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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, v. STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, Defendant.	Case 3AN-91-6957 Civil Copper River Highway

STATE OF ALASKA'S REPLY TO PLAINTIFFS' SUPPLEMENTAL BRIEF

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STATE OF ALASKA'S REPLY TO PLAINTIFFS' SUPPLEMENTAL BRIEF

I. Summary of the Argument.

Section III of the plaintiffs' Supplemental Brief attempts once again to refute the state's argument that Congress, by the Act of July 26, 1941 1/ dedicated the entire former Copper River and Northwestern Railway Company right-of-way for highway purposes. The state's reply brief begins with this section because, if the court agrees that the right-of-way was dedicated by the 1941 Act, the R.S. 2477 theory need not be considered at all.

When Congress acts to dedicate public lands, the elements of a common law dedication of private property are inapplicable; only a clear expression of Congress's intent to dedicate is required. The language of the 1941 Act, the historical background, and numerous acts of federal agencies over the years positively do support the state's argument that the 1941 Act must be interpreted

1/ Pub. L. 176, ch. 300, 55 Stat. 594.

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as a dedication of the railroad right-of-way for highway purposes. If the 1941 Act dedicated the right-of-way, or if (in accordance with plaintiffs' theory) the surveying, engineering, funding requests and appropriations, and actual construction of 88.0 system miles before 1959 establish that the Secretary considered the right-of-way necessary for a highway, then the Omnibus Act Quitclaim Deed transferred the right-of-way to the State of Alaska in 1959.

Alternatively, if the railroad right-of-way was not segregated from the public domain and reserved for highway purposes by the Act of 1941, it was acquired as a right-of-way under R.S. 2477. 2/ The plaintiffs' argument that federal law controls and establishes actual construction as the standard for R.S. 2477 acceptance was systematically analyzed and rejected in Sierra Club v. Hodel, 848 F.2d 1068, 1080 (10th Cir. 1988). Alaska cases have repeatedly held that not merely construction, but any positive act of appropriate authorities manifesting a clear intent to accept the R.S. 2477 grant is sufficient. Years of work on this road by the Alaska Road Commission (ARC) and the Bureau of Public Roads (BPR) clearly show an intent to accept the entire right-of-way.

Finally, whether the right-of-way was dedicated by the 1941 Act, or acquired under R.S. 2477; Amendment 2 to D.O. 2665 widened it to 300 feet in 1956. This right-of-way was clearly

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2/ The Act of July 26, 1866, 14 Stat. 253, sec. 8, subsequently recodified as Revised Statutes sec. 2477 and 43 U.S.C.A. sec. 932. R.S. 2477 was repealed and replaced in 1976 by the Federal Land Policy and Management Act of 1976. Pub. L. No. 94-579, Title VII, sec. 706(a), 90 Stat. 2793 (1976).

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located by actual construction of the railroad, and by surveys and USGS maps; therefore staking and posting was unnecessary either to establish the original 200 foot right-of-way, or to widen it later. The Omnibus Act Quitclaim Deed conveyance of unconstructed as well as constructed portions of roads in the state would otherwise have no meaning.

II. The 1941 Act Was a Dedication for Highway Purposes of the Entire Railroad Right-of-Way from Cordova through Chitina to the Kennecott Mine; the Dedication Was Effective Upon Relinquishment by the Railroad Without Additional Agency Action.

Whether the 1941 Act is to be interpreted as a dedication of the former railroad right-of-way is a matter of statutory interpretation, and does not depend on a finding of the common law elements of a dedication of private property to public uses. The language and purpose of the 1941 Act, and consistent later acts of two federal Departments clearly support the conclusion that the 1941 Act was a dedication of the former railroad right-of-way for highway purposes.

A. A Congressional Dedication of Public Lands Does Not Require the Common Law Elements of a Dedication of Private Property to Public Purposes.

The elements necessary to establish a common law dedication to public use by the owner of private property are not applicable to a congressional dedication of public lands. 3/ The

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3/ Congress undisputedly has the capacity to "withdraw," "appropriate," or "reserve" public lands of the United States for specific public uses. Congress may also "dedicate" public lands, and this word does not imply any limitation of Congress's power, or any additional requirements to perfect. The word "dedicate" has been used in these briefs because it is usually associated with setting aside land for roads or highways.

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common law elements of dedication -- a clearly expressed offer to dedicate, and acceptance by appropriate public authorities -- attempt to assure fairness to the two separate entities interested in the transaction: the owner of the private property said to be dedicated to public use, and the public recipient. The element of a clearly expressed offer to dedicate serves to protect the owner from overreaching by a public claim to more than the owner intended to dedicate. The element of an acceptance by public authorities serves to protect the public from being burdened by property of no value or usefulness. See, e.g., Note, Public Ownership of Land Through Dedication, 75 Harvard L. Rev. 1406 (1962); Parks, The Law of Dedication in Oregon, 20 Ore. L. Rev. 111 (1941).

But dedication of property owned by a government for a particular public use is a different sense of the word. 23 Am. Jur. 2d Dedication (1983) Sec. 2 at p. 6. See also, 26 C.J.S. Dedication, Sec. 6, p. 404 n. 55.15; Sec 34, p. 462 n. 48.5 (1956); Tigner, Dedication - a Survey, 15 Baylor L. Rev. 179 (1963) at 184-5, n. 38. No acceptance is necessary when a public body having capacity to do so makes a formal dedication. State of California v. U.S., 169 F.2d 914, 921 (9th Cir. 1948); Gewirtz v. City of Long Beach, 330 N.Y.S. 2nd 495, 506 (N.Y. Sup. Ct 1972); McKernon v. City of Reno, 357 P.2d 597, 601 (Nev. 1960); Singewald v. Girden, 127 A.2d 607, 616 (Del. 1956); Arcques v. City of Sausalito, 272 P.2d 58, 60 (Cal. Ct. App. 1954). When acting to dedicate public land, Congress has authority and responsibility to determine what uses of public lands will benefit both the public as landowner and

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the public as user. The dedication and its acceptance are in the same acts. Singewald, 127 A.2d at 616.

For this reason, the plaintiffs' search (Plaintiffs' Supplemental Brief at pp. 42-47) for two separate elements of offer and acceptance is simply inappropriate. The only pertinent question is whether the 1941 Act is properly interpreted as an expression of intent to appropriate or reserve the right-of-way as a future transportation route, or whether the 1941 Act merely directs the Secretary to determine later whether the right-of-way is needed for use as a highway, without specifying the form of such a determination or imposing any restrictions which would protect the right-of-way from passing out of the public domain before the Secretary made such a determination.

This is an issue of statutory construction, which is a matter within the special competency of the court. Tesoro Alaska Petroleum Co. v. Kenai Pipeline Co., 746 P.2d 896 (Alaska 1987) There the court said:

> the starting point should be the language of the statute itself construed in light of the purposes for which it was enacted. . . . The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others.

Id. at 904-905.

B. The Language and Purpose of the 1941 Act Support the Conclusion that Congress Dedicated the Railroad Right-of-Way for Highway Purposes.

First, the plain language of the 1941 Act shows that Congress intended the former railroad corridor to be used for a

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highway. 4/ The title describes it as a bill "authorizing the [railroad] to convey its right-of-way for use as a public highway" (emphasis added). References to the bill in the available legislative history use similar language to describe its purpose. See Appendix 20 at p. 1 and Appendix 21.

Sec. 2 of the Act says "The Secretary is hereby authorized. . . .to accept. . . .said properties to be used, operated and maintained, as far as may be practical and necessary, as a public highway. . ." 5/ Nowhere in the 1941 Act are there any words requiring the Secretary to withdraw the railroad right-of-way if he thought it was necessary for a highway, or supporting

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4/ See also the State's Reply to Opposition for Motion for Summary Judgment at pp. 7-8.

5/ In his own letter which he quotes at pp. 36-37 of Plaintiffs' Supplemental Brief, plaintiffs' counsel first concedes that this language is directive. With this the state agrees--the right-of-way is to be used for a highway if it possibly can be. The rest of the logic in the quoted DuBrock letter is seriously flawed. Although Congress realistically acknowledged that it might not be reasonable to use all the railroad property (including equipment) for a highway, Congress did not make use of the right-of-way merely elective, or intend that the right-of-way would be otherwise disposed of unless the Secretary made an affirmative statement announcing a withdrawal.

Congress amended the original version of the bill to take away the Secretary's power to dispose of any of the railroad property. See Appendix 19; Appendix 20, p.1; Appendix 21. It would be highly inconsistent with the purpose of this amendment if Congress intended mere inaction of the Secretary to dispose of the most important property of all, the right-of-way, by returning it to the unappropriated public domain where it could pass into private hands under the various public land grant laws.

A far more logical reading of the directive language of the Act is that use of the equipment, planning, timing and location of construction, and other management decisions were left to the Secretary, but that the right-of-way was dedicated for highway use unless the Secretary made a positive finding that use would be impractical or unnecessary, and obtained the approval of Congress in the form of a revocation of the dedication.

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the further leap of logic by which plaintiffs reason that, because construction was not completed on the portion of the Copper River Highway south of Chitina, all the planning and preparatory work of the ARC and the BPR failed to show that the right-of-way was thought necessary. 6/

Next, historical evidence refutes the idea that the main purpose of the 1941 Act was only to preserve the McCarthy to Chitina part of the former railroad route. Attached as Appendix 24

6/ A fundamentally mistaken and impractical concept about roadbuilding is inherent in plaintiffs' argument that the entire route had to be actually constructed to sufficiently demonstrate that the Secretary considered it necessary for highway purposes. Roads are intended to go somewhere, and nothing is thought more ridiculous than a few highly publicized highways that abruptly deadend. Yet, construction of a 130 mile highway through a remote part of Alaska, crossing the powerful Copper River and numerous tributaries, is an enormous project, likely to take many years of work and many annual appropriations of partial funding. For this road, the purpose (clearly expressed in reports of the Alaska Road Commission) was to connect Cordova to the rest of Alaska. Therefore the decision to build the very first part of the road implies the conclusion that the entire route is necessary.

The same impractical notion is inherent in the argument that only actual construction of the entire route is sufficient to accept an R.S. 2477 grant. There is no conceivable way that a public authority could instantly construct an entire highway. If the R.S. 2477 grant could not be accepted in advance by planning, the necessary right-of-way could not be reserved. While the authority was seeking funding, surveying, doing preliminary engineering, or even constructing one segment, any homesteader could enter the intended route and establish a private interest which the authority would then have to buy out. For this right-of-way, the positive acts of surveying, preliminary engineering, seeking and obtaining legislative appropriations, and actual construction of part of a road that was clearly intended to connect Cordova to the rest of Alaska along the former railroad route certainly established the intent to accept this entire length of the Copper River Highway.

The BLM has impliedly recognized the reasonable position that some acts less than complete construction of an entire route can be an acceptance of the R.S. 2477 grant. See MOU at 2, Appendix 33.

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is House Joint Memorial No. 21, a resolution in which the Territorial Legislature urged the President and the Secretaries of War and Interior to support construction of a roadway over the entire former railroad route. This resolution clearly expresses the legislature's view that transportation is needed to connect Cordova with the Copper River and Chitina valleys and the Richardson Highway at Chitina.

In Appendix 23, Acting Secretary of the Interior Wirtz acknowledged HJM No. 21, and enclosed as a response copies of the bill which eventually became the 1941 Act. Wirtz asserts the bill will allow his department to develop the transportation facilities supported by the Territorial Legislature, "in so far as conditions require, and in so far as Congress may appropriate funds."

Acting Secretary Wirtz is also the author of the explanatory letter in Senate Report No. 375, Appendix 20. In the second paragraph at p. 2, this letter says, "For the time being, no highway or tramway is contemplated on the portion of the right-of-way between Chitina And Cordova." This language is very different from the implication in plaintiffs' brief that there was no plan ever to build on this part of the right-of-way.

The secretary's choice of words states only that his Department was not planning immediate work to convert the railbed between Chitina and Cordova to a highway or tramway. It strongly implies that, in the future, as opposed to "for the time being," plans for use of this portion would be formulated. Because the bill was not drafted to specify only the McCarthy to Chitina portion of the route, the secretary's comment suggests that he

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understood well the necessity of preserving the right-of-way for future use even when present construction was not scheduled.

Furthermore, Wirtz said the bill was intended to "avoid the necessity and cost of acquiring, for the purposes contemplated, portions of the right-of-way from the municipalities and patentees in whom title to such portions would otherwise vest" (Appendix 20, p. 2). It would be an anomaly for Congress to take specific action in Sec. 3 to assure that existing settlers could not acquire the rights while failing to take any precautions against acquisitions by future settlers. To serve the purpose Wirtz pointed out, the 1941 Act also had to take the former railroad right-of-way out of the public domain so that it would not pass with any future land dispositions. Congress did this by dedicating the right-of-way for highway purposes.

Finally, if, as plaintiffs argue, the 1941 Act only gave the Secretary of Interior authority to decide whether the right-of-way was necessary for highway use, it would have been entirely redundant to authority that the Secretary already had under R.S. 2477, and the Act of June 30, 1932. 7/ In the absence of the 1941 Act, the railroad right-of-way would have reverted to the public domain upon abandonment by the railroad (except for the special circumstances addressed in Sec. 3). As unappropriated public land, it would have been available for grant under R.S.

7/ The Act of June 30, 1932 transferred the Alaska Road Commission from the Department of War to the Department of the Interior, and authorized it to locate, lay out, construct and maintain public roads in Alaska from 1932 until Alaska's inclusion in the Federal-Aid Highway Act of 1956. 48 U.S.C. sec. 321(a).

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2477, and the Secretary, through the ARC, could have accepted it for a highway.

But the 1941 Act did not merely duplicate R.S. 2477; it did something more. It expressed Congress's intent that this particular federal property should be used for a highway if it was reasonable to do so.

C. Subsequent Acts of the Commerce and Interior Departments Are Consistent With Interpretation of the 1941 Act as a Dedication.

The plaintiffs also argue (supplemental brief, p. 44-46) that subsequent conduct of the Department of the Interior weighs against interpretation of the 1941 Act as a dedication. 8/ The State agrees with plaintiffs that the interpretation of agencies charged with administration of the subject matter of legislation can also be an aid to statutory construction. But contrary to plaintiffs' argument, both the Department of the Interior through the ARC and the Bureau of Land Management (BLM), and the Department of Commerce, through the BPR, acted in a way which was not only consistent with interpretation of the 1941 Act as a dedication, but also leads directly to the conclusion that the State of Alaska now owns the former railroad right-of-way.

8/ To support their argument, the Plaintiffs point to the adoption of D.O. 2665 in 1951, and to the grant of a patent without a reservation of this right-of-way to Harvey Bain King in 1962. The first of these points is addressed at p. 32 of this brief. The second argument is plainly wrong because "the patent contains an implied-by-law condition that it is subject to such a right-of-way." State v. Alaska Land Title Association, 667 P.2d. 714, 726-727 and notes 20-21. See also, Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1224 (Alaska 1975).

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During Alaska's territorial days, the ARC was the Department of Interior agency most directly responsible for roads in Alaska. From the time of the 1941 Act until its responsibilities were turned over to the BPR in 1956, the ARC continuously worked on construction or planning for construction of the former railroad right-of-way. For a discussion of all the positive acts showing the ARC's work on this route, see Appendices 6-11, pp. 10-11 of the State's Reply to Opposition to Motion for Summary Judgment, and pp. 26-32 of this brief.

In 1956, authority over roads in Alaska was transferred to the BPR, an agency within the Department of Commerce. Attached are two documents showing that this agency considered the former railroad right-of-way to be under its jurisdiction, and thus among the "rights, title and interest of the Secretary of Commerce" that was transferred to the State of Alaska by the 1959 Omnibus Act Quitclaim Deed.

Appendix 25 is an excerpt of a list prepared by the BPR in 1957 of roads transferred to its jurisdiction. The list includes 78 constructed miles and 170 unconstructed miles of the Copper River Highway.

Appendix 26 is a settlement agreement dated December 11, 1957 in a lawsuit by Ruben Grevnin against the United States. The agreement, signed by representatives of both the BPR and the BLM, provides at p. 2:

> WHEREAS, pursuant to the terms of the Federal-Aid Highway Act of 1956 (70 Stat. 374), the Bureau of Public Roads, United States Department of Commerce, assumed jurisdiction over the aforesaid

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> abandoned former right-of-way of the Copper River and Northwestern Railroad; . . .

At p. 5, para.8, this agreement also states: "The Government is constructing a highway progressively along the general route of the abandoned former right-of-way of the Railroad. . ."

The BLM, charged with responsibility for administering federal land dispositions, including ANCSA conveyances, has expressed the view in telephone calls and in formal decisional documents, that the State of Alaska owned the former railroad right-of-way. Because of the BLM's view that the state already owned the right-of-way, this agency declined the state's request to designate this corridor as an ANCSA Section 17(b) transportation route. 9/

9/ ANCSA Sec. 17(b) (43 U.S.C. 1616) provided a special procedure for identifying easements for public transportation needs and directed that these interests should be reserved in conveyances to the Village and Regional Corporations. Section 17(b) provides:

> (b)(1) The Planning Commission shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.
>
> (2) In identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall receive and review statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements: Provided, That any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.
>
> (3) Prior to granting any patent under this Act to the Village Corporation and Regional Corporations, the Secretary shall consult with the State and the Planning Commission and shall reserve such public easements as he determines are

(continued...)

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Appendices 27--29 are documents found in BLM files from ANCSA adjudications. Appendix 27 is a BLM memo dated Feb 15, 1978 setting out recommendations for easement reservations on the land sought by the Village of Chitina. At p. 8, the memo shows that easement requests were not approved for the Copper River Highway because the right-of-way was already in existence, having already been granted to the State.

Appendix 28 is a memo of telephone call of August 19, 1981. It shows that a BLM employee informed the office of a state legislator that the right-of-way was conveyed to the state under the Omnibus Act, and that the BLM could not reserve an easement because of that fact.

Appendix 29 is the hearing officer's Recommended Decision regarding various requested easements and reservations in the lands granted to Plaintiff Chitina Native Corporation in IBLA 82-1161. At p. 18 (85 IBLA 330), the hearing officer concluded:

> 6. The State of Alaska owns the Copper River Northwestern Railroad right-of-way which extends south from Chitina to Cordova. The rails have been removed and the roadbed is used for some undisclosed distance from Chitina south as a vehicular road. From the evidence presented it appears that with the O'Brien Creek Bridge passable it is traversable by vehicular traffic at least as far south as Haley Creek. While no specific survey evidence was introduced it can be concluded that the width of the right-of-way is 100 feet on each side of the centerline and that at a number of places south of O'Brien Creek the right-of-way

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9/(...continued)
necessary.

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> reaches to and/or extends into the State-owned riverbed (Citations omitted).

See also, Appendix 29A, the decision which affirms this recommended hearing officer's decision, 85 IBLA 311.

Finally, when the BLM prepared the Interim Conveyances to these plaintiffs, it expressly mentioned a 300 foot wide right-of-way. Appendix 30, the conveyance to Chitina Native Corporation says the grant is subject to:

> Any right-of-way interest in the Copper River Highway (FAS Route No. 851), extending one hundred fifty (150) feet on each side of the centerline, transferred to the State of Alaska by quitclaim deed dated June 30, 1959, executed by the Secretary of Commerce under the authority of the Alaska Omnibus Act, Public Law 86-70, 73 Stat. 141, from T. 6 S., R. 4 E., Copper River Meridian, Alaska, northerly to a junction with FAS Route No. 850 at the village of Chitina, located in T. 4 S., R. 5 E., Copper River Meridian, Alaska.

Appendix 31, the conveyance to Ahtna Incorporated of the subsurface estate in the same property, cross-references all the easements and right-of-ways in Appendix 30.

Even if these interim conveyances do not purport to adjudicate the existence or width of this right-of-way, they certainly do refute the plaintiffs' contention that the BLM has acted in a way inconsistent with the state's theories of ownership. On the contrary, the BLM as well as the ARC and the BPR, clearly held views that support the state's position here.

III. Alternatively, if the Former Railroad Right-of-Way Was Not Dedicated by Congress, It Was Acquired as an R.S. 2477 Right-of-Way.

In 1866 Congress enacted a statute providing for the acquisition of free rights-of-way over public lands not otherwise

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reserved for public use. 10/ Commonly referred to as R.S. 2477, the statute was a standing offer from the federal government to the public. 11/ If the former railroad right-of-way was not dedicated for highway purposes when the railroad relinquished it to the federal government, then it was accepted as an R.S. 2477 right-of-way before 1959 by the ARC or the BPR. 12/

Plaintiffs contend that an R.S. 2477 right-of-way could only be accepted by actual construction. The Alaska Supreme Court has repeatedly held to the contrary: actual construction is not required to accept an R.S. 2477 grant; some positive act on the part of the appropriate authorities clearly manifesting an

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10/The plaintiffs have also argued (Supplemental Brief, p. 6-7) that portions of this right-of-way were not available for R.S. 2477 grant because they were the subject of various power site classifications or withdrawals between 1950 and 1957. No evidence of these purported withdrawals is provided, nor is there any showing that the effect of these actions would have excluded highway use. See also n.6, supra.

11/ R.S. 2477 said only "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

The offer reflected a time in our national history when this nation was young and relatively unpopulated. The statute demonstrates that Congress wished to encourage expansion, exploitation and development of the public lands. In contrast, now that our nation is relatively developed and our population is well disbursed throughout the 50 states, Congress has an altogether different purpose, i.e., to conserve, protect and preserve the public lands. Wilkenson v. Department of Interior of the United States & James Watt, 634 F. Supp. 1265, 1274 - 1275 (D. Colo. 1986).

12/ There may be sites along the quitclaimed 300 foot right-of-way where additional right-of-way was acquired by action of state authorities or by public use between 1959 and the repeal of R.S. 2477 in 1976. This motion does not attempt to adjudicate any such site specific claims because the plaintiffs have not replied to the state's discovery request to identify any locations where they contend public use is outside the 300 foot right-of-way.

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intention to accept a grant is sufficient. Dillingham Commercial Company, Inc. v. City of Dillingham, 705 P.2d 410 (1985); State v. Alaska Land Title Association (ALTA), 667 P.2d 714, 722 (1983); Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1226 (1975); Hamerly v. Denton, 359 P.2d 121, 123 (1961).

Plaintiffs would have this court reject these controlling Alaska precedents for the reason that federal, not state, law controls perfection of the R.S. 2477 offer, but in Sierra Club v. Hodel, the Tenth Circuit Court of Appeals decided in a thorough and authoritative analysis that state law controls an R.S. 2477 grant. 13/ The court also rejected the "actual construction" standard advocated in that case. Many of plaintiffs' arguments in its supplemental brief are the same arguments the Hodel court rejected.

A. State Law Controls What Constitutes an Acceptance of the R.S. 2477 Right-of-Way.

R.S. 2477 itself is silent as to whether federal or state law applies to determine when and if the offer is accepted. The Hodel court noted first that the legislative context is not helpful, Id. at 1080, and then reasoned that the interpretation given by the federal agency with jurisdiction over the statute's

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13/ Hodel cannot be distinguished as plaintiffs assert at p. 8-9 of their supplemental brief. Although the precise factual issue there was whether the width of an R.S. 2477 right-of-way was limited to the constructed width, the court spoke in broader terms, concluding that the "scope" of an R.S. 2477 right-of-way was a matter of state law. The court defined "scope" as "the bundle of property rights possessed by the holder of the right-of-way. This bundle is defined by the physical boundaries of the right-of-way as well as the uses to which it has been put." 848 F.2d at 1079, n.9. The court further noted, 848 F.2d at 1082 n. 13, that many of the cases it relied on "subsume the question of scope into the question of perfection."

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subject matter should be entitled to great weight. In direct contrast to the argument of the plaintiffs here, the Hodel court found that:

> the federal regulations heavily support a state law definition. At least since 1938, the Secretary of the Interior has interpreted R.S. 2477 as effecting the grant of a right-of-way 'upon the construction or establishing of highways, in accordance with State laws ...' 43 C.F.R. sec. 244.55 (1939). BLM, the Secretary's designee, has followed this interpretation consistently and incorporated it in BLM's own Manual: 'State law specifying widths of public highways within the State shall be utilized by the authorized officer to determine the width of the RS 2477 grant.' BLM Manual, Rel. 2-229 at 2801.48B,

Id. at 1080.

The Hodel court also considered the same 1980 Solicitor's Opinion offered by plaintiffs here, and found it either "highly suspect and [deserving] little weight," inapplicable to the question of scope, or capable of being harmonized with the state's position because it says that as a matter of federal law, state law has been designated as controlling. Id. at 1081. Even if the solicitor's opinion is applicable to the question here, 14/ its conclusion either can be harmonized; 15/ or is contrary to both

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14/ It is interesting to note that, although the BLM was a party in Hodel, it was not the advocate of the "actual construction" standard.

15/ Even if United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411, 1413 (9th Cir. 1984) is not distinguishable on its facts, it can also be harmonized. The court simply held that R.S. 2477 was inapplicable to rights-of-way for utility lines because Congress had separately legislated in that area. In dicta, the court said that while the scope of a grant of federal land is a question of federal law, "it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable (continued...)

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prior and subsequent expressions of Department of Interior policies. See BLM Manual, Rel. 2-263, Appendix 3 at 3 (December 7, 1988 Departmental Policy Statement, RS 2477) attached as Appendix 32 to this brief.

The 1984 Memorandum of Understanding (MOU) between BLM and the Alaska Departments of Transportation and Natural Resources, attached as Appendix 33 to this brief, contains additional support for this position. The signatories to the MOU referred to a July 7, 1983 memorandum from the United States Department of the Interior, Office of the Solicitor which said "[The Department of the] Interior has long recognized that State law controls what constitutes a[n R.S. 2477] highway within each state."

These documents clearly refute the contention that the BLM contends federal law controls. To the extent these documents assert that actual construction is required, they are internally inconsistent, and therefore also deserving of little weight.

The Hodel court also recognized that more than a hundred years of state court precedents have viewed state law as defining R.S. 2477 grants since the statute's enactment in 1866, and that adoption of a federal standard would "necessitate the remeasurement and demarcation of thousands of R.S. 2477 rights-of-way across the country," and "would undermine the local management of roads across

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15/(...continued)
to its conveyances."

That is precisely the point. The United States has assented to an application of state standards since the inception of R.S. 2477.

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the western United States." 848 F.2d at 1082. The court also said "we are not aware of any state that even considered the possibility of a federal rule." Id. Each western state has articulated its own rules of law as to when a R.S. 2477 grant is perfected and what is the extent and width of the right-of-way. Id. n. 13. 16/

B. Actual Construction Is Not the Standard for Acceptance of an R.S. 2477 Grant.

Plaintiffs also contend that imposing a standard of actual construction for acceptance of an R.S. 2477 grant is supported by the language of R.S. 2477, by a 1938 regulation, and by comparison with other mid-nineteenth century statutes. 17/

16/ In Alaska, for example, there must be "either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted." Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961). In Arizona, local law determines whether a public highway exists, the extent of the public right-of-way, and the width of the highway. State v. Crawford, 441 P.2d 586, 590 (Ariz. Ct. App. 1968) (Arizona statute authorizes State Highway Commission to determine public need for highway and authorize state engineer to proceed).

Under California law, acceptance of the federal offer would be manifested by "the selection of a route and its establishment as a highway by public authority" or "by the laying out of a road and its use by the public sufficient in law to constitute an acceptance by the public of an offer of dedication." Ball v. Stephens, 158 P.2d 207, 209 (Cal. Ct. App. 1945). In Montana, until July 1, 1895, a public highway could be established by either the act of the proper authorities according to Montana law or by use by the public. State ex rel. Dansie v. Nolan, 191 P. 150, 152 (1920). After that date, no public highway could be established by public use unless in the manner provided by statute. Id. at 152.

17/ The plaintiffs' argument that 26 L. D. 446, an 1898 decision of the Department of the Interior, somehow supports applying an actual construction standard deserves only a brief note. If not plainly overruled, this 94 year old decision has been routinely disregarded by numerous state courts. Girves v. Kenai Peninsula Borough, 536 P.2d at 1226 (Alaska 1975); Costain v. (continued...)

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Accepting these arguments would require the overruling of Dillingham, ALTA, Girves and Hamerly v. Denton, supra, p. 15. The logic offered in support of plaintiffs' arguments does not warrant discarding thirty years of precedent represented by these cases.

1) the language of R.S. 2477.

First, plaintiffs argue (Supplemental Brief, p. 12) that the word "construction" appearing in R.S. 2477 somehow supports the conclusion that the grant is contingent upon completion of actual construction. Plainly, this does not follow. The statute grants right-of-way for the purpose of constructing roads. This is quite different from saying that acceptance of the grant can only be accomplished by a completed construction project. A highway cannot be constructed in a moment; this is especially obvious when the highway encompasses 130 miles of difficult terrain through a remote part of Alaska. The statute's language comports with the practical and sensible approach that an intent to construct a highway comes before actual construction is completed. If an identified route could not be accepted by the intent to construct, and thereby protected from disposal under other land grant programs, the road builders would never know whether the next mile could be constructed. See n. 6 supra.

2) the 1938 regulation.

At p. 15-16 of their Supplemental Brief, plaintiffs argue that a 1938 regulation supports their position. This is the same

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17/(...continued)
Turner County, 36 N.W. 2d 382, 383 (S.D. 1949); Hubbell Co. v. Gutierrez, 22 P. 225 (N.M. 1933).

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regulation, 43 C.R.F. Sec. 244.55 (1939) relied on by the Hodel court as support for its conclusion that state law applies, and that actual construction is not the standard. See p. 16-17, supra. In fact, this regulation poses two alternatives. One is construction. The other is something different from construction -- "establishment, in accordance with state law." Alaska law is that an R.S. 2477 highway can be established by any positive act showing intent. It could hardly be clearer that this regulation does not require actual construction.

3) other mid-nineteenth century statutes.

The plaintiffs also argue (p. 12) that an actual construction requirement should be implied because the statute is in pari materia with other mid-nineteenth century statutes granting public land for mining claims (Sec. 2, Act of July 6, 1866), or right-of-way for canals (Sec. 9, Act of July 6, 1866), or right-of-way for railroads ("the Railroad Act").

To begin with, this argument misapplies the in pari materia concept. The concept conveyed by this phrase is that a court must, if at all possible, construe statutes on the same subject matter so that they are not in conflict. 2A Norman J. Singer, Sutherland Stat. Const. § 51.01 (5th ed, 1992). But there is no conflict between statutes merely because they may apply different standards for perfection of land grants which are made for different purposes. There is no particular reason why a grant to the public for right-of-way should be perfected in the same way as a mining claim grant to a private individual.

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Even if the same standards should be applied to the land grants in these different statutes, this argument does not support plaintiffs' position. The requirement to obtain a mining claim was not to develop a full scale mining operation, but to occupy and spend a relatively small amount of money in improvements. 18/ Under the Railroad Act, the right-of-way for planned construction could be obtained in advance by filing a location map showing the planned route of construction. 19/

18/ Section 2 of the Act of July 26, 1866 provides:

> And be it further enacted, That whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local custom or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant or association of claimants to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

19/ The Railroad Act provided:

> The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road,

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Furthermore, it is quite logical that standards for accepting the public right-of-way should be more flexible because numerous members of the public may benefit, whereas mining claims are by their nature mutually exclusive. For mining claims, defining ownership rights clearly so that potential conflicts between claimants would be avoided was an important purpose. Thus it made sense for Congress to define in great detail an objective manner of perfecting a mining claim. The Railroad Act and Section 9 of the Act of July 6, 1866 which provides for a right of way for the construction of ditches and canals 20/ are also quite specific in their requirements. These statutes show that Congress knew how to be specific when it wanted to be. The logical deduction from comparison of R. S. 2477 with these statutes is that

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19/(...continued)
material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

20/ Section 9 of the Act of July 26, 1886 provides:

And be it further enacted, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: Provided, however, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

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Congress did not intend to limit the methods of accepting the grant, but to allow local laws and customs to determine what practical standards should be applied.

C. Even if the Authorities Support a Construction Standard, It Does Not Require Completion of Every Part of the Road.

Even if the plaintiff's arguments lead this court to the conclusion that "construction" is a requirement for acceptance of an R.S. 2477 right-of-way, this does not mean completion of every part of the construction along the entire route, as the plaintiffs contend. Construction work on some portions of the road has been recognized as sufficient. In Streter v. Stalnaker, 85 N.W. 47, 48 (Neb. 1901), the public had travelled continuously over the public domain and the county authorities had assumed control over the road and worked and improved a portion of the road. The court held that the work and improvement of a section of the road served as an acceptance of the offer of the entire road. See also, Rolling v. Emrich, 99 N.W. 464, 465 (Wis. 1904) (surveying, platting, and marking out a road was sufficient acceptance). See also, n. 5, supra.

For this highway, the very substantial construction and additional planning for this road completed by the ARC and the BPR met the standard even if some construction is required. Actual construction was completed at least from Cordova north to mile 50 at the Million Dollar Bridge, and from Chitina south to O'Brien Creek. The ARC reports make clear that surveying and preliminary engineering was done on the remainder of the route. These activities are sufficient construction activities to serve as an

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acceptance of the R.S. 2477 offer of the entire Copper River Highway.

D. Activities of the Alaska Road Commission or the Bureau of Public Roads Before 1959 Clearly Constituted Acceptance of the Copper River Highway Right-of-Way.

1) who can accept

Plaintiffs' contention (Supplemental Brief at 25-28) that only the Legislature is the appropriate public authority to accept an R.S. 2477 right-of-way is plainly wrong. As early as 1938, the Alaska District Court found that the ARC -- established under the Secretary of War with the power to locate, lay out, construct and maintain wagon roads in Alaska -- had the power to accept R.S. 2477 rights-of-way. Clark v. Taylor, 9 Alaska Reports 298, 303 (1938). See also, BLM Billum brief, attached as Appendix A to Plaintiffs' Notice of Supplemental Authority, p. 12, n. 9. When Congress transferred the authority over Alaska's roads to the Department of the Interior, the Secretary of Interior, by that transfer, also possessed the authority to accept an R.S. 2477 right-of-way on behalf of the Alaska public. See 48 U.S.C. sec. 321a.

But the ARC is not the only body capable of accepting the grant. There have been several federal, territorial, and state "appropriate public authorities" with overlapping responsibilities -- each of which could legally accept the federal offer of a right-of-way.

The Territorial Board of Road Commissioners for the Territory of Alaska had the power to construct, reconstruct, alter,

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maintain or repair any public road, highway, bridge or ferry in the Territory of Alaska. 2 Alaska Compiled Laws sec. 41-2-2 (1933).

The BPR within the Department of Commerce had construction authority over roads in the national forests, and after 1956, when Alaska was included in the Federal Aid Highway Act of 1956, the BPR acquired jurisdiction over all the roads former constructed and maintained by the ARC.

The Alaska territorial legislature accepted the R.S. 2477 dedication of public lands for highway purposes by establishing section line easements. AS 19 SLA 1923. See also, Girves v. Kenai Peninsula Borough, 536 P.2d at 1226. After Statehood, the Alaska legislature was likewise an appropriate public authority to accept the RS 2477 offer. Wilderness Society v. Morton, 479 F. 2d 842, 882 (D.C. Cir. 1973).

2) the positive acts accepting the grant

The public records reflect not one but countless positive acts by the appropriate public authorities that demonstrate their intent to establish a right-of-way over the abandoned railroad bed. While a world war, an earthquake, geographic obstacles and difficult climactic conditions have caused temporary setbacks, the reports of the ARC and other historical accounts clearly depict an ongoing effort towards constructing a highway from Cordova to Chitina.

In March 1941, the Alaska Territorial Legislature adopted a resolution to the attention of President Franklin Roosevelt, the Secretary of War, the Secretary of the Interior, and the Alaska delegate to Congress. See House Joint Memorial No. 21, attached

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here as Appendix 24. The resolution noted that the Copper River and Northwestern Railroad had ceased providing service between Cordova and Chitina and that the area was now without any source of service. The Legislature therefore requested:

> that the various Governmental authorities herein addressed, do seriously consider and investigate the suggested practicability and necessity of converting the roadbed of the discontinued Copper River and Northwestern Railroad into a highway connecting with the Richardson Highway at Chitina, Alaska, and extending southward to a coastal terminus at Cordova, Alaska.

Less than four months later, Congress adopted the Act of July 15, 1941 which authorized the Copper River and Northwestern Railway Company to convey its railroad right-of-way to the United States. Pub. L. 176, chap. 300, sec. 1, 55 Stat. 594 (1941).

In 1941 the United States was just embarking on World War II and money for highways was being diverted to construct a highway system that would link Alaska with the lower 48. 2 Naske, Claus-M., Paving Alaska's Trails: The Work Of The Alaska Road Commission (hereafter, Naske, ARC Work) at 264 (n. d.). Notwithstanding more pressing highway priorities, the ARC responded quickly to Congress' delegation of authority in the Act of July 15, 1941. In the same year that Congress adopted the Act of July 15, 1941, ARC assumed maintenance responsibilities for the 60 miles of abandoned railway between Chitina and McCarthy, which was used as a tramroad. Id. at 250.

In 1943, the ARC proposed 14 projects for its postwar construction program. The projects selected were those which ARC believed would be most heavily used immediately after completion.

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Id. at 263. The Copper River Highway was on the list; for the route between Chitina and McCarthy, ARC budgeted $2,200,000. Id. at 264.

In 1950 the ARC conducted several important field surveys, including a survey "to locate a practicable route for the proposed new highway from Cordova up the Copper River canyon to connect with the Richardson Highway." Noyes, John R., Report of Operations of the Alaska Road Commission For The Fiscal Years 1949, 1950 & 1951 (hereafter, Noyes Report) at 25 (1951). The BPR was assigned to survey on the ground and design a 50-mile stretch from Cordova to the Million Dollar Bridge just north of the Chugach Forest boundary. Id. at 25, 34, 35. The remaining survey work consisting of two parts: (1) from Mile 50 to Chitina and (2) from Mile 101 up the Tiekel canyon to the Richardson Highway was performed by aerial means. Id. at 25 -26.

In 1951 Congress earmarked $100,000 for fiscal year 1952 for preliminary work on a new road that would connect the City of Cordova via the Copper River Valley with the major Alaska highway system. Id. at 31. During the 1953 fiscal year, the ARC began work on "the 170-mile-long Copper River Highway, which, when completed would provide interior Alaska with its fourth route to an ice-free port open all winter." Naske, ARC Work at 338.

By 1954, the Copper River Highway had been designated as route 122 and the ARC had spent a total of $1,376,324.37 on the right-of-way. See 1954 Annual Report Alaska Road Commission (hereafter, 1954 Report) at 52 (1954). Construction of the right-of-way along the old railroad bed and within the Chugach National

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Forest was complete from Cordova up to mile 22; design work along the railroad bed was complete up to mile 39. Id. at 17, 23; Naske, Claus-M., Alaska's Inclusion In The Federal-Aid Highway Act of 1956, The Work Of The Bureau of Public Roads And The Transition To Statehood: Final Report (Naske, BPR Work) at 60, 168, 207 (1987).

For 1955, the ARC construction appropriation included $700,000 for construction in progress. These funds would permit construction of the highway across the delta of the Copper River and up to Mile 39. 1954 Report at 35, 38. Mile 39 was the outer boundary of the Chugach National Forest as well as a junction point for a future road to the Katalla oil fields and the junction point for "the northward extension of the Copper River Highway along the route of the abandoned Copper River and Northwestern Railroad." Id. at 38. There was also a separate appropriation of $80,000 for preliminary surveys from Mile 39 to approximately Mile 79, "utilizing existing bridges and roadbed of the abandoned Copper River and Northwestern Railroad as much as practicable." 1954 Report at 37. Eventually the Copper River Highway was expected to link Cordova with the Alaska highway system. Noyes Report, January 27, 1955 Press Release at Appendix, p. 2.

For 1956, the ARC proposed to spend $100,000 for additional planning for the Copper River Highway. 1954 Report at 43. This engineering work covered an additional 35 miles of field surveys and office design, including some surveying from Chitina south. Id. at 45; Naske, BPR Work at 60. Under its long range plan for highway construction, the ARC intended to complete the Copper River highway by 1956 and to pave the Copper River Highway

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and an extension of the highway to the Bering River coal deposits in 1957. Naske, ARC Work at 340.

In 1956, Alaska became eligible to participate in funding under the Federal Aid Highway Act of 1956. Jurisdiction for the roads formerly constructed and maintained by the ARC was transferred to the BPR under the Department of Commerce. See Naske, BPR Work at 41 - 44. At the time of the transfer, survey work had been completed on over 104 miles of the Copper River Highway: a complete survey from Cordova to the Airport, and air and ground surveys between mile 39 and mile 76, mile 76 to 101 (Tiekel), and mile 101 to 131 (Chitina). Naske, BPR Work at 197.

The BPR renumbered the Copper River Highway as S-850 (Chitina-McCarthy) and S-851 (Copper River Highway). The routes were included in the Secondary Highway System - "A". S-851 was reported as having constructed mileage of 78 and system mileage of 170. Id. at 233. As a measure of the Copper River Highway's importance, BPR earmarked S-850 and S-851 for 3 out of its 15 priority construction projects for the 1958 construction season:

> 6. Reconstruction of the Copper River Highway Route S-851 from 9 Mile to the airport at about 14 Mile. This would be the widening and raising of the roadway and replacing the wooden bridges. It is estimated to cost approximately $500,000.00....
>
> 9. Construction of a bridge across the Copper River on Route S-850 about Chitina. Estimated cost approximately $1,500,000.00....
>
> 11. Painting the steel trusses on the Copper River Highway Route S-851. Estimate cost approximately $200,000.00.

Id. at 142. For the 1958 season, the BPR only planned 2 new surveys and one of them was for the Copper River Highway, i.e.,

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"[t]o begin a survey of about a 25 mile section from Chitina down the Copper River toward Cordova." Id. at 144. Finally, the BPR noted a continuation of the Copper River Highway project by extending the existing road another 10.5 miles to the Million Dollar Bridge at Mile 50. Id. at 313.

In the meantime, the BPR also had the task of maintaining the roads already in existence. By 1957, the bridges between mile 13 and mile 39 had to be reconstructed; concrete web walls had to placed on the piers of existing structures to protect them from ice damage; the road between Cordova and the airport at mile 14 had to be reconstructed; several grading and drainage projects had to be carried out. Id. at 313, 316, 318 - 319, 323.

In 1958 alone, the BPR spent almost $1.5 million on the Copper River Highway: $635,500 on carryover projects and $800,000 on maintenance and on new projects. Id. at 318 - 319, 323. Between 1957 and 1969, a total of $2,649,000 was spent on improvements for the Copper River Highway from the funds available under the Federal Aid Highway Act of 1956. Id. at 192.

The facts described above are sufficient to establish that the appropriate public authorities -- the ARC and the BPR -- took positive steps to express their intent to accept the R.S. 2477 offer of a public right-of-way. The Copper River Highway was planned to be built over time in 6 segments. See Noyes Report at 197. The ARC and the BPR stretched their limited resources to construct and to survey additional segments of the highway while at the same time having to go back and reconstruct and repair the existing segments.

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Construction of the Copper River Highway between Cordova and Chitina has necessarily moved in fits and starts because of the terrain, the weather, limited funds during war years, competition for limited funding during post war years, and the aftermath of the 1964 earthquake. Notwithstanding the setbacks, the record shows that the ARC and the BPR never lost sight of the project and their intent that it should all be built. Their activities over almost a 20-year period constitute more than sufficient positive acts to establish an R.S. 2477 right-of-way over the Copper River Highway.

IV. Amendment 2 to D.O. 2665 Widened the Existing Right-of-Way to 300 Feet Along Its Entire Width Except Where Any Intervening Rights Were Granted.

With respect to Departmental Order 2665, Plaintiffs argue (Supplemental Brief at pp. 2-6) that its purpose was to fix certain problems, including the width and location, of roads established under R.S. 2477 grants. 21/ Assuming this argument to be valid, then it follows that the purpose of D.O. 2665 was not to impose additional requirements to perfect a right-of-way dedicated by Congress. This right-of-way was unique in Alaska history because

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21/ The state has not argued that D.O. 2665 replaced R.S. 2477, or that it was a wholly new method of establishing rights-of-way. See State's Reply to Opposition to Motion for Summary Judgment, pp. 4, 13.

Although there is some authority that the R.S. 2477 grant can be accepted by railroad construction, Oregon Short Line R. Co. v. Murray City, 277 P.2d 798 (1954); Flint & P. M. Ry Co. v. Gordon, 2 N.W. 648, 653 (Mich. 1879), this too, is not the argument that the state makes. The state's argument is that the right-of-way at issue in this case was clearly located by the construction of the railroad. The route was fully surveyed and actually used for nearly thirty years, and thus was an "existing" right-of-way within the meaning of State v. Alaska Land Title Association, 667, P.2d 714, 721 (Alaska 1983).

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of the 1941 Act, preceded by nearly thirty years of actual use by the railroad.

Even if this right-of-way was acquired under R.S. 2477 instead of by congressional dedication, its width and location were not uncertain. Again, this right-of-way was unlike other R.S 2477 right-of-ways because of thirty years of railroad use. Its width was clearly established at 200 feet by the Act of 1898 which authorized the railroad grant, and its location was established by the constructed line of rail, and by survey maps prepared between 1907 and 1922. See, Appendix 4, the railroad relinquishment document which identifies all the relinquished property.

Plaintiffs argue, however, that D.O. 2665 established that posting and staking was the exclusive method of accepting an R.S. 2477 right-of-way after 1951 for new construction or an extension of an existing road. This interpretation cannot be reconciled with Wilderness Society v. Morton, 479 F. 2d 842 (D.C. Cir. 1973), or Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975). In Morton, the federal court held that passage of a statute stating the intent to construct a highway from the Yukon River to the Arctic Ocean was a valid acceptance even if the motive was to assist construction of the pipeline. In Girves, the Alaska court held that the Borough had a right-of-way to extend Redoubt Drive along the section line which formed the northern boundary of Girves' property. This work was done in 1967. The court concluded that the right-of-way for section line roads was accepted by act of the legislature although there was no indication that the extension had been staked and posted with notice before 1951.

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Neither can plaintiff's theory be reconciled with what the scope of the Omnibus Act Quitclaim Deed purported to transfer. The Omnibus Act Quitclaim Deed consists of a two page deed with appended schedules of transferred property, including "Schedule A --Highways, consisting of 60 pages," which is attached as Appendix 34. See also, Appendix 15. For each road listed on schedule A, the information provided includes the FAS Route No., the Name, a description, the Highway District No., the constructed mileage and the system mileage. The list includes many, many roads for which the stated system mileage is greater than the constructed mileage. The only reasonable explanation for the inclusion of this information is that the BPR, which prepared this list was of the opinion that the roads within its jurisdiction included not only those actually constructed, but also certain planned extensions. The Copper River Highway, FAS No. 851 is noted as having 88.0 miles constructed, and a system mileage of 170.0. The description of this route says:

> 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.

The conclusion that the quitclaim grant meant what it implied -- that the unconstructed portion of listed roads as well as the constructed portion was conveyed to the State of Alaska at statehood -- is supported by a recent decision of the Department of Interior Board of Land Appeals which does directly consider the impact of D.O. 2665. See, Lloyd Schade, IBLA 89-358, 116 IBLA 203 at 206-208 (October 4, 1990) attached as Appendix 35.

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For this unique right-of-way, however, this court need not attempt to resolve the broader issue of how to apply the posting and staking requirement of D.O. 2665. This right-of-way was an existing, clearly located right-of-way long before the adoption of D.O. 2665. See State's Reply to Opposition to Motion for Summary Judgment, pp. 13-15. Furthermore, unlike the landowners in State v. Alaska Land Title Association, 667 P.2d 714 (Alaska 1983) there can be no question but that plaintiffs here took their property with full knowledge of the BLM's conclusion that the State owned this right-of-way.

V. Conclusion.

The defendant State of Alaska should be granted a partial summary judgment, holding that the Omnibus Act quitclaim deed at statehood conveyed to the state a 300 foot wide right-of-way along the former route of the Copper River and Northwestern Railway Company.

Dated at Anchorage, Alaska this 2nd day of March, 1992.

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LIST OF CONSECUTIVELY NUMBERED APPENDICES

To minimize confusion over the numbering of attachments to its three briefs on this motion, the state has used consecutive numbering. To assist the court, the following index to all the state's appendices is offered.

State's Motion for Partial Summary Judgment, dated September 11, 1991.

1. ICC Report of the Commission
2. Act of 1898 (granting the railroad right-of-way)
3. Act of July 14, 1941
4. Relinquishment
5. Decision accepting rr relinquishment
6. Excerpt from Alaska Road Commission Annual Report, 1939
7. Excerpt from Alaska Road Commission Annual Report, 1941
8. Excerpt from Alaska Road Commission Annual Report, 1949
9. Excerpt from Alaska Road Commission Annual Report, 1950
10. Excerpt from Alaska Road Commission Annual Report, 1953
11. Excerpt from Alaska Road Commission Annual Report, 1954
12. D.O. 2665
13. D.O. 2665, Amendment 2
14. Number not used
15. Excerpt from Omnibus Act Quitclaim Deed
16. As Built History from Final Compendium Report, Department of Transportation and Public Facilities, 1988

State of Alaska's Reply to Opposition to Motion for Partial Summary Judgment, dated October 21, 1991.

17. State's Reply on Billum Brief
18. Billum Decision
19. S.B 1289
20. Report No. 375
21. Congressional Record, June 9, 1941
22. Letter, Stimson to Bartlett
23. Letter, Wirtz to Bartlett

State of Alaska's Reply to Plaintiff's Supplemental Brief, dated February 29, 1992.

24. House Joint Memorial No. 21
25. Bureau of Public Roads list of roads transferred to its jurisdiction, 1957
26. Grevnin settlement with Bureau of Public Roads
27. February 15, 1978 Memo regarding Easement Recommendations for the Village of Chitina
28. Report of telephone call, date August 19, 1981

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29. Recommended Decision, Chitina Native Corporation v. BLM, IBLA 82-1161, 85 IBLA 311

29A. Decision of March 21, 1985 (affirming recommendation of hearing officer in pertinent part) 85 IBLA 311

30. Interim Conveyance No. 1021 to Chitina Native Corporation (surface estate)

31. Interim Conveyance No. 1022 to Ahtna Incorporated (subsurface estate)

32. BLM Manual, Rel. 2-263, Appendix 3

33. 1984 Memorandum of Understanding between BLM and Alaska Department of Transportation and Public Facilities, and Alaska Department of Natural Resources

34. Schedule--Highways attached to Omnibus Act Quitclaim Deed

35. Decision in re Lloyd Schade, IBLA 89-358, 116 IBLA 203 (Oct.4, 1990)

Also provided are copies of the following historical reports or treatises:

Claus-M. Naske, Paving Alaska's Trails: the works of the Alaska Road Commission 2 Vol. (n.d.)

Clause-M. Naske, Alaska's Inclusion in the Federal-Aid Highway Act of 1956, the Work of the Bureau of Public Roads and the Transition to Statehood. (1987)

John R. Noyes, Department of the Interior Report of Operations of the Alaska Road Commission for the Fiscal Years 1949, 1950 and 1951.

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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, v. STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, Defendant.	Case 3AN-91-6957 Civil Copper River Highway

CERTIFICATE OF SERVICE

I, Vicki I. O'Brien, hereby certify that on March 2, 1992, I mailed a true and correct copy of STATE OF ALASKA'S REPLY TO PLAINTIFFS' SUPPLEMENTAL BRIEF in the above proceeding to the following:

Jerry Ritter, Esq.
Ahtna, Inc.
406 West Fireweed Lane, #101
Anchorage, Alaska 99501

Roger W. DuBrock
900 West Fifth Avenue, Suite 700
Anchorage, Alaska 99501

by depositing same in the U.S. Mail at Anchorage, Alaska, postage prepaid.

Vicki I. O'Brien

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