully did in part with issuance of the quitclaim deed involved here on June 30, 1959. See Lloyd Schade, 116 IBLA 203, 204-05 (1990). Section 2 of the Act of Jan. 27, 1905, as amended, and the Act of June 30, 1932, were finally repealed, effective July 1, 1959, by section 21(d) of the Alaska Omnibus Act, P.L. 86-70, 73 Stat. 145 (1959).

Congress then enacted the Act of July 15, 1941, P.L. 176, 55 Stat. 594, which authorized Copper River to "convey" to the United States "all or any portion of its railroad right-of-way" and the Secretary of the Interior to accept, on behalf of the United States, such a conveyance. The Act further provided that the transferred property would be "used, operated, and maintained, as far as may be practicable or necessary, as a public highway, tramroad, or tramway under the provisions of the Act of June 30, 1932." 55 Stat. 594 (1941) (emphasis added). On March 29, 1945, the company formally relinquished portions of its right-of-way, including (according to the State) the segment that now crosses the Billum allotment, to the United States. See SOR at 3-4; "Appendix 4" attached to SOR. The relinquishment was accepted by the Commissioner, General Land Office (GLO) by decision dated May 11, 1945. See "Appendix 5" attached to SOR. The State contends that, by virtue of acceptance of the relinquishment, the United States "became the owner of the original 200-foot-wide * * * [r]ailroad right-of-way" and that, by virtue of the limitation on use in the Act of July 15, 1941, the right-of-way was dedicated to use as a public highway (SOR at 4). When the GLO Commissioner accepted Copper River's relinquishment, a tramroad along the route of the railroad right-of-way, as it now crosses the Billum allotment, was apparently being maintained. A gravel road was partially constructed along the route of the tramroad, apparently by June 1959. By quitclaim deed dated June 30, 1959, the Secretary of Commerce (who had assumed the authority of the Secretary of the Interior under the Act of June 30, 1932, in 1956), acting pursuant to section 21(a) of the Alaska Omnibus Act, P.L. 86-70, 73 Stat. 145 (1959), conveyed all of his Department's right, title, and interest in certain "Highways," including the Chitina-McCarthy Road, to the State ("Attachment 2" to BLM Answer at 9). See Research at 6; "Attachment 2" to BLM Answer at 5. The State argues that by this mechanism it acquired the 200-foot-wide railroad right-of-way, which should be reserved in Billum's certificate of allotment. See SOR at 7, 8.

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 GLO Commissioner's acceptance of the relinquishment from the railway company stated that the railroad right-of-way had been "noted canceled" on the records of the Department. See "Appendix 5" attached to SOR. In any case, cancellation of the acquired right-of-way is the mandated effect of the relinquishment of an approved right-of-way. At the time of the March 1945 relinquishment, 43 CFR 105.1 (1938) provided for acceptance of the relinquishment of an approved right-of-way, whereupon the right-of-way would be deemed cancelled and the land available for other disposition. See Frank M. Gallivan, A-27830 (Feb. 4, 1959), at 3 (relinquishment of right-of-way renders land available for oil and gas leasing); Yakutat & Southern Railway Co. (On Rehearing), 53 I.D. 65, 70 (1930) (relinquishment of railroad right-of-way under section 2 of the Act of May 14, 1898, subjects land to outstanding withdrawal and reservation). The result could not be otherwise since the United States could not hold both fee title to the public lands (which it had retained, in the case of the railroad right-of-way, since issuance, see 43 CFR 74.1 (1938) (formerly Circular No. 491,

45 L.D. at 268 (July 19, 1916)) and a right-of-way over those lands. See Cole Industries, Inc., 82 IBLA 289, 292 (1984). Nothing in the Act of July 15, 1941, provides for survival of the right-of-way following conveyance. This also explains the fact that nowhere in the June 1959 quitclaim deed to the State is there any mention that it conveyed to the State the Commerce Department's right, title, and interest in the relinquished railroad right-of-way. Rather, it provides simply for conveyance of all right, title, and interest of the Department in certain "Highways" that were identified on attached lists ("Attachment 2" to BLM Answer at 9). Those lists ("Schedule A") refer, according to both the State and BLM, to the Chitina-McCarthy Road. See SOR at 7; Research at 6; "Attachment 2" to BLM Answer at 5. There is no reference to the relinquished railroad right-of-way because that right-of-way had ceased to exist by the time of the 1959 quitclaim deed.

When the right-of-way ceased to exist upon acceptance of the March 1945 relinquishment, the Secretary of the Interior was required to take further action, under the Act of June 30, 1932, to ensure the use, operation, and maintenance as a public highway of the land along the route of the relinquished right-of-way. He did so, providing for continued use, operation, and maintenance of the Chitina-McCarthy Road. Designation of the road as a public highway did not occur automatically as a result of the Secretary's acceptance of the March 1945 relinquishment of the railroad right-of-way. Rather, that Act simply bound the Secretary, upon acceptance of the relinquishment, to use, operate, and maintain the land formerly burdened by the railroad right-of-way as a public highway in accordance with the Act of June 30, 1932. This duty was limited in extent to that which was "practicable or necessary." 55 Stat. 594 (1941). As originally proposed by the Secretary and then introduced in Congress, the legislation that eventually became the Act of July 15, 1941, not only required that the properties conveyed be used, operated, and maintained as a public highway as far as might be practicable and necessary, but also then authorized the Secretary to dispose of "portions of the properties acquired * * * [that] do not prove essential for highway purposes." 4/ See S. Rep. No. 375, 77th Cong., 1st Sess. 1 (1941); H.R. Rep. No. 850, 77th Cong., 1st Sess. 2 (1941). Believing that it was unwise to grant blanket authority to the Secretary to dispose of all or part of the acquired railroad property, the language authorizing disposal was stricken by Congress. See S. Rep. No. 375, 77th Cong., 1st Sess. 3 (1941); H.R. Rep. No. 850, 77th Cong., 1st Sess. 3 (1941). Nonetheless, the limitation on use, operation, and maintenance

4/ Section 2 of the original Senate bill (S. 1289, 77th Cong., 1st Sess. (1941)) read, in relevant part:

"The Secretary of the Interior is hereby authorized * * * to accept * * * conveyances of said properties [including rights-of-way] to be used, operated, and maintained, as far as may be practicable or necessary, as a public highway * * * under the provisions of the Act of June 30, 1932 * * * and to dispose of such of said properties or parts thereof * * * as may not be needed in the repair, operation, and maintenance of the highway" (87 Cong. Rec. 4870 (1941)).

as a public highway remained. Congress therefore recognized that not all of the acquired right-of-way might be practicable or necessary for use, operation, and maintenance as a public highway, and as BLM properly contends, the Secretary had the discretionary authority, under the Act of July 15, 1941, to determine, in constructing a new road or maintaining an existing road over the former railroad right-of-way pursuant to the Act of June 30, 1932, what land was "practicable or necessary" for use, operation, and maintenance of the road as a public highway.

In order to decide what was practicable or necessary, the Secretary was necessarily empowered, under the Act of June 30, 1932, to set the width of the recognized public highway, since the Act of July 15, 1941, neither provided that the highway would have the width of the former railroad right-of-way nor established any specific width. See State v. Alaska Land Title Association, 667 P.2d 714, 721 n.8 (Alaska 1983), cert. denied, 464 U.S. 1040 (1984). BLM correctly asserts that a determination regarding the width of the public highway over the route of the former Copper River right-of-way occurred when the Secretary issued Order No. 2665 (16 FR 10752 (Oct. 20, 1951)) on October 16, 1951. See State v. Alaska Land Title Association, supra at 722; Frank Sanford, 119 IBLA 147, 149-50 (1991). Issuance of the order comported with the Act of July 15, 1941, since it was issued pursuant to section 2 of the Act of June 30, 1932, ch. 320, 47 Stat. 446, formerly codified at 48 U.S.C. § 321a (1958). See 16 FR 10752 (Oct. 20, 1951). In his order, the Secretary determined that only 50 feet on each side of the centerline of the road was "necessary" for a public highway (BLM Answer at 14). It was this public highway that was quitclaimed to the State in June 1959.

We start with Public Land Order No. (PLO) 601 (14 FR 5048 (Aug. 16, 1949)), issued August 10, 1949. That order withdrew, subject to valid existing rights, all public lands, at fixed distances on each side of the centerline of certain "through," "feeder," and "local" roads, from all forms of appropriation under the public land laws, and reserved such lands for highway purposes. See 14 FR 5048 (Aug. 16, 1949). Because the Chitina-McCarthy Road was not identified as a through or feeder road it fell into the local roads category. Consequently, all public lands within 50 feet on each side of the centerline of that road were withdrawn. See id. PLO 601 was amended on October 16, 1951, by PLO 757 (16 FR 10749 (Oct. 20, 1951)), that revoked the withdrawal of public lands on each side of the centerline of local roads, but preserved the withdrawal as to certain through and feeder roads. 5/ See State v. Alaska Land Title Association, supra at 719. However, also on that date, the Secretary issued order No. 2665, to "fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior" and to "prescribe a uniform procedure for the establishment of

5/ PLO 601 was revoked on Apr. 7, 1958, pursuant to PLO 1613 (23 FR 2376 (Apr. 11, 1958)), but an easement for highway purposes, encompassing public lands lying within 150 feet on each side of the centerline of the remaining through and feeder roads, was established.

rights-of-way or easements * * * for such highways." : 16 FR 10752 (Oct. 20, 1951). The order stated that a public highway for "local roads," would extend 50 feet on each side of the centerline of the road. Id. Because the Chitina-McCarthy Road was not classified as a through or feeder road it remained a local road. See Frank Sanford, supra at 150. The order also established a "right-of-way or easement for highway purposes" covering all public lands so embraced by a local road (16 FR 10752 (Oct. 20, 1951)). The effect of the 1951 order was therefore to formally recognize the public highway for the Chitina-McCarthy Road by establishing an easement for highway purposes and to define the limits of that highway, which was then quitclaimed to the State in June 1959. BLM then properly acknowledged the extent of the highway when it decided to issue a certificate of allotment to Billum, since creation of the highway preceded initiation in 1967 of his use and occupancy under the Act of May 17, 1906. See Frank Sanford, supra at 151. As the District Court said in Myers v. United States, 210 F. Supp. 695, 700 (D. Alaska 1962), aff'd, 323 F.2d 580 (9th Cir. 1963): "Where a public road has been created over a part of the public domain, one who thereafter acquires title to, or rights in, that part of the public domain takes and holds subject to the right-of-way for such road."

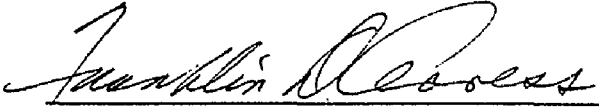
Alternatively, the State calls attention to the fact that Order No. 2665 was subsequently amended by the Secretary on September 15, 1956, to designate the Copper River Highway as a "through" road. See 21 FR 7192 (Sept. 21, 1956). This meant, under the terms of the original order, that the public highway for that roadway would extend 150 feet on each side of the centerline of the road. See 16 FR 10752 (Oct. 20, 1951). The State maintains that the Chitina-McCarthy Road is part of the Copper River Highway, and should also be afforded a 300 foot width. See SOR at 1, 5-6. It has offered no evidence in support of this contention, however, but reasons that, since the road and the highway both run along the route of the abandoned railroad right-of-way and both owe their existence to that right-of-way, the road must be part of the highway. See Reply to BLM Answer at 1-2. We do not find this logic persuasive. The fact that both the road and the highway follow parts of the old railroad right-of-way does not make them the same roadway for purposes of Order No. 2665, as amended, or any other purpose.

Instead, the record, as supplemented on appeal, contains convincing evidence that the Chitina-McCarthy Road has long been considered distinct from the Copper River Highway. The road is referred to as the "Chitina-McCarthy" road in reports of the Alaska Road Commission in 1939, from 1941 through 1945, and in 1949, 1950, and 1954. See SOR at 4-5; "Appendix 6," "Appendix 7," "Appendix 9," and "Appendix 10," attached to SOR; "Attachment 9" to BLM Answer at 1. The "Copper River Highway" is referred to separately in Commission reports of 1953 and 1954. See "Attachment 8" to BLM Answer at 1; "Attachment 9" to BLM Answer at 2. Further, the highway is shown on a June 1959 Department of Commerce map running in a northerly direction to the town of Chitina and then continuing on (along the route of the old "Edgerton Cutoff") to the Richardson Highway. See "Attachment 2" to BLM Answer at 6, 7. The evidence also supports BLM's assertion that the avowed purpose of the highway was eventually to connect Cordova, Alaska, along the southern coast of Alaska, with the Richardson Highway

(a major north-south route listed as a "through" road in PLO's 601 and 757 and Order No. 2665), by running a highway up along the Copper River. See Research at 3-4; "Attachment 3" to BIM Answer; "Appendix 11" attached to SOR. The Chitina-McCarthy Road, by contrast, is shown on the June 1959 Department of Commerce map leaving the town of Chitina and then running east from the town, initially following the old railroad, and then continuing for a short distance in a northerly direction. See "Attachment 2" to BIM Answer at 6; see also "Attachment 10" to BIM Answer at 4. The evidence supports BIM's assertion that the purpose of the road was simply to connect the mining town of McCarthy with the town of Chitina. See Research at 5-6. Further, the highway (Route 851) and the road (Route 850) are given distinct identifying numbers on the Department of Commerce map and were separately identified in the attachment to the June 1959 quitclaim deed by which the State acquired both roadways. See Research at 4, 6; "Attachment 2" to BIM Answer at 5.

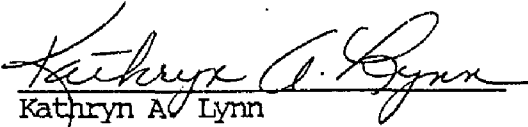
Consequently, we find that the Chitina-McCarthy Road is not part of the Copper River Highway and is not a public highway which extends 150 feet on each side of the centerline of the road, in accordance with Order No. 2665, as amended. We therefore conclude that the July 1989 BIM decision properly decided to reserve an easement 50 feet on each side of the centerline of the Chitina-McCarthy Road in any certificate of allotment issued to John Billum, Jr., with respect to parcel A of Native allotment claim AA-2520.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.



 Franklin D. Arness
 Administrative Judge

I concur:



 Kathryn A. Lynn
 Administrative Judge
 Alternate Member