

GALENA CAMPION ROAD – BEAVER CREEK CULVERT RIGHT-OF-WAY ASSESSMENT

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Introduction

The purpose of this report¹ is to assess the status of the existing right-of-way along the Galena – Campion Highway (aka “Tiger Freeway”) at the Beaver Creek crossing. The “Tiger Freeway Galena” is cited in the DOT&PF listing of Federal Aid Highways² as being 7.0 miles in length between Dike Road and the FAA Vortac Site. The Beaver Creek Culvert project is located approximately 1.5 miles beyond the Vortac road intersection. The Galena – Campion road was constructed to connect Galena Air Force Base and Campion Air Force Station. Construction at Campion commenced in June of 1950 and the station became fully operational as an air defense radar station in July of 1952.³ The name “Tiger Freeway” is a reference to “Tigers in the sky”, the unofficial designation for the fighter pilots stationed at Galena.⁴



Figure 1 - USGS Quad Nulato (C-2) 1953 minor rev. 1983

¹ This report was prepared for DOT&PF Project No. Z6406600000/64066; PSA 025-5-1-012; R&M No. 2315.01

² Federal Aid Highways: Interstate, Primary, and Secondary Highways of Alaska – Northern Region; The document can be found at the DOT&PF Right-of-Way website:

http://www.dot.state.ak.us/stwddes/dcsrow/assets/pdf/fedaidhwys/nr_routename.pdf

³ Welcome to Campion AFS, Alaska brochure:

http://www.radomes.org/museum/documents/Campion_Welcome2.pdf

⁴ 2005 BRAC Commission Regional Hearings, August 8, 2005

Figure 2 represents the earliest publication of USGS Quadrangle Nulato (C-2) dated 1952. Both versions are based on 1952 aerial photography indicating the location of Campion road at that time. The Figure 1 version was updated with the rectangular grid and other edits adding municipal, military and national wildlife refuge boundaries.

With respect to the rectangular survey system, the project site is located in the West ½ of Section 7, Township 9 South, Range 11 East, Kateel River Meridian and adjoins lots within U.S. Survey No. 7401.



Figure 2 - USGS Quad Nulato (C-2) 1952

General Land Status

The land status in the vicinity of the Beaver Creek culvert is a mix of ANCSA⁵ Corporation lands, Native Allotments⁶, private property and military reservations. The military reservations relate to lands withdrawn for the Campion Air Force Station in 1952⁷. The northerly boundary of the military reservation appears to cross Campion road approximately 600 feet south of the Beaver Creek culvert and should not be an issue for this project.

The surface estate for the ANCSA lands within Section 7 was conveyed to Gana-a 'Yoo, Limited in patent No. 50-2015-0029 issued on November 19, 2014. The sub-surface estate was conveyed to Doyon, Limited in patent No. 50-2015-0030 issued on November 19, 2014. With respect to the lands within Section 7, the patent conveyed only Government Lots 5 and 6.

⁵ Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(a), 1621(j)

⁶ Act of May 17, 1906, as amended, 43 U.S.C. 270-1 to 270-3 (1970)

⁷ Public Land Order No. 843 dated 6/24/52 withdrawing lands for the Department of the Air Force.

The relationship between the Beaver Creek site, the Native Allotments and the existing Campion road can be seen in the Figure 3 Google Earth map overlay. The outlines of the Native Allotments were obtained from the BLM SDMS website⁸.

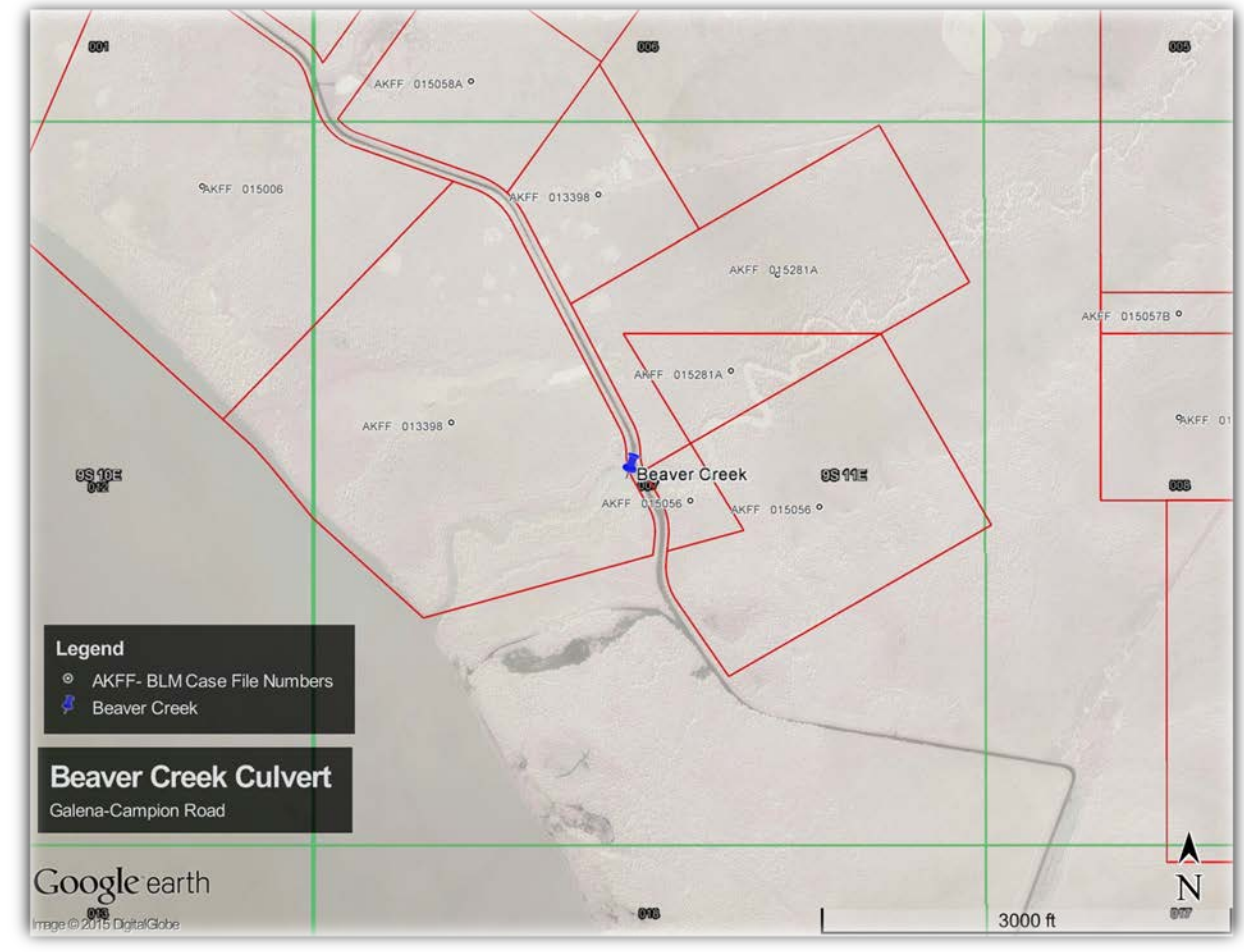


Figure 3 - Google Earth with BLM SDMS Native Allotment Overlay

The boundaries of the Native Allotments were defined by U.S. Survey No. 7401 approved September 30, 2013 (Figure 4). The boundaries of the Native Allotments adjoining Campion road are coincident with the right-of-way for the “Galena Campion Highway”⁹. The BLM field notes cite the “right-of-way of the Galena – Campion Highway” in every reference to an intersection with or a boundary call along the road ROW. The ROW width as shown on the U.S. Survey is 100-feet¹⁰ and is likely based on a line offset 50-feet each side of the physical road

⁸ BLM Alaska – Spatial Data Management System: <http://sdms.ak.blm.gov/isdms/imf.jsp?site=sdms>

⁹ Campion Road is referred to as the “Galena Campion Highway” in the plat and field notes for U.S.S. No. 7401

¹⁰ Note: The U.S. Survey does not label the width of the “Galena Campion Highway”. The width can be easily determined by comparing the inner and outer radii of curves that form the ROW. The survey is dimensioned in chains with the ROW width being 1.52 chains or 100.32 feet (1 chain = 66 feet)

centerline according to an as-built survey. Figure 4 reflects the graphic relationship between Beaver Creek, Campion road and the Native Allotments.

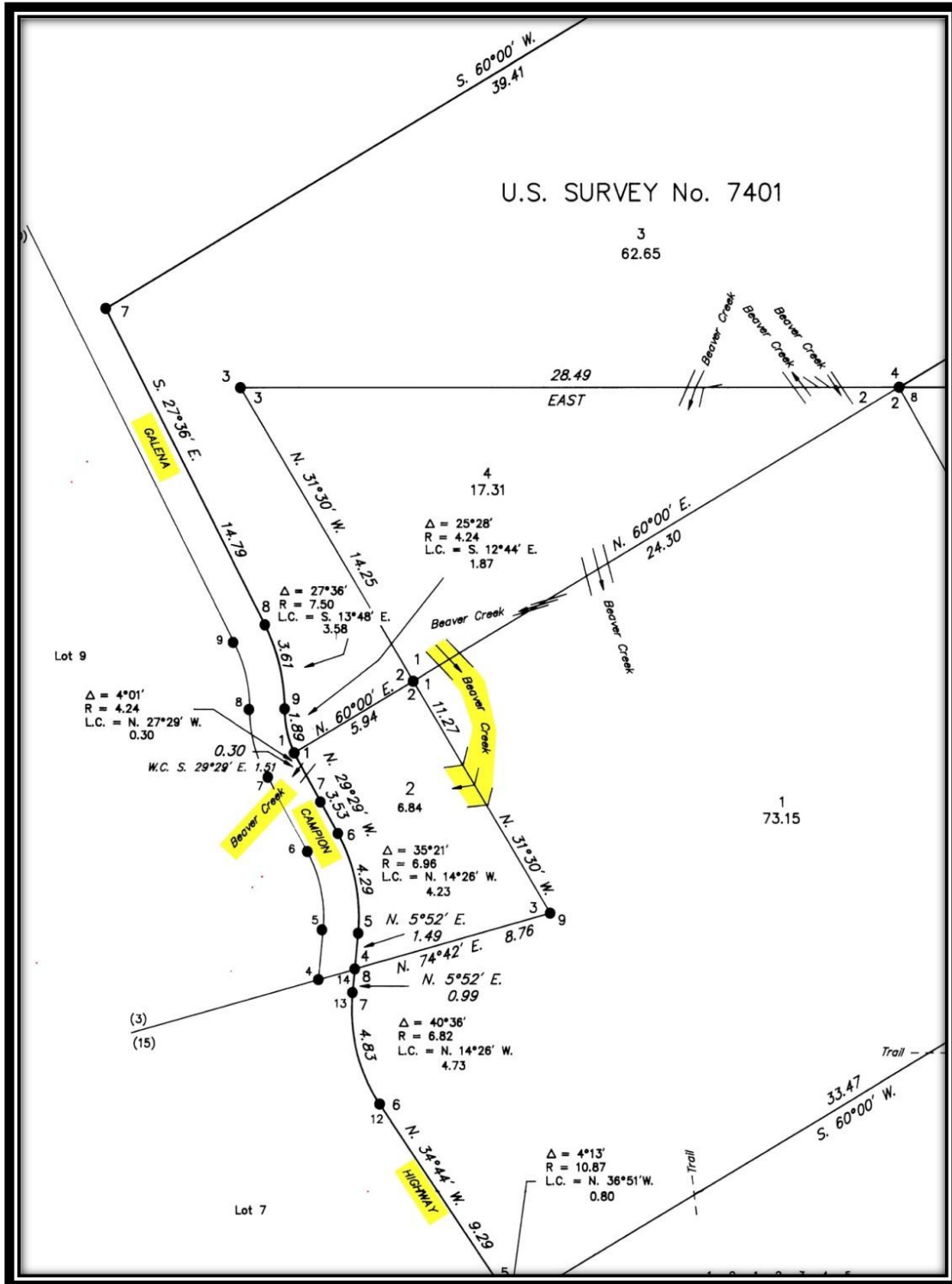


Figure 4 - Plat of U.S. Survey No. 7401

After U.S. Surveys No. 7401 and 13822 defined the Native Allotments and lands remaining under military withdrawal, the BLM patents to Gana-a 'Yoo, Limited for the surface estate and Doyon, Limited for the sub-surface estate reflect the fact that the only remaining lands available within Section 7 for conveyance to the ANCSA Corporations would be defined as Government Lots 5 & 6. Figure 5, an excerpt from the BLM Master Title Plat, shows the parcels within Section 7 (highlighted) that were specified in the ANCSA patents. The parcel labeled as Lot 6 (Government Lot with an area of 9.80 acres) is the 100-foot wide "ROW" for the Galena-Campion Highway within Section 7.

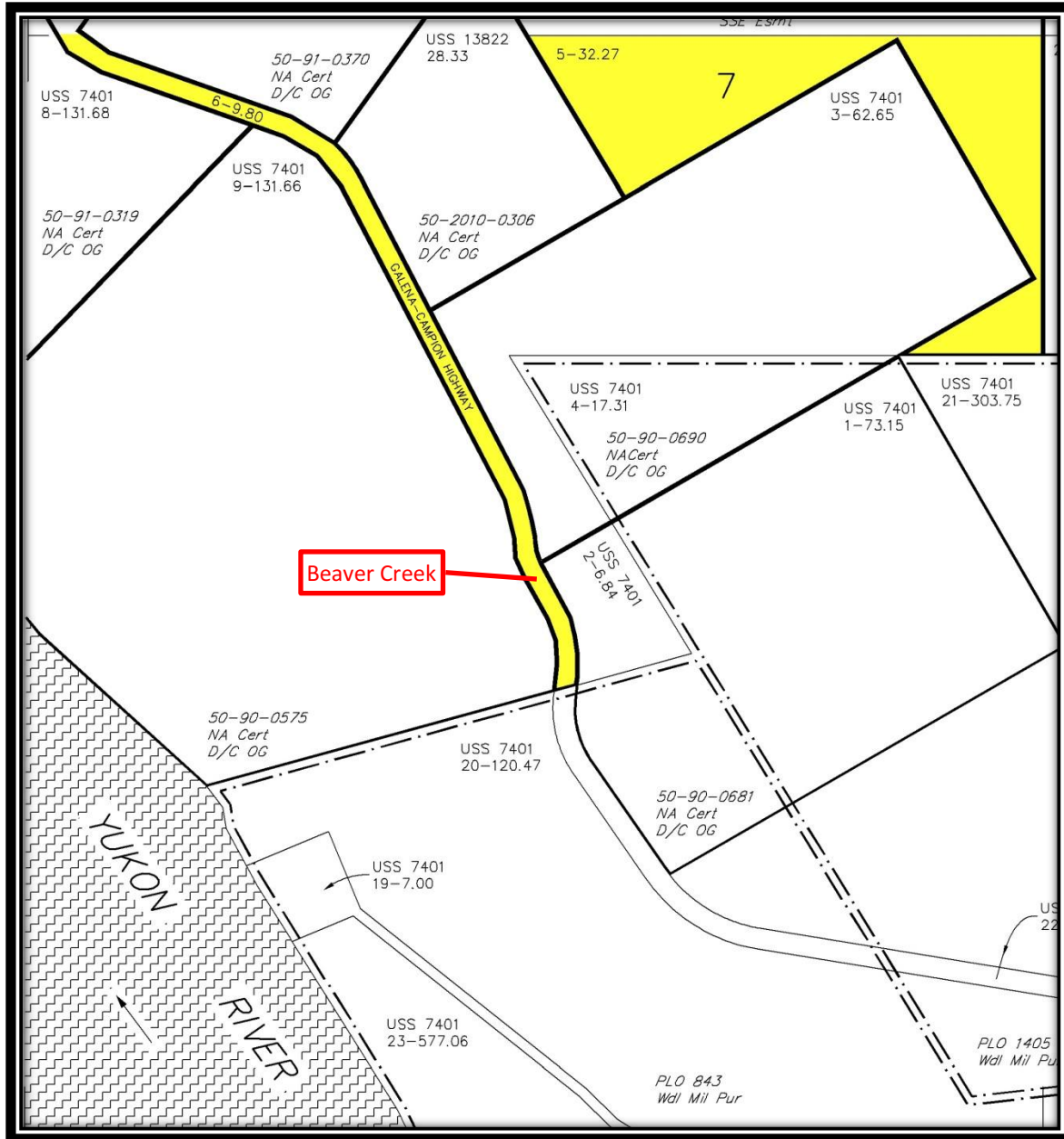


Figure 5 - BLM Master Title Plat T.9S., R.11E., K.R.M.

Figure 6 shows that Government Lot designations within Section 7 were revised in the Amended Township Survey Plat for Section 7, T.9S., R.11E., K.R.M., approved May 30, 2012.

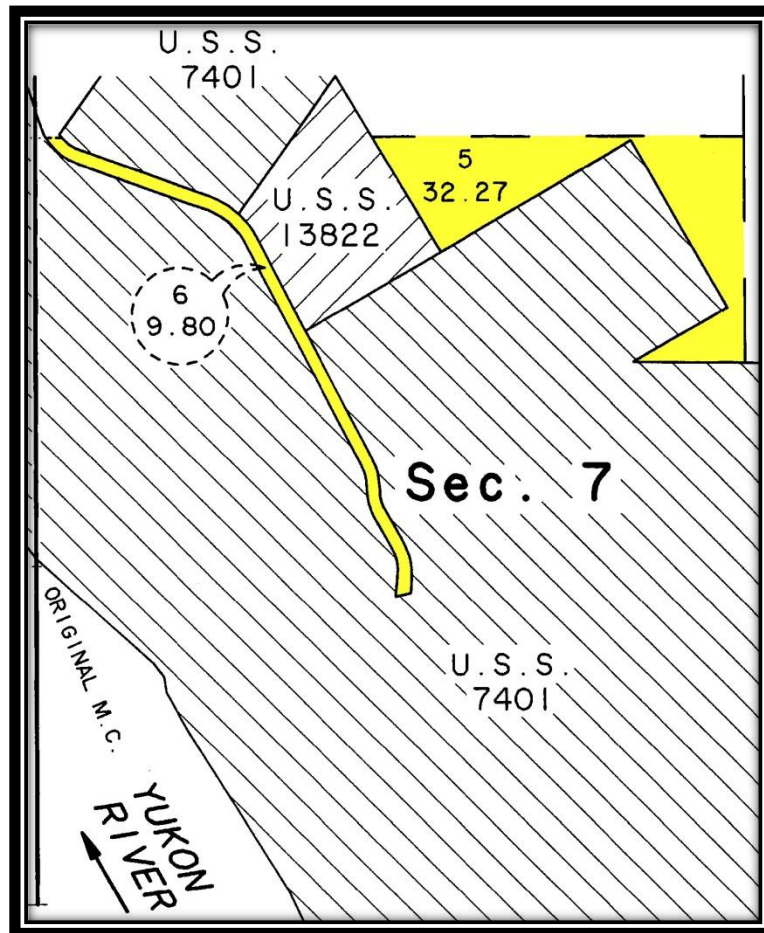


Figure 6 - BLM Amended Plat T.9S., R.11E., K.R.M - May 30, 2012

ANCSA 17(b) Easement

While the 100-foot wide strip of land referred to as Government Lot 6 in Section 7 is identified in U.S. Survey No. 7401 as the “right-of-way of the Galena – Campion Highway”, the fee estate is in fact owned by Gana-a ‘Yoo, Limited (surface estate) and Doyon, Limited, (sub-surface estate). This fee interest, however, is subject to an ANCSA 17(b) easement according to the aforementioned patents¹¹. The patents are specifically subject to several ANCSA 17(b)

¹¹ “Pursuant to Sec. 17(b) of the Alaska Native Claims Settlement act of December 18, 1971, 43 U.S.C. 1601, 1616(b),...are reserved to the United States. These easements are subject to applicable Federal, State, or Municipal corporation regulation. The following is a listing of uses allowed for each type of easement. Any uses which are not specifically listed are prohibited.” – “60 Foot Road – The uses allowed on a sixty (60) foot wide road easement are: travel by foot, dogsleds, animals, snowmobiles, two – and three-wheel vehicles, small and large all-terrain vehicles (ATVs), track vehicles, four-wheel drive vehicles, automobiles, and trucks.”

easements including the following easement identified in Figure 7: “(EIN 13f C5) An easement sixty (60) feet in width for an existing road, the Campion Highway, from the Galena – Campion Landfill Road, described in Dedication of Road recorded at Book 22, Page 920 in the Nulato Recording District, said road being located within lot 18, U.S. Survey No. 6664, in Sec. 2, T. 9 S., R. 10 E., Kateel River Meridian, southeasterly to lot 20 (formerly lot 18), U.S., Survey No. 7401, in Sec. 7, T. 9S., R. 11 E., Kateel River Meridian. The uses allowed are those listed above for a sixty (60) foot wide road easement.” The 17(b) easement is coincident with and centered on the existing Galena – Campion road.

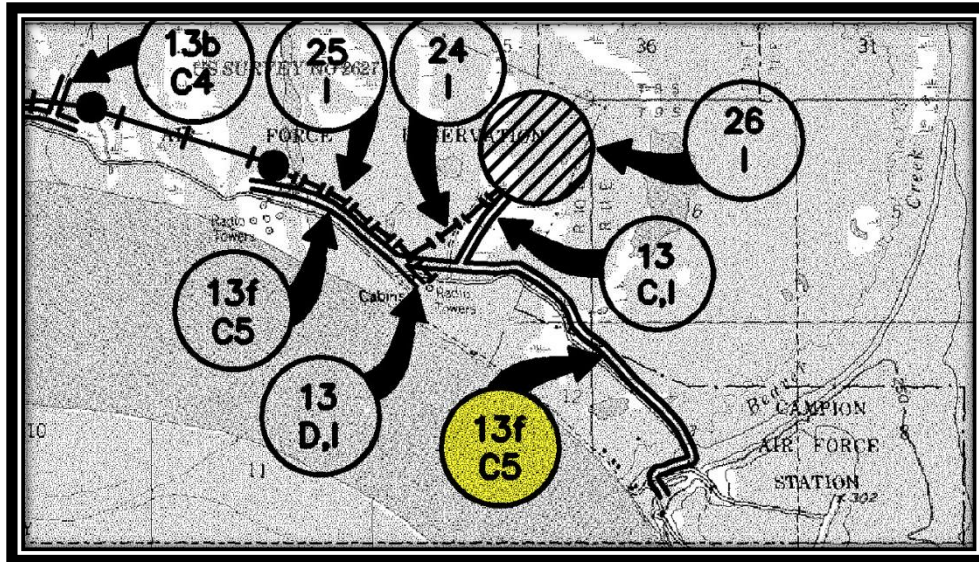


Figure 7 - BLM ANCSA 17(b) Easement Map Nulato (C-2) - August 5, 2004

Due to the “scope of use” limitations on ANCSA 17(b) easements, they have generally not been incorporated into DOT&PF Northern Region project rights-of-way. The 60-foot easement that is in place for the Galena – Campion road will permit most typical highway uses with one possible exception. The “scope of use” of a highway easement over lands subject to state law includes placement of utilities. This is contrary to the federal interpretation for lands subject to federal law. The “scope of use” over federal lands does not include the right to place utilities. What is unique for ANCSA 17(b) easements is that while they cross lands subject to state law (ANCSA Corporation lands) they are reserved to and administered by the United States. I suspect if a utility applied to BLM, the federal administrator of the 17(b) easement, that they would interpret their management of the easement to not include placement of utilities. Also, the allowed uses as specifically stated in the ANCSA patents would not include placement of utilities. It is clear that DOT&PF Utilities has permitted utilities within the Galena – Campion road ROW in the past. This would not be unusual as DOT&PF will permit a utility to the extent that they have authority to do so, but they leave it up to the utility to assess the validity of the existing ROW and take the risk if the DOT&PF permit lacks the appropriate authority. For a utility to install a facility within a 17(b) easement, a separate utility permit or easement would have to be obtained from the ANCSA corporation.



To formally authorize DOT&PF management of an ANCSA 17(b) easement, a Transfer of Administration from BLM to DOT&PF would be required. To our knowledge this has only occurred on one Northern Region project. The objective was to incorporate a 1 – acre 17(b) site easement adjoining the Elliott Highway where it ends at the Tanana River near Manley. To accomplish this, it was first required that an MOU be established between BLM and DOT&PF concerning the Transfer of Administration for ANCSA 17(b) easements.¹² This was followed with a letter transferring the specific 17(b) easement to DOT&PF under the terms of the MOU.¹³

RS-2477 Trail

Figure 8 indicates that an RS-2477¹⁴ trail has been asserted by the State of Alaska on each side of the Beaver Creek culvert project site but not in the specific vicinity of Beaver Creek.

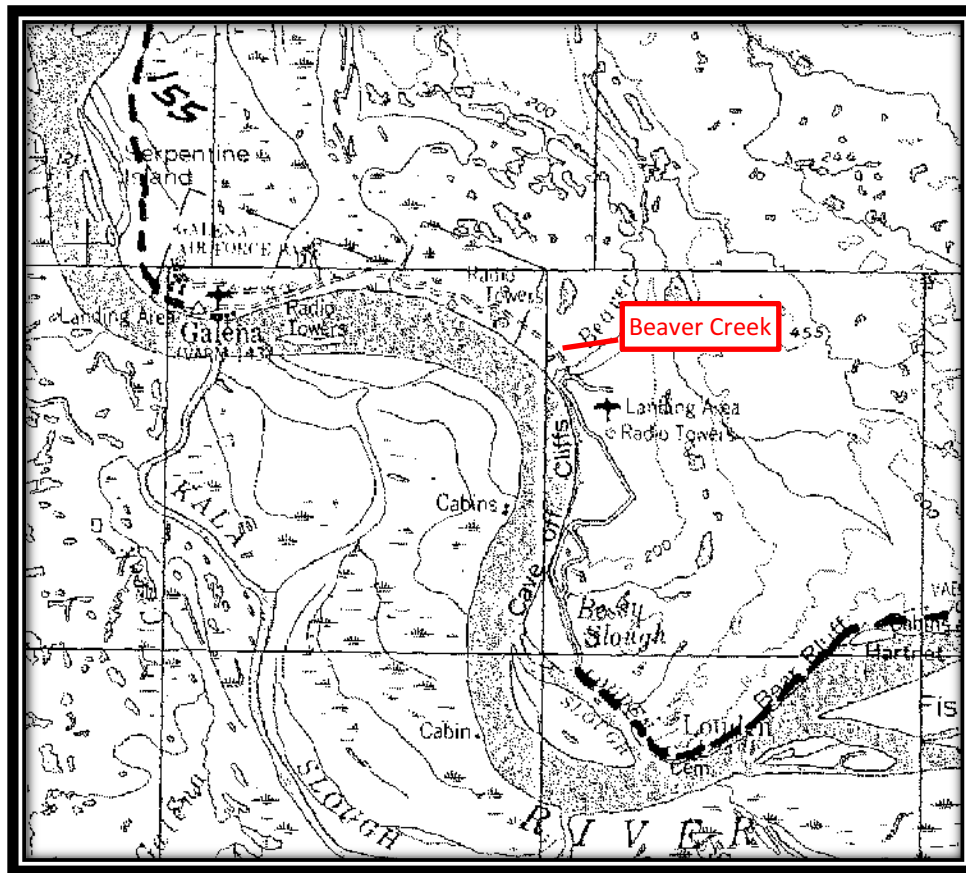


Figure 8 - DOT&PF RS-2477 Trail Inventory Map Nulato, Alaska - September 12, 1973

¹² See MOU dated 10/24/96 – See DOT&PF ROW File for Project 66661

¹³ See BLM letter in ROW file for Project 66661, Manley Slough to Tanana River dated 2/18/97. BLM AKF-14891-EE

¹⁴ Revised Statute 2477 provided a federal offer for road easements over public lands that can be accepted by public act or by user. RS-2477 was based on the Mining Law of 1866 - Lode and Water Law, July 26, 1866 (Section 8 - 14 Stat. 253)

The above map is from the 1973 DOT&PF Trails Inventory Map 97 (Nulato Quadrangle). The trail noted as No. 155 is RST #287, “Ft. Gibbon – Kaltag Trail” and is listed in Article 05, Rights-of-Way Acquired Under Former 43 U.S.C. 932, Alaska Statute 19.30.400 as a trail that the “state claims, occupies, and possesses under 43 U.S.C. 932”. According to the map, it is not applicable to the Beaver Creek project.

44 LD 513

BLM Case File AKFF 014450 suggests that the 17(b) easement was imposed over and intended to replace a right-of-way to Campion Air Force Station that was held in the name of the Corps of Engineers under the authority of 44 LD 513. A 44 LD 513 ROW is not a “public” right-of-way in the generally accepted sense. It was intended to be an administrative ROW for the benefit of a specific federal agency over federal public domain lands. Under one federal interpretation, a 44 LD 513 ROW does not continue in effect once the Federal Government’s use and occupancy terminates.¹⁵

Public Prescriptive Easement

To the extent that the physical footprint of the existing road is wider than the 30-feet on each side of centerline provided by the ANCSA 17(b) easement, or wider than the 50-feet on each side of centerline that would cross into the Native Allotments, there would be little opportunity to assert a “public prescriptive easement”. There are many roads on the Alaska Highway System for which no evidence of written title exists such as by easement deed or plat dedication. Occasionally, DOT&PF will assert a claim of a “public prescriptive easement” based on continuous public use in excess of 10 years. These assertions are based on the adverse possession statutes found in A.S. 9.45.052. Generally, the assertion of a “public prescriptive easement” against ANCSA Corporation lands or Native Allotments is not an option. Federal law provides that undeveloped ANCSA lands are generally exempt from claims of adverse possession.¹⁶ Native Allotments are protected in a manner similar to other Federal lands preventing claims by adverse possession.¹⁷

Existing Right of Way Summary

The project has an existing 60-foot wide ANCSA 17(b) easement that for practical purposes is centered on the mathematical road centerline as determined by U.S. Survey No. 7401. The entire 100-foot wide corridor between the Native Allotment boundaries is owned by Gana-a ‘Yoo, Limited (surface estate) and Doyon, Limited (sub-surface estate) subject to the 60-foot wide 17(b) easement. The remaining strips of land between 30 and 50-feet from centerline on each side represent unencumbered Gana-a ‘Yoo and Doyon lands.

¹⁵ See Highway Rights-of-Way in Alaska 2013 Section IX. - <http://alaskapls.org/standards2013/Highways-2013.pdf>

¹⁶ Section 11 of Public Law 100-241, 101 Stat. 1807, Feb. 3, 1988.

¹⁷ Haymond v. Scheer, 543 P.2d 541 (Okla. 1975) “It is well settled that there can be no adverse possession against the federal government which can form the basis of title by estoppel or under the statute of limitation; and it has been held that the same rule applies where the lands involved are lands that have been allotted to Indians with restriction upon alienation...”

Maintenance & Management Authority

Until BLM has transferred administration of the 60-foot ANCSA 17(b) easement to DOT&PF, the management authority legally remains with BLM.

In a December 31, 1996 letter I wrote as DOT&PF Northern Region Right of Way Engineer regarding Road Jurisdiction in Galena, I noted the following: “On 2/15/95 a memorandum of understanding was executed by DOT&PF, the City of Galena and the Air Force regarding access to a new landfill site along Campion road. In this document, DOT&PF agreed to perform normal road maintenance to the new landfill. In order to obtain state and federal funds for the improvement of Galena city streets, the city passed resolution 95-12 which accepted maintenance responsibility for all roads improved by DOT&PF except for Dike/Campion road which was to remain the state’s responsibility.” (emphasis added)

Recommendations for Right-of-Way Acquisition

In recognition of the design constraints afforded by a 60-foot wide ROW and the fact that the existing culvert appears to extend beyond 50-feet on each side of centerline the following options were considered:

Widen ROW from 60-feet to 100-feet. This would require acquisition of a highway easement over the 20-foot wide strips of Gana-a ‘Yoo/Doyon land on each side of centerline for a specified distance north and south of the Beaver Creek culvert.

In 2008 and 2009 DOT&PF acquired highway easements for emergency repairs to the Galena – Campion road from Gana-a ‘Yoo, Limited. In 2012 DOT&PF acquired both the fee estate to the surface estate from Gana-a ‘Yoo and a sub-surface easement from Doyon for several parcels related to Project STP-0002(146)/61653, the Galena Campion Road Realignment. All of the Gana-a ‘Yoo acquisitions were authorized under Board Resolution No. 2009-02 dated April 18, 2009 in which the Corporation found the transfer of land interests to be in their best interest in order to deal with continuing erosion of the road. Gana-a ‘Yoo was paid fair market value for each of these acquisitions. In 2011, the compensation for Parcels 6-9 for project STP-0002(146) was based on a Reviewer’s Determination of FMV for the fee estate of \$650/acre. That same year, the compensation for Parcel E-5 was based on an FMV for the fee estate of \$850/acre.

It is apparent that Gana-a ‘Yoo has been a cooperative partner given their willingness to convey additional ROW parcels as needed to combat the continuing erosion. They have the option to donate an easement under the federal Uniform Act¹⁸ if the appropriate waivers for donation and appraisal waivers are executed. If Gana-a ‘Yoo requires payment for the additional easement, the parcel size and resulting estimated fair market value would be minimal. As availability of the

¹⁸ The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended – Public Law 91-646 dated January 2, 1971.

full 100-foot wide corridor would reduce the overall design and construction costs, acquisition of these easements is recommended.

Widen ROW beyond 50-feet each side of centerline: The lands that are located beyond 50-feet each side of centerline in the vicinity of the Beaver Creek culvert are or were restricted Native Allotments. While technically feasible, the acquisition of a highway easement across a restricted Native Allotment can be a lengthy process. Temporary access may be considered to remove a portion of the existing culvert that extends into the allotments or to provide a construction detour.

(See Figure 4) Lot 9 of U.S. Survey No. 7401 to the west of Campion road was patented as a Native Allotment to the heirs of Robert G. Demoski Sr. in certificate No. 50-90-0575 on September 17, 1990. Lot 3 of U.S. Survey No. 7401 to the northeast of the culvert site was patented to Wilhelmina Yaska in certificate No. 50-90-0690 on September 28, 1990. Lot 2 of U.S. Survey No. 7401 to the east of the culvert site was patented to Valentine B. Demoski in certificate No. 50-90-0690 on September 28, 1990.

Lot 2 of U.S. Survey No.7401 was conveyed from Valentine B. Demoski to Benjamin and Jenny R. Koontz by deed recorded in Document 2010-000239-0 on September 10, 2010 in the Nulato Recording District. Note that as a part of this conveyance, approved by the Bureau of Indian Affairs, the Native Allotment restrictions were removed. As a result, the partial acquisition of a temporary or permanent easement interest in this parcel may be handled in the same manner as an acquisition from any other private party and no BIA review or approval is required.

Due to the close proximity of the existing Beaver Creek culvert to the northerly boundary of Lot 2, it is unclear whether any permanent or temporary interest would have to be acquired from the restricted Native Allotment in the adjoining Lot 3. It is also unclear whether the proposed design would require a permanent or temporary interest in the restricted Native Allotment to the west in Lot 9.

The rules regarding temporary access to restricted Native Allotments have been inconsistent. For the past several years, Northern Region RFPs have included a warning notice in the Statement of Services regarding access to restricted Native Allotments and the requirement that the contractor not enter these properties without a BIA approved Revocable Use Permit¹⁹. In

¹⁹ "Access to a restricted native allotment or townsite lot for purposes including surveying and other design related services requires written permission to enter by the Bureau of Indian Affairs (BIA) (25 CFR 169.3). The Contractor and his representatives shall not enter these properties without a copy of a BIA approved Revocable Use Permit (RUP) in their possession. The Contractor will be solely responsible for any and all penalties or fees resulting from the unpermitted entry by the Contractor or his representative onto these lands. The Issuance of a Professional Services Agreement, Contract Award, nor Notice to Proceed does not exempt the Contractor from this requirement. RUP's shall be acquired by the DEPARTMENT; the Contractor shall be required to provide a workplan for proposed activities on the Native lands and comply with all stipulations. The Contractor may be requested to complete all forms and coordination with BIA or the Native association to secure RUP, if requested and an amendment shall be negotiated. Contractor secured RUP's will be subject to DOT Right of Way concurrence prior to commencement of work."

my experience, a BIA approved RUP would be secured for temporary access to an allotment for surveying, environmental and geotechnical investigations. In the past year our office secured an access agreement for geotechnical investigation within a restricted Native Allotment in the vicinity of the south abutment of the Yukon River Bridge. At the time, the BIA Realty Contractor, Tanana Chiefs Conference (TCC), informed us that a formal BIA approved RUP was not required and that we could draft an appropriate right of entry, agree on compensation and TCC would facilitate obtaining the allottee's signature.

For this project I contacted Paul Mayo, Natural Resource & Realty Director for TCC who referred me to TCC Realty Specialist April Frick. April said that the BIA rules regarding RUPs had not changed but that TCC was able to use their discretion in determining whether a proposed use warranted the full BIA approved RUP or a less formal access agreement. Short term low impact access for surveying and environmental work would likely fall into the category of uses that would no longer require the full BIA approved RUP. A detour for the Beaver Creek Culvert which would require cutting of trees and placement of gravel would require a full RUP which might not be approved if it was determined that the impacts could not be adequately remediated. A request for access to an allotment would be handled on a case by case basis by TCC and as a part of the initial request, they would determine what level of agreement or permit would be required if it was to be allowed at all. It is likely that a permit to remove the remains of the existing culvert from the allotment would be a low impact event not requiring the full BIA approved RUP.

Summary: To the extent possible it is recommended that a design solution avoid access to restricted Native Allotment lands except for limited temporary access necessary to remove the existing culvert. The design solution should be constrained to the widened 100-foot wide ROW on the basis that the widened ROW can be easily acquired from Gana-a 'Yoo, Limited. Acquisition of permanent or temporary ROW across the now unrestricted Lot 2 of U.S.S. 7401 may be feasible assuming that the private land owner is willing to negotiate. The nature of this project would not likely warrant a condemnation action to acquire right-of-way.

Whether federal FEMA²⁰ or state funds²¹ are used to acquire permanent or temporary²² right-of-way for this project, the acquisitions will be subject to the previously cited federal "Uniform Act".

²⁰ "49 CFR § 24.4 Assurances, monitoring and corrective action. (a) Assurances. (1) Before a Federal Agency may approve any grant to, or contract, or agreement with, a State Agency under which Federal financial assistance will be made available for a project which results in real property acquisition or displacement that is subject to the Uniform Act, the State Agency must provide appropriate assurances that it will comply with the Uniform Act and this part."

²¹ Alaska Right-of-Way Manual Effective August 30, 2011; Chapter 2.1.1 – State-Funded Projects

²² 49 CFR § 24.101(c) – Application of Uniform Act to temporary easements.