

did the State of Alaska perfect an easement interest in the subject lands prior to 1969, when a Public Land Order withdrew all federal land in Alaska from entry pending resolution of Alaska Native Land Claims. As a result of conveyances under the Alaska Native Claims Settlement Act, the Chitina Native Corporation and Ahtna, Incorporated, gained title to land within and surrounding the former railroad right of way.

B. The Copper River Railroad Right of Way Was Extinguished by the Federal Government.

The history of the establishment and operation of the Copper River and Northwestern Railroad are ably set out in the State's Memorandum and need not be restated here. History, however, is determinative of many of the issues surrounding the Copper River Highway, and so this memorandum will focus on certain critical events. The first of these is the abandonment of the railroad right of way.

In 1938, with the profitable Kennecott ores exhausted and the mines closed, the Copper River and Northwestern Railway Co. requested the federal Interstate Commerce Commission to allow it to cease operation of the railroad, at which time it would relinquish its right-of-way. See Appendix 1 to State's memorandum, at 1. The ICC held a hearing and, in 1939, agreed to allow cessation of operations and relinquishment. See *id.* The hearing decision noted, however, that there were still people living out near McCarthy who would be isolated by the closure of the railroad, and recommended that the rail line between Chitina and McCarthy be maintained for their benefit and operated by light equipment. See *id.*, at 3-5; accord, State's memorandum, at 4.

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There was a legal problem, though, with relinquishing the right-of-way and keeping part of the railroad line operating. The source of the problem was a 1922 federal statute that said that upon relinquishment of a railroad right-of-way, the parts passing through previously patented lands, like homesteads and mining claims, would become the property of the patentees. See Act of March 8, 1922; Pub.L. 163, ch. 94; 42 Stat. 414; codified at 43 U.S.C. § 912 (1976); see also Note, *Reversion of Railroad Rights of Way in South Dakota after Haack v. Burlington Northern, Inc.*, 28 S.Dak.L.Rev. 196, 202 (Winter 1982) (1922 Act "requires that public lands granted to the railroads revert to the servient estate upon decree of abandonment by a court of competent jurisdiction or an act of Congress." (footnote omitted)). In other words, the effect of the 1922 statute would be to sever the right-of-way between McCarthy and Chitina wherever it crossed private land.

At the suggestion of the Secretary of the Interior, Congress passed a law in 1941 that said that the Secretary of Interior could accept the relinquishment of the right-of-way

to be used, operated and maintained as far as may be practicable or necessary, as a public highway, tram road, or tramway under the provisions of the Act of June 30, 1932 (17 Stat. 446), notwithstanding any Act to the contrary.

and that

[t]he provisions of the Act of March 8, 1922 (42 Stat. 414), shall not affect the right-of-way, or any portion thereof, or any other lands or properties donated, granted, or conveyed to the United States pursuant to the authorization contained in this Act.

Act of July 15, 1941, Pub.L. 176, ch. 300; 55 Stat. 594.

The immediate effect of the 1941 Act was to allow the federal government to reclaim the railroad right-of-way

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MEMORANDUM

without losing portions of it to the adjoining landowners along the Chitina to McCarthy route. As a result, the Chitina to McCarthy section could continue to be used as a transportation route for the people who lived east of Chitina, thus satisfying the concerns of the Interstate Commerce Commission that these people not lose their means of access.

Regardless of the subsequent use or nonuse of any part of the railroad grade as a public highway, the Copper River & Northwestern Railway Company's right-of-way ceased to exist as a legal property interest on May 11, 1945:

The relinquishment is found to be satisfactory and is hereby accepted. Accordingly, the easements for the railroad right-of-way, terminal and station grounds have been noted **canceled** on the records of this office.

Decision of the U.S. Dept. of the Interior General Lands Office, Appendix 5 to State Memorandum (emphasis supplied). It is therefore erroneous to say that the State of Alaska in any way succeeded to ownership of the railroad right-of-way; if the State of Alaska has any right-of-way for the Copper River Highway, it was created independently. Plaintiffs now refute that possibility.

C. The 1941 Federal Statute Was Not a Dedication of a Right-of-Way from Chitina to Cordova.

The State argues, at pages 3 and 4 of its memorandum, that the Act of July 15, 1941, amounts to a dedication of the old railroad right of way as a public highway, and therefore:

"[A]s of May 11, 1945, the United States became the owner of the original 200-foot-wide Copper River Railroad right-of-way (plus station grounds) subject to the requirement of the Act of July 15, 1941 that the

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