

MEMORANDUM

State of Alaska
Department of Transportation & Public Facilities

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TO: Dave McCaleb, PE
Chief of Design
Northern Region

DATE: March 11, 1993

FILE NO:

TELEPHONE NO: 2413

SUBJECT: Copper River Highway
Ahtna Lands

FROM: John F. Bennett, PLS
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Northern Region

This memo is in partial response to a fax from the Commissioner's office dated 2/26/93 outlining Ahtna's positions and Points of Negotiation on Cordova road issues. The combined responses from Design, Environmental and Right of Way should be submitted to the Anchorage AG office for review. The AGO review may also wish to restructure our comments based upon their evaluation of the potential of an appeal by Ahtna and the possibility of an adverse outcome.

Existence of right of way and status of litigation:

The Superior Court issued a Partial Summary Judgement in Ahtna v. SOA on April 3, 1993 which dealt with the status of the right of way for the Copper River Highway. The judgement stated in part, "The State of Alaska acquired through quit-claim deed from the federal government a 300 foot wide easement through the lands which are the subject matter of the plaintiff's complaint. Said easement was among other things intended for use as a public highway. Plaintiff is not entitled to any damages or just compensation for the 300 foot right-of-way." Ahtna feels that there was no legal basis for the decision and apparently intends to appeal the judgement. We hold that the Superior Court judgement will guide our position regarding the status of the Copper River highway right of way until the decision is reversed or upon further advice from the Attorney General's office.

Sources of construction materials and aggregates:

In general, highway easements are issued "for construction and maintenance" of a road and, under this language without stipulation, could include material removal from the right of way. In the past we have been able to use material from the right of way under grants from federal and state agencies, as well as certain native corporations. Having this ability is beneficial when material sources are far apart and a materials need arises. Usage of materials within the right of way by Maintenance can be a valuable asset to protect, if possible, but may not be considered "incidental cut and fill."

More recently, use of material from roadways has been discouraged if language could be interpreted to restrict use, especially where the material would be used some distance from the site of removal. Generally, removal of material in the right of way is becoming more prohibitive by native corporations, as well as the federal government. (Since 1982, the federal Highway Easement Deeds have stipulated that no material sources may be developed

in the right of way.)

However, it is possible to interpret the use of materials within the Copper River highway more liberally due to the unique origin of the right of way.

The original right of way for the construction of the railroad was acquired by the CR&NW Railroad Company under the Act of May 14, 1898. This act, along with establishing a right of way 100 feet on each side of centerline, also provided the "right to take from the lands of the United States adjacent to the line of said road, **material, earth, stone, and timber** necessary for the construction of said railroad." This right of way was subsequently relinquished to the federal government and later conveyed to the State of Alaska by virtue of the 1959 Omnibus Act Quitclaim deed.

It is therefore, reasonable to suggest that whatever rights that the CR&NWR Company had in the railroad right of way were transferred intact to the State of Alaska, and those rights may have included the right to use the materials within the right of way for construction and maintenance purposes. The issue of materials use within the Copper River Highway right of way was not addressed by the recent Superior Court case.

Should the Department consider Ahtna's offer, the stipulation allowing "incidental cut and fill" activities only must be given a closer look. Since material will be needed for both construction and maintenance on the Copper River Highway and the road has no developed material sources, it would be an advantage to the department to be able to use material where needed. The first step in making a determination as to the acceptability of Ahtna's stipulation is obtaining their definition of "incidental cut and fill" to determine what use can be performed under such terminology.

Relinquishment of abandoned Rights-of-way on ANCSA land:

It is not clear what is meant by "abandoned rights of way" in the "Other Issues" section. The Regional Right of Way Section files indicate four Ahtna requests for vacation of right of way since 1982. Two of the requests we denied, one because the route provided access to State-owned lands and the other because it was determined that the requested area would be needed for future intersection upgrades. The two requests granted were for more than 38 acres through Copper Center and four acres along a portion of the Richardson Highway, Mile 115 to 125 project.

Requests have not been "routinely" denied. Any DOT&PF owned highway right of way easements may be evaluated for vacation by the Department upon request of the owner of the fee estate. The evaluation is performed by the DOT&PF Right of Way Property Management Section for the appropriate region when a request is made in writing by the fee owner for a specific parcel of land. The evaluation is based upon comments from DOT&PF Maintenance, Planning, Design, Utilities, and Right of Way with respect to the current and future needs of the Department. Comments are also solicited from the State of Alaska Department of Natural Resources with regard to the necessity of retaining the old right of way in order to provide access to adjoining public or private lands. In summary, a process

is in place for a property owner to request vacations of highway right of way easements. Because each request must be evaluated in detail with respect to location, it is necessary for a property owner to define specific areas from which a vacation is being requested. It is also required that a property owner provided evidence of title to the fee estate. The above process has been applied to Ahtna's requests for specific vacations of rights of way, with no indication that such requests were routinely denied.