

MEMORANDUM

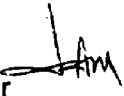
State of Alaska
Department of Transportation & Public Facilities

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TO: George Levasseur
Southcentral District Manager

DATE: 5/7/92

FILE NO:

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

TELEPHONE NO: 474-2402

SUBJECT: FAS "A" Route 850
Chitina to McCarthy

Right of Way Width:

Due to some ambiguity in the Alaska Road Commission/Bureau of Public Roads records, there has been a question as to the width of the right of way for the Chitina to McCarthy road. The following chronology relates some of the references that discuss the Copper River Highway and the McCarthy Road:

5/11/45: As of this date, the United States, Department of Interior became the owner of the original 200 foot wide Copper River Railroad right of way subject to the provision that the right of way be used as far as practicable as a public highway.

1949-1950: The ARC Annual Reports for 1949 and 1950 make reference to Route 57K, Chitina to McCarthy and that approximately 54,000 dollars had been expended on that route at that time.

1952: Page 21 of the 1952 ARC Annual Report discusses the "Copper River Highway" as follows: "A total of 57 percent was completed on this initial 8 miles of the project to connect the city of Cordova with the highway system of Alaska, utilizing the railroad bed of the abandoned Copper River and Northwestern Railroad. The route is along the picturesque Copper River to Chitina, Mile 131, where it joins the 39 mile Edgerton Cutoff between that point and the Richardson Highway."

1/20/54: "ARC Order No. 40, (Revised) - Highway System - Route Numbers and Mileages" lists as a "Feeder" road, "Route No. 122, Cordova - Richardson Highway."

9/15/56: Secretarial Order 2665, Am. No. 2 classified the "Copper River Highway" as a "Through" road with a right of way width of 150 feet on each side of centerline.

6/30/59: Omnibus Act Quitclaim Deed conveyed from the federal government to the State of Alaska Federal Aid Secondary "A" Route 851 which is described as being "From the Ocean Dock at the Port of Cordova through the Town of Cordova

northerly paralleling the Copper River to a junction with FAS Route 850 at Chitina; thence northwesterly to a junction with FAP Route 71" (Richardson Highway). The system mileage is listed as 170 miles. The Omnibus Act also lists FAS "A" Route 850 as being "From junction with FAS Route 851 at Chitina easterly to McCarthy"; system mileage is listed as 59 miles.

5/29/70: Project S-0850(6) Chitina East - These ROW plans depict the existing ROW as 100' on each side of centerline. ROW was acquired out to 150' each side of centerline.

7/14/70: Project S-0850(7) Copper River East to Kuskalana River - These ROW plans depict the existing right of way as 100' on each side of centerline. The majority of the new ROW for this project was acquired by a BLM ROW Grant on 3/16/72. On 7/3/84 the BLM ROW was relinquished as the project had not been constructed.

3/14/88: In a letter from DOT&PF Central Region ROW to the National Park Service states that "The Copper River Highway does not include the Chitina-McCarthy portion of the road and, therefore, the right of way remains at 200 feet for that portion."

4/3/92: Ahtna, et al v. State of Alaska - Judge Johnstone rules that the corporation lands are subject to a 300' wide ROW for the Copper River Highway.

Part of the confusion that has arisen with the ROW width for the McCarthy road has been whether the "Copper River Highway" as intended in the above references went between Cordova and Kennicott, or Cordova and the Richardson Highway.

The majority of the references suggest that the "Copper River Highway" is between Cordova and the Richardson highway and that is the route that was subject to the 300' wide ROW established by Secretarial Order 2665 Am. No. 2.

In summary, our conclusion is that the original right of way for the McCarthy road remains at 100' on each side of the railroad centerline based upon the transfer of the Copper River and Northwestern Railroad right of way.

Materials Use within the ROW:

Existing PLO Easements: It is still unclear as to the rights of the Department with regards to extracting materials from rights of way obtained through Public Land Orders. We have discussed this issue with Central Region ROW staff and Shari Howard of our staff as well as members of the Attorney General's staff. John Athens, Asst. AG, stated that he is unaware of any existing AGO legal opinions or case law which deal with the use of materials within PLO rights of way.

The PLO rights of way were defined as a "right of way or easement for highway purposes", suggesting that if the materials were for road construction, this could be an acceptable "highway purpose". The general philosophy is that a "cut and fill" operation for construction or maintenance could generally be considered to be within the scope of utilizing an easement for highway purposes. However, to develop a PLO highway easement as a material source and haul the material off project appears to be beyond what is considered acceptable. Between these two options exists a large grey area.

Original McCarthy Road ROW: The above discussion, however, may not be relevant to the McCarthy road as the original right of way was not created by a Public Land Order.

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."

The Act of July 15, 1941 authorized the Secretary of the Interior to accept a relinquishment of the right of way from the railroad company "to be used, operated and maintained as far as may be practicable or necessary, as a public highway, tram road, or tramway..."

On March 29, 1945, the CR&NWR relinquished all of its interest in the original railroad right of way.

On May 11, 1945, the USA became the owner of the original 200 foot wide railroad right of way subject to the provisions of the Act of July 15, 1941, that the right of way be used as far as practicable, as a public highway.

This interest was subsequently conveyed to the State of Alaska as FAS "A" Route 850 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.

Judge Johnstone's Partial Summary Judgment establishing the 300 foot width for the Copper River Highway was discussed with Virginia Rush of the AG's office in order to determine whether it had any effect on the McCarthy Road. She stated that this case considered the Copper River Highway to be from Cordova to the Richardson and did not include the McCarthy road. Also, the issue of use of materials from within the right of way was not raised.

Although the issue of material use within the McCarthy road right of way is still a bit ambiguous, it appears that we may have a better case for it on the McCarthy road than on another road created by PLO. Our options at this time are to either request a formal AGO opinion on the matter, or commence with the material use and see what happens. In either case, we will leave the decision up to you.

Feel free to contact us if you have further questions on this matter.

jfb