10/2/91

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA 73

THIRD JUDICIAL DISTRICT

AT ANCHORAGE

AHTNA, INCORPORATED, an Alaska corporation, and CHITINA NATIVE CORPORATION, an Alaska corporation, and the CHITINA TRADITIONAL COUNCIL, an Alaska Native village,	)	
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES,	)	
Defendant.	)	Case No. 3AN-91-6957 Civ.

NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs cite the court to additional authority for the proposition that the State did not acquire a 200-foot right-of-way by virtue of the Act of July 15, 1941 (Pub. L. 176, Chap. 355, Stat. 594) and the subsequent relinquishment executed by the Copper River and Northwestern Railroad. The authority in question is a BLM Decision of July 5, 1989, relating to AA-2520 Parcel A, a Native allotment located along the Chitina-McCarthy Road. This case has been appealed by the State to the IBLA and is currently pending as IBLA 89-614. A copy of the legal reasoning supporting the BLM Decision, which involved a determination that the 1941 Act and the relinquishment did not establish a right-of-way in favor of the State, is to be found

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in the BLM's brief filed in the IBLA appeal, at Argument heads II and III. A copy of this brief is attached hereto as Appendix "A."

DATED this 2nd day of October, 1991.

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Attorney for Chitina Native Corporation

By _____
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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

IBLA 89-614	)	AA-2520, Parcel A
	)	
STATE OF ALASKA,	)	
DEPARTMENT OF TRANSPORTATION	)	
AND PUBLIC FACILITIES	)	Native Allotment
	)	

ANSWER OF THE BUREAU OF LAND MANAGEMENT
TO STATEMENT OF REASONS

I. CHITINA-McCARTHY ROAD IS NOT A SEGMENT OF COPPER RIVER HIGHWAY

In its Statement of Reasons, the Department of Transportation and Public Facilities, State of Alaska (hereinafter referred to as "DOT&PF") contends that the BLM decision of July 5, 1989, is in error to the extent that it makes Mr. Billum's allotment entitlement "subject to only 50 feet each side of the centerline of the Chitina-McCarthy Road" (p. 1). The alleged error is predicated on DOT&PF's contentions that (1) "the Chitina-McCarthy road is a segment of the Copper River Highway, which was formerly the right of way of the

Copper River Railroad" (p. 1), having a width of 150 feet on each side of the center line as fixed by Amendment No. 2 (September 15, 1956) of Secretarial Order No. 2665 ("SO 2665") of October 16, 1951 (16 F.R. 10752), and that (2) the Chitina-McCarthy Road occupies the relinquished railroad right-of-way of the Copper River and Northwestern Railway Company ("Railroad"), having a width of 100 feet on each side of the center line as prescribed by section 2 of the act of May 14, 1898 [30 Stat. 409; 43 U.S.C. § 942-1 (1988)]. However, DOT&PF has chosen to limit its claim to the 200-foot right-of-way of the relinquished railroad right-of-way crossing Mr. Billum's Native allotment claim.

The first contention of DOT&PF is factually in error. At the request of Department Counsel, Ms. Allyson Johnson of the BLM State Office, Alaska, prepared "Research On The Chitina-McCarthy Road," dated April 12, 1990 (hereafter "BLM Research"), which not only addresses the history and location of the Chitina-McCarthy Road, but also addresses the history and location of the Copper River Highway to the extent it was either constructed or planned prior to or at the time the Billum allotment claim was initiated. A copy of BLM Research is attached to and made a part of this Answer. In BLM Research it is stated:

> "...[H]owever, the State's claim that the Chitina-McCarthy Road is a segment of the Copper River Highway cannot be supported by research of records that document the history of both roads . . . (documents researched are hereafter described).

In fact, the documents describe the two roads as being entirely separate. The Chitina-McCarthy Road is described as a connection between the town of Chitina and the mining community of McCarthy while the Copper River Highway is consistently described as a means of linking Cordova to the rest of Alaska via the Richardson Highway. The Richardson, designated as a through road in P.L.O.'s 601, 757 and S.O. 2665, as amended ... consists of approximately 268 miles of roadway. Constructed as a major artery of the Alaska Highway system in the early 1900's, the Richardson Highway extends from Valdez to Chitina to Fairbanks in a southerly to northerly direction ... (p. 2)

The Richardson Highway is listed as Federal Aid Primary Route No. 71 in the 1959 quit claim deed which transferred the road to the State of Alaska... and connects with other through roads which lead to Anchorage, Fairbanks, and Canada.... Thus, linking the Copper River Highway to the Richardson Highway would tie Cordova to the main thoroughfares in Alaska, Canada, and the rest of the United States. This is supported by the following excerpts from key documents. (p. 3)

* * *

Although the State puts great emphasis on the use of the abandoned Copper River and Northwest Railway bed as the route for the Copper River Highway, it is significant to note that as early as 1950, an alternative route for the road up the Tiekel River was under consideration and was even included in the 1950 survey. (Alaska Road Commission Report dated June 20, 1951, pages 25, 26, Attachment 7) Again in 1967, the State Department of Highways explored the alternatives of the Tiekel Route as well as the Tasnuna Route through Marshall Pass. (Copper River Highway Feasibility Study, 1967, pages 5, 91-99, Attachment 10) The Tasnuna Route would cut westerly toward the Richardson Highway 48 miles from Chitina and the Tiekel Route would cut westerly toward the Richardson Highway 31 miles from Chitina. Thus, the historical plan for the Copper River Highway has been to link Cordova to the Richardson Highway. Whether the Copper River Highway would extend as far as Chitina was never certain in the planning of the road. It was not the railroad right-of-way that would deter-

mine the final route of the Copper River Highway, but rather the most feasible route to accomplish the link between Cordova and the Richardson Highway.

The Chitina-McCarthy Road is described strictly as a connection between the town of Chitina and the mining town of McCarthy, as shown in the following excerpts: . . . (p. 5)

* * *

An examination of the estimated road mileage found in our research further supports our contention that the Chitina-McCarthy Road has been historically considered a separate road from the Copper River Highway . . . (p. 6)

Clearly, the route for the Copper River Highway, both during the initial planning stages and at the time of transfer to the State of Alaska, was considered to be in a general south to north direction from Cordova to Chitina and then northwesterly to the Richardson Highway --a distance of 170 miles. The Chitina-McCarthy road extends approximately 60 miles easterly from Chitina to McCarthy, an additional mileage not included in the 170-mile estimate for the Copper River Highway.

Based upon historical descriptions of the routes for the roads and the alternative routes for the Copper River Highway, the original intent for each road, and the estimated mileages for the road, we must conclude that the Chitina-McCarthy Road cannot be considered a segment of the Copper River Highway. (p. 8)[1]

1/ The only portion of the Copper River Highway which has been constructed is the so-called "Edgerton Cutoff" of 39 miles from Chitina northwesterly to the Richardson Highway which goes north out of Valdez, Alaska. To this day, most of that portion (131 miles) of the planned Copper River Highway from Cordova north to Chitina along the Copper River has not been constructed.

The above conclusion is well documented by the attachments to BLM Research, consisting of copies of excerpts from various reports of the old Alaska Road Commission in the Department and the Alaska State Department of Highways, predecessor to DOT&PF.

II. CHITINA-McCARTHY ROAD EASEMENT DOES NOT EMBRACE ALL OF THE LAND IN THE RELINQUISHED RAILROAD RIGHT-OF-WAY

A. Relinquishment of right-of-way did not constitute a conveyance authorized by the act of July 15, 1941 (Pub. L. 176, ch. 300, 55 Stat. 594), and therefore, the land formerly under such right-of-way was not subject to act's restriction of future use to public highway purposes.

The BLM decison of July 5, 1989, made Mr. Billum's allotment claim subject to a right-of-way of 50 feet on each side of the center line of the Chitina-McCarthy Road. Regardless of when such road was established, BLM determined that it was classified as a local road having a fixed width of 50 feet on each side of the center line under the provisions of Public Land Order (PLO) 601 of August 10, 1949 (14 F.R. 5048), PLO 757 of October 16, 1951 (16 F.R. 10749) and SO 2665 of October 16, 1951 (16 F.R. 10752). Under these orders, the Chitina-McCarthy Road was not named as a through or feeder road and therefore

was classified as a local road. DOT&PF disagrees with this BLM determination, and contends instead that special legislation applicable to termination of the right-of-way of the Copper River and Northwestern Railway Company (hereafter "Railroad") operated to dedicate the relinquished railroad right-of-way area to use as a public highway. Since such area had a width of 100 feet on each side of the center line, as prescribed by the Alaska railroad right-of-way law [§ 2, act of May 14, 1898, 30 Stat. 409; 43 U.S.C. § 942-1 (1988)], DOT&PF further contends that the dedicated highway is coextensive with such area and therefore also has a width of 100 feet on each side of the center line.

In its Statement of Reasons, DOT&PF correctly points out that on April 21, 1939, the Interstate Commerce Commission granted permission to the Railroad to abandon its operation over the old railroad right-of-way between Cordova, on the southerly end of the line, and McCarthy and Kennecott, on the northeasterly end of the line; that on March 29, 1945, the Railroad executed a relinquishment of its interest in such right-of-way and filed the same with BLM; and that by decision of May 11, 1945, such relinquishment was accepted by the General Land Office and "the easements for the railroad rights-of-way ... noted cancelled on the records" of the Office (pp. 2-4). (Emphasis ours). If we assume, as the General Land Office did, that the Railroad had acquired an easement under the act of May 14, 1898, supra, a relinquishment of such a less-than-fee interest in the

land embraced in the railroad right-of-way was an appropriate mode of terminating the right-of-way and causing it to revert to an unappropriated public land status. Frank M. Gallivan, A-27830 (February 4, 1959); and 43 CFR 105.1 (1938).[2] Cf. 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).[3] However, DOT&PF contends that upon relinquishment, all of the land within the

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2/ In 1945, the relinquishment regulation [43 CFR 105.1 (1938)] provided in part as follows:

> 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 cancelation 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 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
>
> * * *

Regulation now found in 43 CFR Subpart 1825 (1989)

3/ Carroll v. Price, supra, states that upon abandonment of a possessory right in public lands, "the piece of land becomes restored to its original status in the public domain, and is subject to occupation and possession by any other citizen" (81 F. at 140). Similarly, Harkrader v. Carroll, supra, states that upon abandonment of a mining claim, "the property reverts to its original status as a part of the unoccupied public domain." (76 F. at 475).

right-of-way became dedicated to use as a public highway by operation of the act of July 15, 1941, supra, which provided:

> ...[T]he Copper River and Northwestern Railway Company, or any of its successors in interest or assigns, is hereby authorized to give and convey to the United States of America (1) all or any portion of its railroad right-of-way acquired under grants made by Congress or otherwise, including station and terminal grounds and lands used as sites for railroad structures or purposes of any kind, and (2) equipment, including telephone and telegraph poles and lines, ties, rails, rolling stock, bridges, buildings, and other properties in Alaska used in connection with the construction, maintenance, and operation of the railroad.
>
> Sec. 2. The Secretary of the Interior is hereby authorized and empowered to accept, on behalf of the United States and without cost to the United States, gifts and conveyances of said properties to 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 (47 Stat. 446), notwithstanding anything within any Act to the contrary.
>
> Sec. 3. The provisions of the Act of March 8, 1922 (42 Stat. 414), 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.
>
> (Emphasis ours)

Section 1 of the above act authorized the Railroad to convey its railroad right-of-way to the United States, and section 2 of the act authorized the Secretary of the Interior to accept on behalf of the United States a conveyance of such right-of-way "to be used, operated, and maintained, as far as may be practical or necessary, as a public highway, tramroad, or tramway." DOT&PF treats the 1945 relinquishment as a conveyance of the right-of-way authorized by the 1941 act, with

the result that "the United States became the owner of the original 200-foot-wide Copper River Railroad right-of-way (plus station grounds) subject to the provisions of the Act of July 15, 1941 . . ., i.e., that the right-of-way be used, as far as practical, as a public highway" ("a dedication of the original right-of-way for use as a public highway"). Statement of Reasons, p. 4. If indeed a relinquishment is a conveyance within the meaning of the 1941 act rather than a formal abandonment or renunciation of a right to use such land, the effect of such a conveyance would be for the lesser easement interest to become merged in the greater fee interest of the United States and thereby lose its separate existence as a right-of-way which can be used as a public highway.[4] If the relinquishment is a formal statement of intent to abandon which together with the non-use of the right-of-way constitutes an abandonment of the right-of-way, such abandonment is not a conveyance within the purview of the act of July 15, 1941. 1 C.J.S. Abandonment § 3 (1985) pp. 4-5. Since the 1941 act does appear to deal with or contemplate a relinquishment by abandonment or surrender of a railroad easement, the act only has real meaning if we assume that the railroad right-of-way in question was,

4/ See 83 C.J.S. Surrender (1953), pp. 917-919.

at the time of the act, considered to be a "limited fee" rather than mere easement.[5] There is much historical justification for this this view.

The 1898 Alaska railroad right-of-way law under which the Railroad's right-of-way was issued was initially construed in the regulations [27 L.D. 248, 254 (1898)] as authorizing the issuance of railroad easements.[6] Such construction was carried forward in subsequent versions of the same regulations, including those in effect at the time the 1941 act was passed. 32 L.D. 424, 432-433 (1904); Circular No. 491, 45 L.D. 227, 268 (1916); and 43 CFR 74.1 and 74.2 (eff. June 1, 1938). Likewise, early regulations [12 L.D. 423, 428 (1888)]

5/ Fee title cannot be abandoned or surrendered, but can be conveyed by deed. Ellis v. Brown, 177 F.2d 677, 679 (6th Cir. 1949), and 1 C.J.S. Abandonment § 7b (1985); and 83 C.J.S. Surrender (1953), pp. 918-919.

6/ The regulations 27 L.D. 248, 254 (1898) provided:

> 7. The grant made by these sections does not convey an estate in fee in the lands used for right of way or lands used for station and terminal facilities. The grant is merely of a right of use for the necessary and legitimate purposes of the roads, the fee remaining in the United States, except as to lands authorized to be sold under section 6 by he Secretary of the Interior, "upon such expressed conditions as in his judgment may be necessary to protect the public interests." The nature of these conditions will depend upon the public necessities and will be governed by the particular circumstances of each case.
>
> 8. All persons entering public lands, to part of which a right of way has attached, take the same subject to such right of way, the latter being computed as part of the area of the tract entered.

promulgated under the General Railroad Right of Way Act of March 3, 1875 [18 Stat. 482; 43 U.S.C. § 934, et seq. (1988)], prototype of the 1898 Alaska railroad right-of-way law, supra, construed the Act as authorizing the issuance of railroad easements.[7] However, in 1916 the Supreme Court opined that a railroad right-of-way granted under the 1875 general act "and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee. . . ." Rio Grande Western Ry. Co. v. Stringham, 239 U.S. 44, 47 (1915). As late as 1937, the Department "conceded that under the act of March 3, 1875, a limited fee was granted in the right of way and not a mere easement or right of passage." Solicitor's Opinion, 56 I.D. 206, 207 (1937) ("Use of Railroad for Extracting Oil").[8] As noted in Phillips Petroleum

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7/ The Alaska railroad right-of-way law is substantially a replication of the General Railroad Right of Way Act of 1875. Significantly, for example, both the 1898 Alaska law and the 1875 general act provide that after the approved right-of-way location has been noted on the land offices records, all lands over which the right-of-way will pass shall be disposed of subject to the right-of-way. 43 U.S.C. §§ 937 and 942-5 (1988). This is some of the easement language noted in Great Northern Ry Co. v. United States, 315 U.S. 262, 271 (1942), infra ("'Apter words to indicate the intent to convey an easement would be difficult to find'").

8/ In discussing the term "limited fee," it has been said that "this term has a settled meaning--it denotes present ownership of the entire interest in land, an ownership that will continue so long as a stated contingency, leading to a reverter, does not occur." J. Frankfurter's dissent in United States v. Union Pacific

Co., 61 I.D. 93, 98 (1953):

> This was the situation obtaining until February 2, 1942. On that date, in Great Northern Railway Co. v. United States, 315 U.S. 262, the Supreme Court overruled the Stringham case and held that the right-of way granted by the 1875 act is not a limited fee but only an easement.

Similarly, State of Idaho v. Oregon Short Line R. Co., 617 F. Supp. 207, 211 (D. Idaho 1985); and Amerada Hess Corporation, 24 IBLA 360, 369, 83 I.D. 194, 199 (1976). Since the 1898 Alaska railroad right-of-way law substantially replicates the 1875 general act, we would have to conclude that prior to the Great Northern Ry. Co. decision in 1942, rights-of-way granted under the 1898 law would, like those granted under the 1875 general act, have been deemed to be limited fees under the Stringham decision. Therefore, in order for the Railroad to divest itself in 1941 of the right-of-way between Cordova and Kennecott, it would have been necessary for the Railroad to convey by deed its limited fee to another entity. In order for such conveyance to result in a dedication to use for a public highway, the conveyance had to be made to a governmental entity having the power to establish highways [i.e., the United States through the Alaska Road Commission under the act of June 30, 1932 (47 Stat. 446; 48 U.S.C. § 321a, et seq. (1934))].[9] To accomplish such a dedication (including authority

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(footnote continued from previous page)
Railroad Co., 353 U.S. 112, 130 (1957).

9/ The only governmental agency having the power to establish highways in 1941 was the Alaska Road Commission under the act of June 30, 1932, supra, 48 U.S.C. § 321a, et seq. (1934). 48 U.S.C.

for acceptance by the United States), the act of July 15, 1941 was passed for this purpose. However, no deed conveying the limited fee in the right-of-way was executed pursuant to the 1941 act inasmuch as such a deed was rendered unnecessary six months later when the Great Northern Ry. Co. decision of February 2, 1942, overruled the Stringham case and held that rights-of-way granted under the 1875 general railroad right-of-way act were only easements. Since this would be true of rights-of-way granted under the 1898 Alaska railroad right-of-way law, it was only necessary for the Railroad to terminate its right-of-way by a relinquishment filed pursuant to 43 CFR 105.1 (1938). Since the Railroad's right-of-way was terminated by such a relinquishment rather than by a conveyance pursuant to the act of July 15, 1941, the requirement of section 2 of the act that all or any portion of the right-of-way conveyed under the act be used as a public highway was not operative. The establishment of a highway subsequent to the relinquishment would have to have been made by the Alaska Road Commission pursuant to R.S. 2477 and the width limitation imposed by PLO 601, PLO 757 and SO 2665 (e.g., 50 feet on each side of the center line for local roads such as the Chitina-McCarthy Road).

(footnote continued from previous page)
§ 24 (1934); Gordon v. Nash, 9 Alaska 701, 706-707 (D. Alaska 1940); and memorandum of Chief Counsel of BLM to Director of BLM, dated February 7, 1951, and set forth in State v. Alaska Land Title Ass'n., 667 P.2d 714, 721 n. 8 and 722 (Alaska 1983).

B. Even if relinquishment constituted a conveyance authorized by the act of July 15, 1941 (Pub. L. 176, ch. 300, 55 Stat. 594), the Secretary determined that only 100 feet of the relinquished right-of-way area was "necessary" for use as a public highway (local road).

Section 2 of the act of July 15, 1941, supra, authorized the Secretary of the Interior to accept on behalf of the United States a conveyance from the Railroad of "its railroad right-of-way" "to 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 (47 Stat. 446) . . . ."Under this restriction, the Secretary had discretion to determine the extent ("as far as") to which it was "practicable or necessary" to use the conveyed right-of-way "as a public highway . . . under the provisions of the Act of June 30, 1932 (47 Stat. 446)." Therefore, if we assume arguendo that the 1945 relinquishment was a conveyance under the 1941 act, supra, the Secretary exercised such discretion under the act by determining in PLO 601, PLO 757, and/or SO 2665 promulgated under the Act of June 30, 1932, supra, that only 100 feet (i.e., 50 feet on each side of the center line) of the relinquished area width (200 feet) was "necessary" for a public highway constructed under authority of the "Act of June 30, 1932." Under the foregoing orders, the Chitina-McCarthy Road was classified as a local road having a width of 50

feet on each side of the center line.

III. CONCLUSION

The 100-foot width limitation for the Chitina-McCarthy Road easement, cited in the BLM decision of June 5, 1989, should be upheld for the following reasons:

(a) The Chitina-McCarthy Road was not a segment of the 300-foot wide Copper River Highway.

(b) Regardless of whether or not the Railroad's 1945 relinquishment is a conveyance within the meaning of the act of July 15, 1941 (Pub. L. 176, ch. 300, 55 Stat. 594), any highway established within the 200-foot wide relinquished area was subject to the 100-foot wide limitation determined by the Secretary to be necessary for local roads (including the Chitina-McCarthy Road).

DATED this 14th day of November, 1990, at Anchorage, Alaska.

James R. Mothershead

JAMES R. MOTHERSHEAD
Department Counsel for the
Bureau of Land Management

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

AT ANCHORAGE

AHTNA, INCORPORATED, an Alaska corporation, and CHITINA NATIVE CORPORATION, an Alaska corporation, and the CHITINA TRADITIONAL COUNCIL, an Alaska Native village,	)	
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES,	)	
Defendant.	)	Case No. 3AN-91-6957 Civ.

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused to be served by hand delivery on October 2, 1991, a copy of NOTICE OF ADDITIONAL AUTHORITY and CERTIFICATE OF SERVICE on the following:

Jerry Ritter
c/o Ahtna, Inc.
406 W. Fireweed Lane, Suite 101
Anchorage, Alaska 99501

and by mail on October 3, 1991, on the following:

Virginia A. Rusch
Assistant Attorney General
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DATED this 3rd day of October, 1991.

LAW OFFICES OF ROGER W. DuBROCK
Attorney for Chitina Native Corporation

By _____
Roger W. DuBrock

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