

March 11, 2016

R&M No. 2363.01

Simpson, Tillinghast, Sorensen & Sheehan, P.C.
One Sealaska Plaza, Suite 300
Juneau, AK 99801
Attn: Kristen P. Miller
Email to kmiller@stsl.com

Dillon & Findley, P.C.
1049 W. 5th Avenue, Suite 200
Anchorage, AK 99501
Attn: Michelle S. Nesbett
Email to michelle@dillonfindley.com

RE: Loewen v. SOA Et. Al. 1JU-13-00596 CI

Dear Ms. Miller/ Ms. Nesbett:

You have requested an assessment of the existing right-of-way (ROW) for Lutak Road in the vicinity of U.S. Survey No. 3707 near Haines, Alaska. I have reviewed the materials that you have provided to me along with other publically available on-line information and our in-house R&M ROW archives. No other external research was performed as a part of this review.

My conclusion is that the representation of a 60-foot wide existing right-of-way for Lutak road as shown on the 1983 Department of Transportation and Public Facilities (DOT&PF) Right of Way Map for Project RS-0991(2) and a preliminary plat for Accretion to Parcel 3 within Chilkoot River Subdivision is incorrect.

The following report will show that at the time the 1983 DOT&PF ROW plans were prepared and as far back as 1955-56, the authority for a 100-foot wide highway easement based on Department of Interior Order No. 2665 existed and could be applied to that portion of Lutak Road within U.S. Survey No. 3707

Location

The study area is located at the mouth of the Chilkoot River at the northerly end of Lutak Inlet approximately 9 miles northwest of Haines. U.S. Survey No. 3707 lies within Sections 25 and 36 of Township 29, South, Range 58 East, Copper River Meridian.



Figure 1 – USGS Quad Skagway (B-2) 1954 Rev. 1977



R&M CONSULTANTS, INC.

212 Front Street #150
Fairbanks, Alaska 99701

phone: 907.452.5270
fax: 907.522.3403

Lutak Road

Lutak Road is identified as being a part of the State Highway System¹ and is listed as Route 298100 with a length of 5.546 miles². The road mileage commences at the Army Dock on the southerly shore of Lutak Inlet within Section 10, T.30S., R.59E., C.R.M., then proceeds northwesterly 4.5 miles to the bridge across the Chilkoot River and continues approximately 1.0 miles to the east. Lutak Road is also listed in the inventory of DOT&PF Southcoast roads with a functional class of "Local"³. Graphic evidence of a trail/road along the southerly shore of Lutak Inlet extends back to 1914 as a part of early native allotment surveys. Later graphic evidence creates ambiguity regarding the width of the ROW that must be resolved.

A review of an existing right-of-way involves four primary areas of consideration. These include authority, location, width and nature of the interest.

1. Authority:

The study area is centered on U.S. Survey No. 3707 that was conveyed as a Native Allotment to Robert David on November 28, 1960.⁴ The entire allotment, designated as Lot 1 was subject to the following provision: *"Excepting, however, from this conveyance that certain road and all appurtenances thereto, constructed by the United States, through, over, or upon the land herein described, and the right of the United States, its officers, agents, or employees to maintain, operate, repair, or improve the same so long as needed or used for or by the United States."* The exception does not specify the width or interest in the road ROW and does not indicate the authority by which the right-of-way was created.

Four authorities may in part contribute to the basis of the existing right-of-way. They include RS-2477, Public Land Orders, Easement by Prescription and direct acquisition.

- a. RS-2477trail: Revised Statute 2477⁵ provided a federal offer for road easements over public lands. In Alaska, highways that were constructed prior to the Public Land Orders establishing rights-of-way may have been created across unreserved public lands by virtue of the RS-2477 grant.

Several of the plats in evidence that identify a trail/road in the study area are indefinite as to the authority by which the ROW was created. The earliest drawing that suggests the potential for an RS-2477 ROW is the unapproved Native Allotment A. A. Survey No. 48, surveyed in September of 1914. This survey was suspended due to a potential conflict with another allotment. This survey adjoins the southerly boundary of U.S. Survey No. 3707 and was eventually resurveyed as U.S. Survey No. 974 in July of 1959 and approved in June of 1960. The

¹ The Department of Transportation and Public Facilities is responsible for the designation, construction and maintenance of the State Highway System. (See A.S. 19.10.020 –A.S. 19.10.030) The State Highway System Inventory is published as required by 17 AAC 05.010 (b) (1-4).

² State Highway System CDS Route Log (298100) as of March 9, 2016.

³ Alaska State Managed Roads – Southcoast Region dated August 28, 2015 http://www.dot.alaska.gov/comm/assets/Ak-State-Rd_NO.pdf

⁴ The Native Allotment Certificate was recorded in Book 11, Page 265, on 1/12/72 in the Haines Recording District.

⁵ The Mining Law of 1866 - Lode and Water Law, July 26, 1866 (Section 8 - 14 Stat. 253). The above referenced Section 8 of the 1866 Mining Law was re-designated as Section 2477 of the Revised Statutes 1878. (43 U.S.C. 932) RS 2477 was repealed by Title VII of the Federal Land Policy and Management Act on October 21, 1976.

plat for A.A. No. 48 shows the "Trail to Chilkoot Village" in the northeast corner of the survey that is in close proximity to the current Lutak Road. (Figure 2)

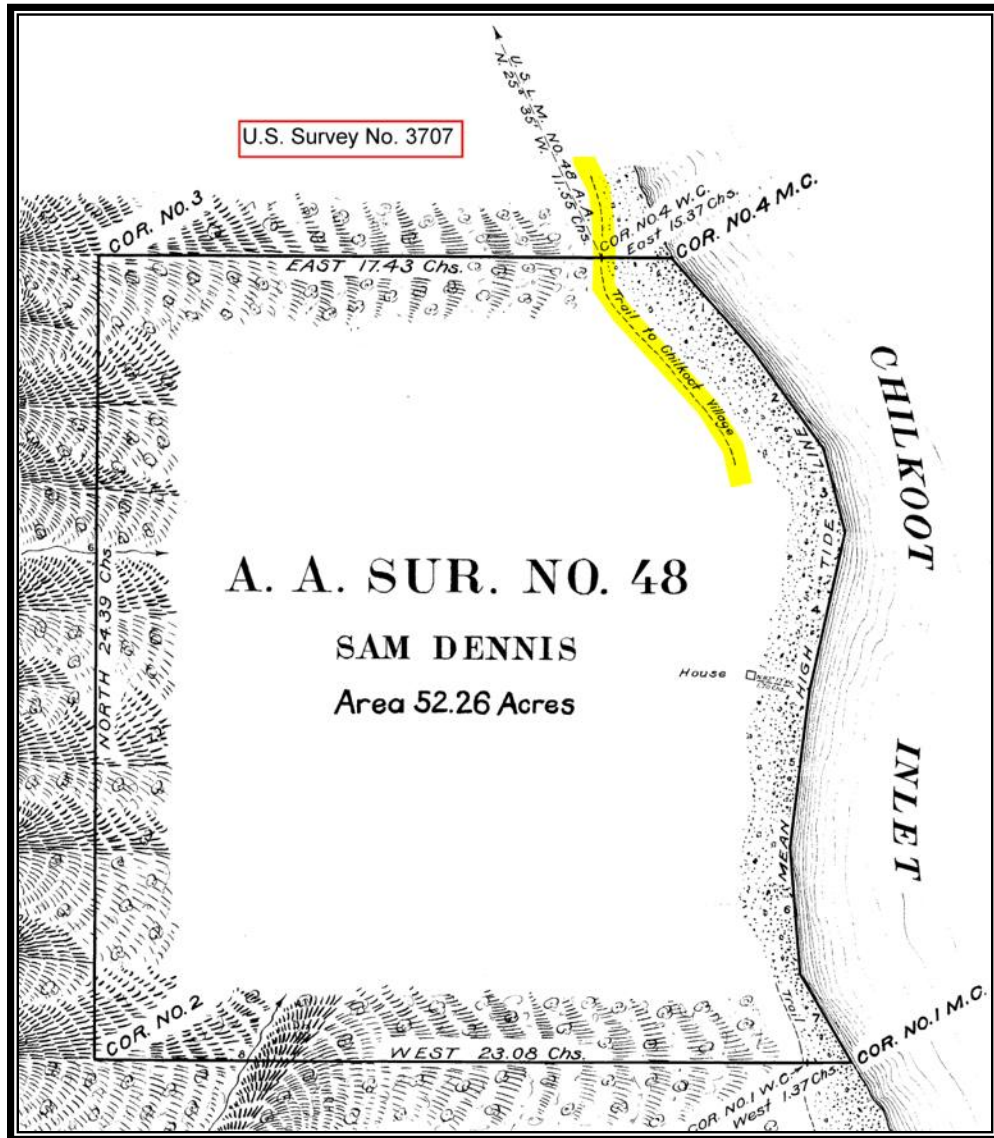


Figure 2 – "Trail to Chilkoot Village" – 1914

The plat for U.S. Survey No. 974 shows an improved gravel road south of U.S. Survey No. 3707. (Figure 3) The field notes for U.S. Survey No. 974 state, "There are no remains of the original house, fence lines or foot trail on the land as described in the original 1914 survey. At the time of this survey, a public gravel road traverses through the survey near the shore line." The graphic proximity of the trail to the gravel road suggests that the road may have followed and replaced the trail.

U.S. Survey No. 973 (see Figure 3) adjoins the southerly boundary of U.S. Survey No. 974 and was surveyed in 1914 as A.A. Survey No. 46. The 1914 plat for A.A. Survey No. 46 also shows the "Trail to Chilkoot Village" running along the shore in close proximity to the current Lutak Road.

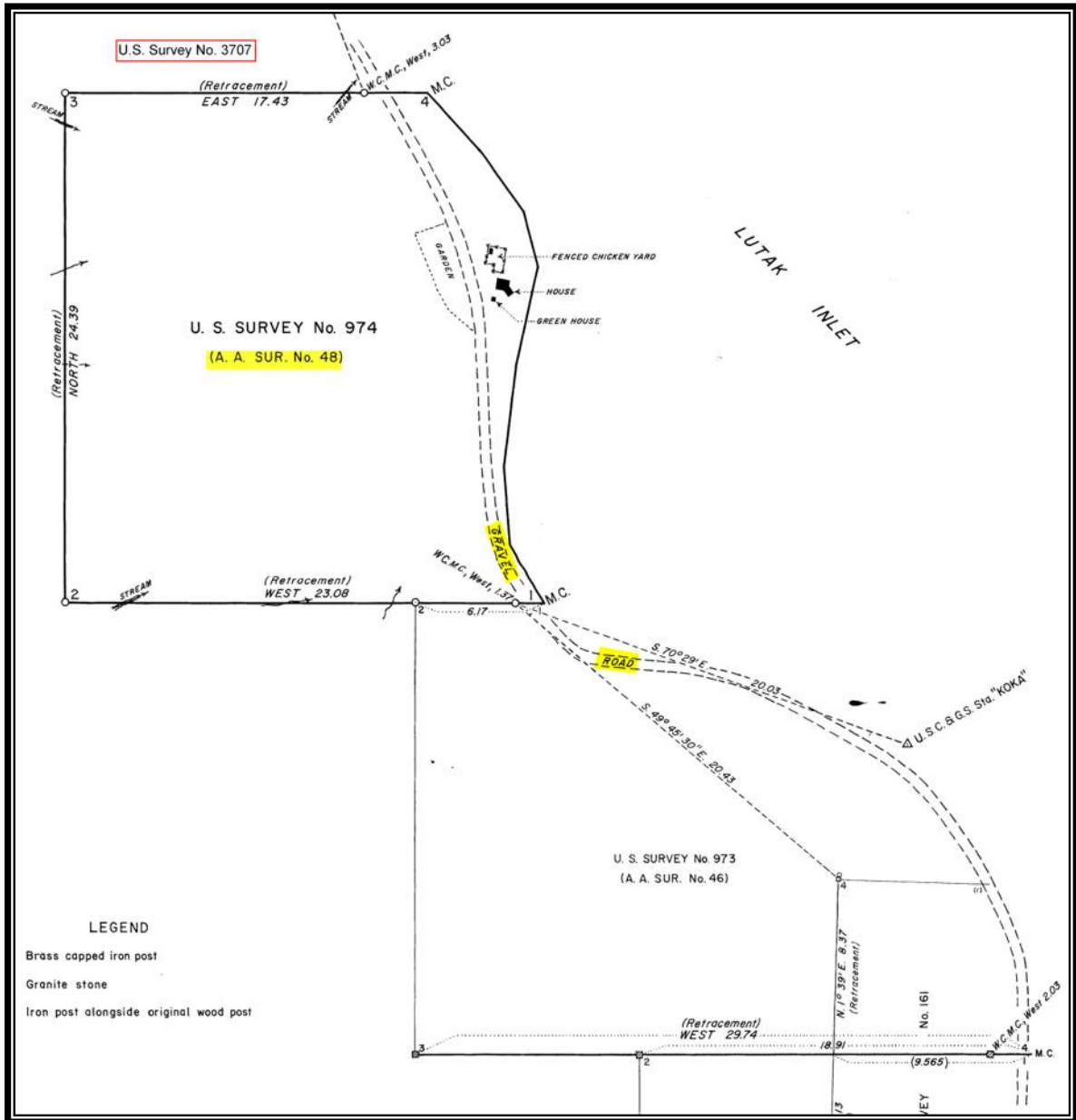


Figure 3 – U.S.S. No. 974 Gravel Road South of Study Area – 1959

Once the offer of an RS-2477 ROW was in place under the 1866 mining law, an acceptance could be made by a positive act on the part of the appropriate public authorities, clearly manifesting an intention to accept a grant, or by public user for such a period of time and under such conditions as to prove that the grant has been accepted.⁶ To the extent that the lands in the study area were "public lands, not reserved for public uses..." as required by the RS-2477 grant, an RS-2477 ROW for the trail may have been accepted as early as 1914.

⁶ See Hamerly v. Denton, 359 P.2d 121 (Alaska 1961)

- b. Territorial Act of 1917: This Act, in part established a minimum width for road and trail rights-of-way. Section 13⁷ provided that "*The Divisional Commission shall classify all public Territorial roads and trails in the divisions as wagon roads, sled road, or trails...The lawful width of right-of-way of all roads or trails shall be sixty feet (60).*"

The 1938 District Court case Clark v. Taylor⁸ clarified that Ch. 36 SLA 1917 applied only to territorial roads built or maintained by the Territorial Board of Road Commissioners, by itself or in cooperation with the federal Board of Road Commissioners for Alaska but it had no application to the roads constructed solely by the federal Alaska Road Commission.

While Annual Alaska Road Commission reports from 1917 to 1921 did indicate amounts of funds that the Territory was contributing toward projects, it appears that it is not until the 1922 that the ARC Annual report clearly segregated federal Alaska Road Commission projects from Territorial Alaska Road Commission projects.

The records of the Territorial Board of Road Commissioners and the Alaska Road Commission from 1923 and up to 1948 indicate that public funds were expended on Route 3E, Haines – Chilkoot for 3 miles of wagon road.

- c. Public Land Orders: These rights-of-way for highway purposes were established across unreserved federal lands under the authority of the Department of the Interior between April 4, 1942 and April 7, 1958. The PLO right-of-way constitutes the majority of varying interests in the DOT&PF ROW inventory. At statehood, the federal government transferred 5,400 miles of highway rights-of-way to the State of Alaska⁹, most of which were based on PLOs.

On August 10, 1949, PLO 601 was issued as the first public land order for highway purposes in Alaska with a statewide effect. Subject to valid existing rights, routes were classified as "Through" roads with a 300-foot wide withdrawal (e.g. Richardson/Glenn/Alaska Highways) and "Feeder" Roads with a 200-foot wide withdrawal (e.g. Elliott/Steese/Edgerton Cutoff) and "Local" with a 100-foot wide withdrawal. "Local" roads were not specifically named but were considered to consist of all roads not classified as "Through" or "Feeder", established or maintained by the Alaska Road Commission. The combination of PLO No. 757 and Secretarial Order No. 2665¹⁰, both effective on October 16, 1951, served to release the withdrawals for the "Feeder" and "Local" classified roads and replace them with highway easements.

To the extent that a PLO ROW is applicable to Lutak Road, a review of the highway PLOs indicates that Lutak was not a "named" route under the "Through" or "Feeder" classifications and so it would be relegated to the "Local" road classification subject to a highway easement, 100-feet in width, subject to prior existing rights.

- d. Easement by Prescription: This term is associated with an easement interest that accrues to an individual under Alaska's adverse possession statutes¹¹ when the use meets the "*prescribed*" period of time along with other

⁷ Ch. 36, SLA 1917 Section 13

⁸ Clark v. Taylor, 9 Alaska 928 (4th Div. Fairbanks 1938)

⁹ On June 30, 1959, pursuant to section 21(a) of the Alaska Omnibus Act, the Secretary of Commerce issued a quitclaim deed to the State of Alaska in which all rights, title and interest in the real properties owned and administered by the Department of Commerce in connection with the activities of the Bureau of Public Roads were conveyed to the State of Alaska.

¹⁰ See Attachment No. 1

¹¹ A.S. 9.45.052. Paragraph (a) of the statute states that "...The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more, or the uninterrupted adverse notorious possession of real property for 10 years or

conditions. A successful adverse claim for an access road or utility would result in a judgment granting an easement interest, as they are based on use rather than full possession. Generally, the elements of adverse possession are that:

- i. the possession must have been continuous and uninterrupted;
- ii. the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and
- iii. the possession must have been reasonably visible to the record owner.

Use of the claimed area cannot be with the permission of the property owner otherwise the use would not be “adverse”. Often a landowner subject to a claim of an easement by prescription will concede to the evidence of long public use and no further action is taken to secure a public ROW. However, if the landowner challenges a claim of an easement by prescription, it may be necessary to file a Quiet Title action in Superior Court to obtain a judgment in favor of the public’s rights.

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. To the extent that the footprint of Lutak Road is not subject to an alternative authority, there is a possibility that it may be claimed for the public as an easement by prescription.

The assertion of a “public prescriptive easement” against a restricted Native Allotment is not an option. Native Allotments are protected in a manner similar to other Federal lands preventing claims by adverse possession.¹²

- e. Acquisition: Several ROW parcels for Lutak Road were acquired by the Department of Transportation & Public Facilities¹³ (DOT&PF) within the study area during the mid-1980s. The effect of the Department’s assertion regarding the width and interest in the Lutak Road ROW will be discussed in following sections.

2. Location

The available mapping in the study area clearly establishes the location of the Lutak Road right-of-way.

- a. U.S. Survey No. 3707: This survey was performed in July of 1959 for the Robert David Native Allotment. The plat graphically shows Lutak Road (labeled as “Chilkoot Lake Road”) running through the survey, it’s bend to the east across the Chilkoot River Bridge and spur continuing northwesterly to Chilkoot Lake.

more because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant, is conclusively presumed to give title to the property except as against the state or the United States.”

¹² 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...”

¹³ DOT&PF has authority to acquire land for highway ROW under A.S. 19.05.040 Powers of the Department and A.S. 19.05.080 Acquisition of Land, Easements...

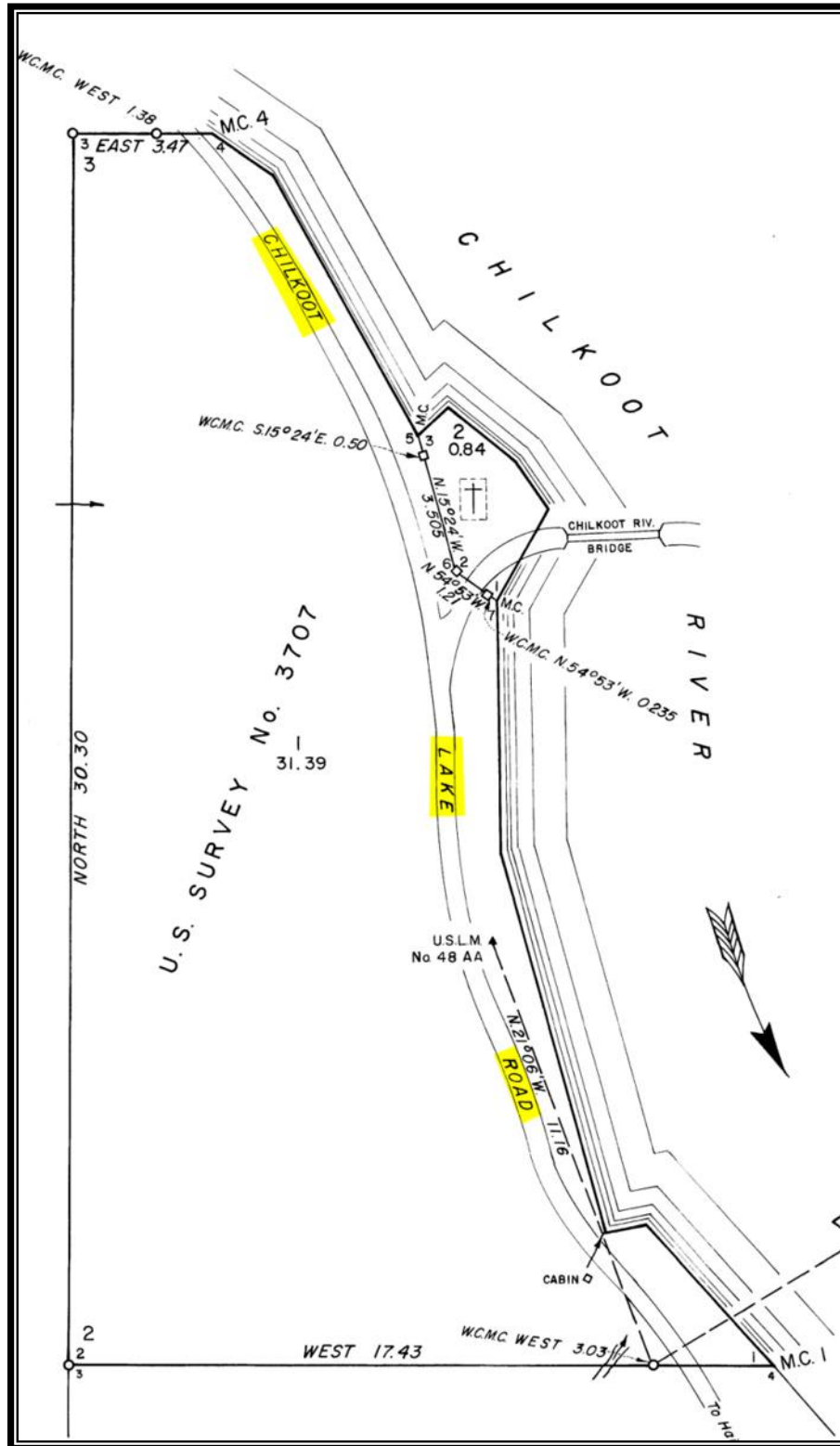


Figure 4 – U.S. Survey No. 3707

- b. Chilkoot River Subdivision¹⁴: The plat graphically reflects Lutak Road location through the study area. It characterizes the road as “unplatted” and 33-feet in width. No geometry is associated with the road alignment and plat note No. 10 states “Lutak Road is unplatted throughout the subdivision and has been utilized to an average of 33’ width. A centerline survey was accomplished by the State of Alaska in 1979.”

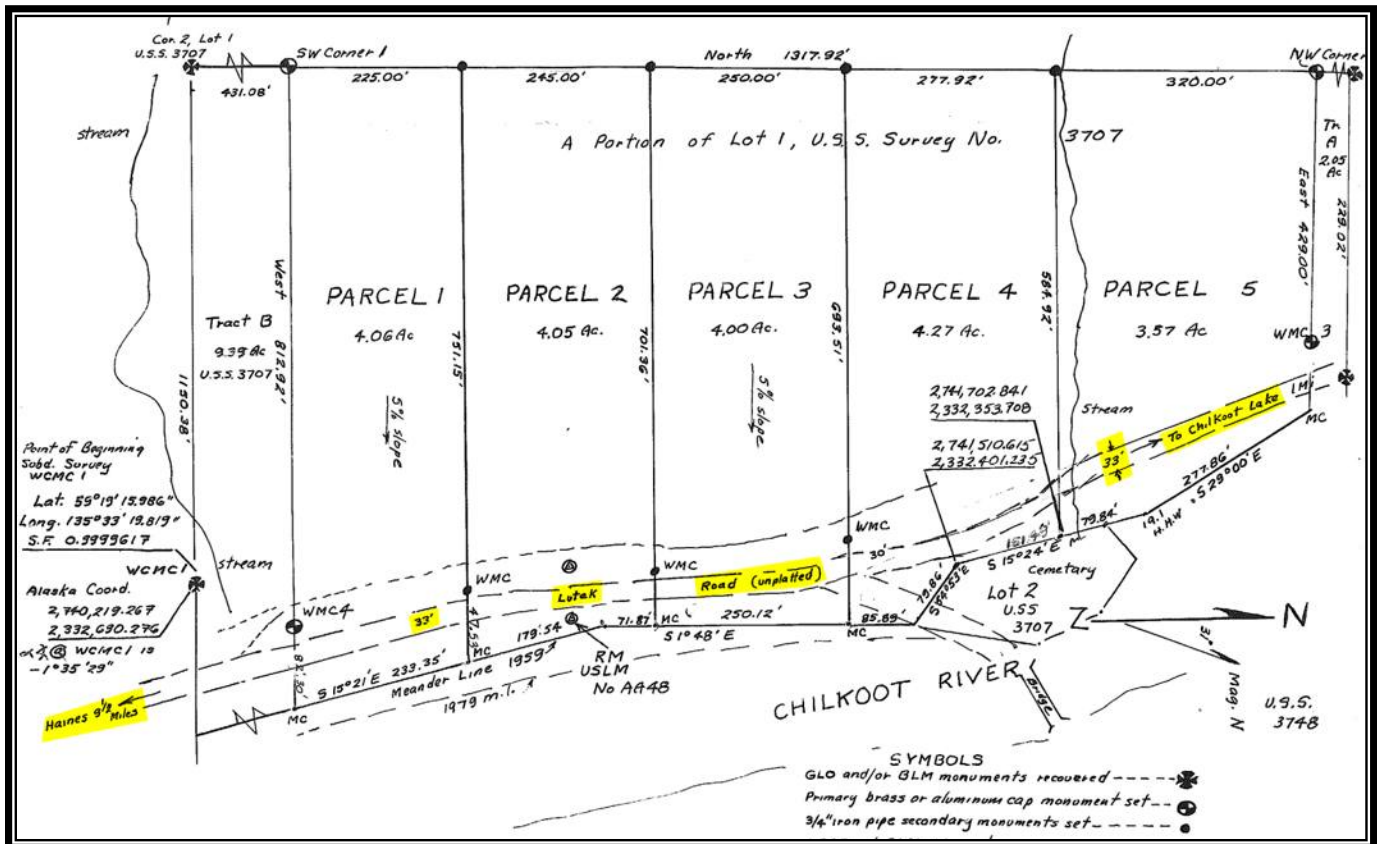


Figure 5 – Plat 79-6 Chilkoot River Subdivision

- c. DOT&PF Project RS-0991(2) Lutak Road – Haines Right-of-Way Map¹⁵: This 4.786 mile project defined the existing right-of-way for Lutak Road from the Ferry Terminal in Section 10, T.30S., R.59E., C.R.M northwesterly to the Chilkoot River Bridge located within the study area. The existing Lutak Road ROW (hatched) within U.S. No. 3707 was defined as 60-feet wide, 30-feet on each side of centerline. The existing ROW was widened at specific locations with fee acquisitions to accommodate the grading and drainage requirements for the project.

¹⁴ Chilkoot River Subdivision filed as Plat 79-6 on July 31, 1979, Haines Recording District.

¹⁵ Lutak Road – Haines Project RS-0991(2)/B-59822, ROW Map approved May 16, 1983 and filed as Plat 90-3, Haines Recording District on May 3, 1990.

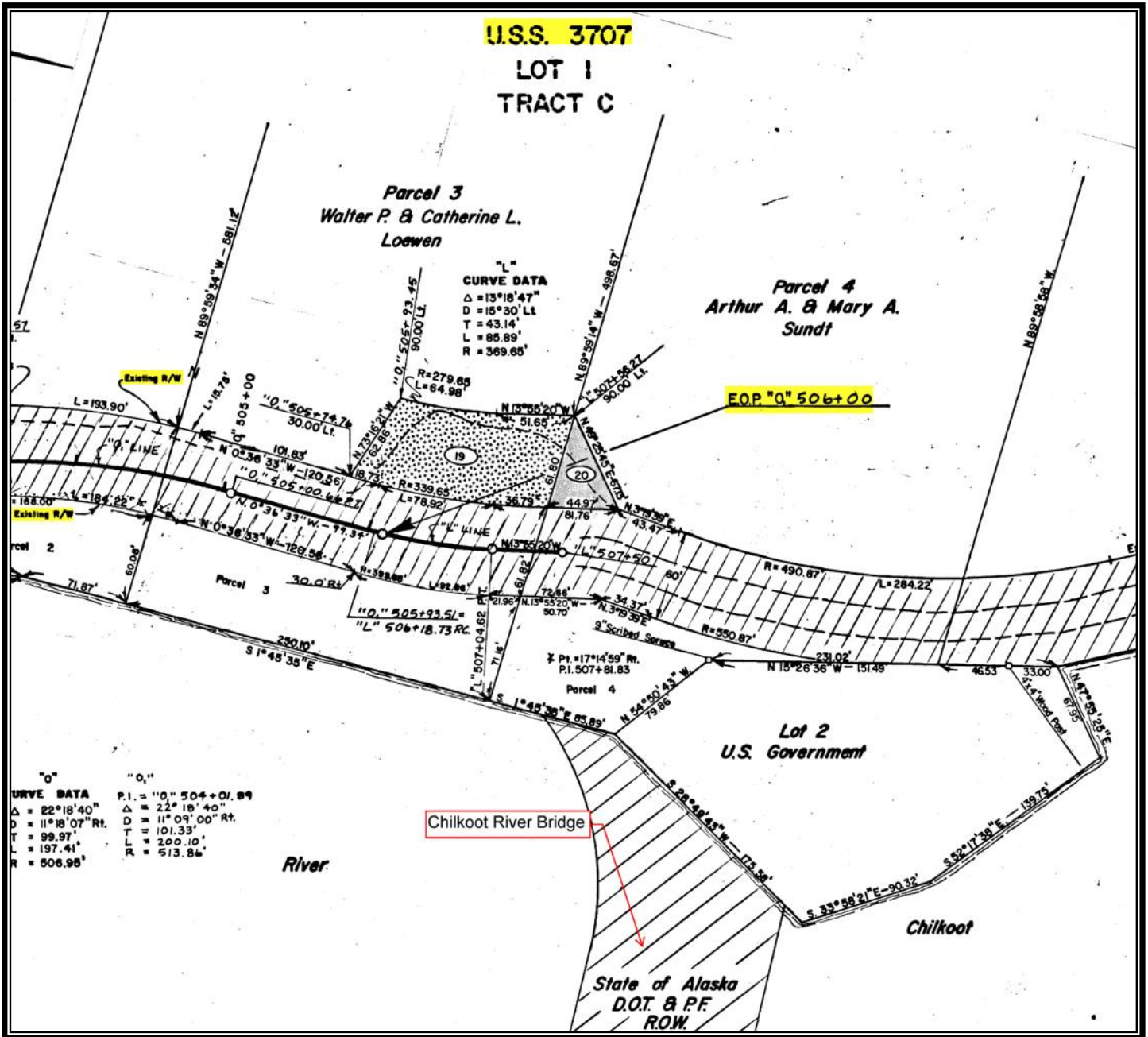


Figure 6 – Lutak Road ROW Plans

- d. Draft ASLS – Accretion to Parcel 3 within Chilkoot River Subdivision¹⁶: This preliminary plat was initially prepared to identify lands accreted to Parcels 3 and 4. It has been revised to limit the accretion assertion to only Parcel 3. The drawing indicates the existing Lutak Road ROW by shading and dimensioning of the ROW through the parcels. Existing ROW outside of the parcels is graphic only.

One version of this drawing suggests that Lutak Road, both that part continuing to the northwest to Chilkoot Lake and the part heading east across the Chilkoot River could also be subject to a PLO 601 “Local” road ROW of 100-feet, 50-feet on each side of centerline. The 100-foot wide PLO ROW crossing the Chilkoot River is in part obscured by the shaded ROW that is purported to be based on “State of Alaska Project No. SOS 3 (009)”¹⁷. The ROW plans for this project indicate that three owners would be impacted by parcel acquisitions. These included State of Alaska, Department of Natural Resources (DNR) for the area below the ordinary high water line of the Chilkoot River, the Bureau of Land Management (BLM) for Lot 2 of U.S. Survey No. 3707 and a parcel from the original allottee, Robert David. I was unable to find any evidence through the Recorder’s Office website or the online records at BLM and DNR that any of these right-of-way parcels were in fact acquired.

¹⁶ Survey performed by R&M Engineering, Inc. (Juneau) for Reuben Loewen to quiet title to accreted lands adjoining Parcels 3 & 4 of Chilkoot River Subdivision both owned by Reuben M. and Rosalie P. Loewen.

¹⁷ Note: According to DOT&PF as-built drawings, the bridge project was constructed between September 20, 1978 and September 28, 1979. The ROW plans for Project S.O.S. – 3(009), Chilkoot River Bridge were undated and unsigned in the approval block

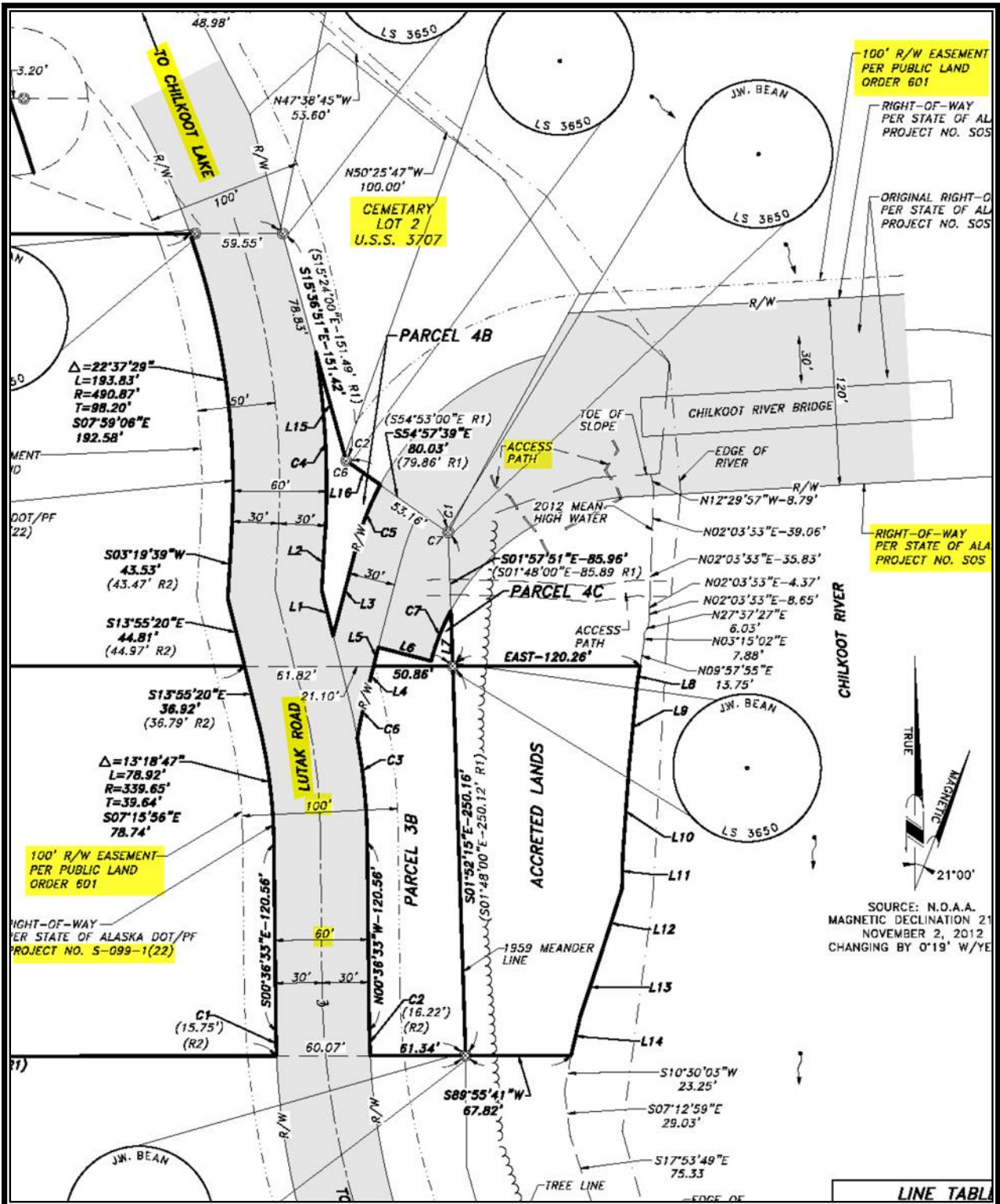


Figure 7 – Excerpt from Draft Accretion Survey

3. Width & Interest

- a. *RS-2477 and Act of 1917*: As previously stated, the allotment certificate to Robert David clearly expressed the intention of the federal government to protect an existing Chilkoot Lake Road through the U.S. Survey. Later surveys have either limited the width to the existing footprint at the time of survey (33' – Chilkoot River Subdivision), 60-feet (DOT ROW Plans) or indicated both 60-feet and 100-feet (Draft Accretion Plat).

The Native Allotment file indicates in both Robert David's own affidavit and by affidavits of others that he had occupied the land within U.S. Survey No. 3707 since 1927. In 1987, the Interior Board of Land Appeals (IBLA) began applying the "relation back" doctrine to declare certain existing rights-of-way null and void. Under the relation back doctrine, the IBLA gives priority to an allottee if the allottee's claimed initial use and occupancy of the land predated other uses and rights-of-way, even if the allotment application was submitted after the right-of-way was issued.¹⁸ Prior to 1987, Alaska Native allotments were generally subject to rights-of-way existing when they were approved.¹⁹

At the time of Robert David's initial occupancy the only available authorities for a right-of-way would have been under RS-2477 or the Territorial Act of 1917 based on the apparent existence of the trail to the Chilkoot Village noted on earlier adjoining allotment surveys.

Over time, assertions of RS-2477 trail rights-of-way have been based on the width of the physical improvement or "ditch to ditch"; 60-feet, based on the 1917 Act; 66-feet based on the 1923 Territorial acceptance of the RS-2477 grant for section line easements or 100-feet based on the A.S. 19.10.015 declaration for all proposed and existing highways. In the 1962 condemnation case *State of Alaska v. Fowler*, the State argued that the 66-foot width was appropriate in that the 1923 legislative acceptance of the RS-2477 grant indicated the local law and custom for these types of ROW. The court held that the RS-2477 ROW would be limited to that width "reasonable and necessary for the use of the public." As a result, A.S. 19.10.015 was enacted to fix the width of all officially proposed and existing highways on public land not reserved for public uses at 100-feet.

For an RS-2477 assertion of the Trail to Chilkoot Village road prior to PLO 601, A.S. 19.10.015 is of no use because of its effective date when compared to the allottee's use & occupancy dates. A 1996 communication with the Attorney General's Office regarding application of the 1917 Act to the Elliott Highway suggested that the 1917 Act would likely be interpreted as an acceptance of the RS-2477 grant. Essentially, the 1917 Act constituted an appropriate governmental act reflecting the local law or custom with regard to the standard width of a highway. The 1917 Act stated, "*The lawful width of right-of-way of all roads or trails shall be 60 feet.*"

Although we believe that the assertion of an RS-2477 right-of-way across a native allotment using a 60-foot

¹⁸ See, e.g., Golden Valley Electric Ass'n (On Reconsideration), 98 IBLA 203, 207 (1987); State of Alaska, Golden Valley Electric Ass'n, 110 IBLA 224 (1989).

¹⁹ See, e.g., State of Alaska v. Heirs of Dinah Albert (Albert Allotment), 90 IBLA 14 (1985) and Golden Valley Electric Ass'n (Irwin Allotment), 85 IBLA 363 (1985), citing United States v. Flynn, 53 IBLA 208 (1981). According to the IBLA opinion on the Albert allotment, the State of Alaska had represented in a brief that where state right-of-way grants preceded the filing of an allotment application, but postdated the alleged use and occupancy, BLM had, in the past, issued allotment certificates subject to such state rights-of-way. 90 IBLA at 19, n.7. On reconsideration of the Golden Valley Electric case, the IBLA shifted its policy and adopted the relation back rule, voiding the rights-of way. 98 IBLA 203 (1987).

width based on the 1917 Act can be supported, it is not necessary to apply it in this situation.

Further research may reveal additional Territorial expenditures prior to 1927 on the road passing through the David allotment that would support an assertion of an Act of 1917 60-foot ROW. However, the standard at the time the allotment was applied for and certified was that the date of occupancy would not defeat an assertion of a public right-of-way that existed prior to the allotment application. Although the basis for the Lutak Road existing ROW is not stated on plats subsequent to the U.S. Survey, I believe that both RS-2477 and the Act of 1917 authorities asserted prior to the allotment application would support the reported existing 60-foot wide ROW.

- b. *Public Land Order*: Prior to statehood, PLOs were the basis for many of the highway rights-of-way that were ultimately conveyed to the State in the Omnibus Act Quitclaim Deed (QCD).²⁰ Some of these rights-of-way have been found to cross Native allotment parcels where the use and occupancy preceded the effective date of the PLO and the effective date of the title transfer for highways to the State of Alaska. At first glance, it would appear that a PLO that is subject to the existing use and occupancy of a Native allotment could not take effect.

A review of a 1982 Solicitor's memo²¹ and two pages out of the BLM guidebook regarding adjudication of Native Allotments provides insight to the adjudication process regarding Omnibus highways in conflict with Native Allotments. In paragraph 11 of the guidebook titled Omnibus Act Roads, it is stated that "...all allotments encompassing an Omnibus Act road must be made subject to an easement for the road. However, research is required to determine whether the applicant's use and occupancy predated the quitclaim deed, any withdrawal for the road, or public use of the road. If the applicant's use did predate, title recovery is required to obtain the easement back, as in other Aguilar-type situations. See modified Regional Solicitor's opinion dated August 23, 1982." The Solicitor's opinion notes that while allotments would be subject to Omnibus rights-of-way where use and occupancy came after the 1959 conveyance, that rule would not apply to allotments where use and occupancy predated the QCD. The above referenced modification to the 1982 opinion is the following hand written note on the first page: "Modified – This proc. applies across the board to native allotments. Prior rights to roads must be vindicated with Aguilar procedures [initials 'DJH'²²"]". In summary, while the allotment date of occupancy might predate the PLO that created the highway right-of-way, BLM appears to acknowledge that the Omnibus QCD could have erroneously conveyed the easement interest to the State and the only way to clear the allotment title is through an Aguilar reconveyance procedure.

The DNR position on these types of conflicts is found in a 1991 Director's Policy²³ that requires protection of "significant state interests" when considering Aguilar reconveyances. These significant state interests would include "Any land improved by a state agency", "All existing roads trails and public use sites" and "Section line easements". To protect its interests, the State will reconvey subject to easements or consider a land exchange.

Given these positions, if the lands within U.S. Survey No. 3707 were still subject to allotment restrictions and

²⁰ On June 30, 1959, pursuant to section 21(a) of the Alaska Omnibus Act, the Secretary of Commerce issued a quitclaim deed to the State of Alaska in which all rights, title and interest in the real properties owned and administered by the Department of Commerce in connection with the activities of the Bureau of Public Roads were conveyed to the State of Alaska.

²¹ Reservation of Omnibus Act Rights-of-Way in Patents and in Native Allotment Certificates, August 23, 1982, Office of the Regional Solicitor, Alaska Region

²² These initials likely belong to Dennis J. Hopewell, an attorney with the BLM Office of the Regional Solicitor in 1982.

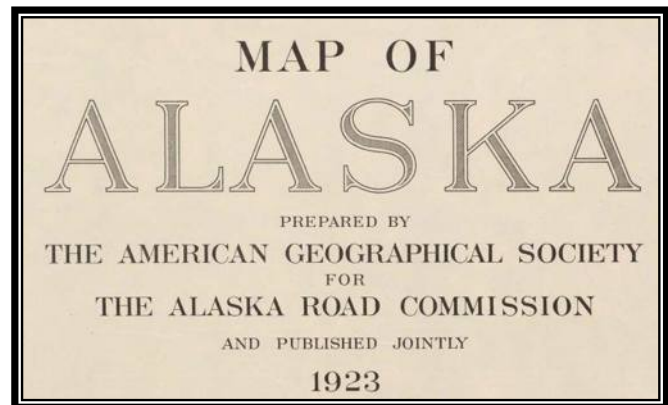
²³ Policy for Reconveyance of Native Allotments, Director's Policy File 92-02, October 14, 1991

DOT asserted the 100-foot wide PLO ROW, the Department of Interior might be obligated to recover title conveyed to the State of Alaska through the Aguilar process. On the other hand, the David allotment was clearly subject to a road ROW reservation as stated in his Certificate. The only question is regarding the width of the ROW. With the allotment adjudication process before 1987 giving deference to rights-of-way that existed prior to the application date as opposed to the date of occupation, it would be reasonable to conclude the allotment adjudicators were aware of the Public Land Orders for highways and their application to Lutak Road and that these PLOs would be the basis for the width and interest in the road ROW.

The properties in question are no longer subject to native allotment restrictions²⁴, and so there would no longer be a need for an Aguilar title recovery process. However, I believe that any private parties who now hold title to the unrestricted parcels would be subject to the full “Local” road width of 100-feet established by the PLOs.

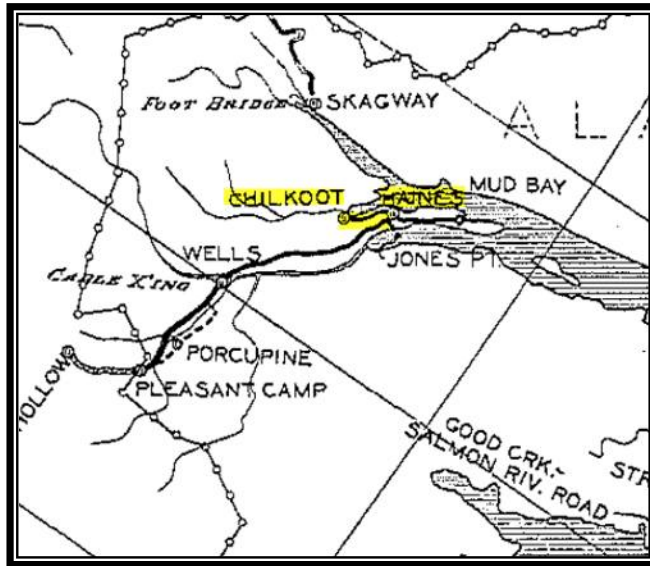
In order to prove that a particular road met the PLO 601 “Local Road” requirements as having been “*established or maintained under the jurisdiction of the Secretary of the Interior*”, we generally look to the records and reports of the Alaska Road Commission (ARC) to establish expenditures, listing on the highway system inventory and dates of construction and maintenance.

History & Mileage: With the many pre and post statehood reports referencing the Haines-Chilkoot Road and the Haines-Lutak Road it can be difficult to focus on exactly which section of the road is being discussed.



The above excerpt from the 1923 Alaska Road Commission Map of Alaska indicates a line type between Haines and Chilkoot associated in the map legend with a “Pack Trail (double ender or dog sled)”. This is consistent with the 1914 native allotment survey A. A. Survey No. 48 that notes the “Trail to Chilkoot Village”.

²⁴ I was unable to locate a document that purported to remove the allotment restrictions from the parcels conveyed from Robert David to Aspers/Foltas in the B6/P143 deed for Tract C of Lot 1 of U.S.S. No. 3707 according to Plat 79-1. I reviewed the Haines Borough on-line Parcel Viewer and noted that these parcels are all currently assessed for taxation purposes. This along with my understanding that a restricted native allotment can only be held by persons eligible to receive a native allotment suggests that the restrictions were removed when the deed was approved by the Bureau of Indian Affairs.



The images above were extracted from the Annual Report of the Alaska Road Commission Fiscal Year 1930²⁵. Notations regarding the Haines-Chilkoot Road in the report include:

- P.8 – “The more important roads upon which new construction was performed were the McCarthy-Nizina,Haines-Chilkoot,...”
- P.15 – “No. 3E Haines-Chilkoot...Construction: \$16,756.56 Maintenance: \$869.50”
- P.47 – “All road expenditures in this district were upon co-operative projects supported by the Territory and the Alaska Road Commission, with the exception of the Haines-Chilkoot,...road which are exclusively Territorial projects.”
- P.47-48 – “Summary of Sub-projects 3E** Haines-Chilkoot Road 3 miles...** Entirely supported by Territorial Funds. 3E – This road was relocated. The route now follows the shoreline, well above high tide, around the peninsula north of Haines. It is suitable for light motor traffic.”

The district map for the South-Eastern District indicates that a wagon road extended from Haines to the west end of Lutak Inlet, a distance of nearly 10 miles. Alaska Road Commission reports from 1923 to 1939 reference the Haines-Chilkoot road with a length of 3 miles.

Between 1950 and 1957 the Alaska Road Commission issued A.R.C. Orders No. 34 and 40 along with multiple supplements and revisions to A.R.C. Order No. 40. The stated intent was to classify the roads and highways under the jurisdiction of the Alaska Road Commission. These classification reports were the precursor to the current Alaska Highway System Inventory and provide evidence that Lutak Road was subject to a PLO 601/SO 2665 “Local” Road 100-foot wide right-of-way.

Attachment	Title	Notes
3	ARC Mileage as of Nov 30 1949.pdf	Local Roads: Route 3E Haines-Chilkoot - 4.6 Miles
4	ARC Order 34 - 1950.pdf	Local Roads: Route 3E Haines-Chilkoot Road - 4.6 Miles

²⁵ Attachment No. 2

5	ARC Order 40 Feb 1951.pdf	Local Roads: 950.1 (3E) Haines – Chilcoot – 4.6 Miles
6	ARC Order 40 Aug 1952.pdf	Local Roads: 950.1 Haines-Lutak Road – 4.6 Miles
7	ARC Order 40 June 1953.pdf	Local Roads: 950.1 Haines-Lutak Road – 4.6 Miles
8	ARC Order 40 Jan 1954.pdf	Local Roads: 950.1 Haines-Lutak Road – 4.6 Miles
9	ARC Order 40 Mar 1954.pdf	Local Roads: 950.1 Haines-Lutak Road – 4.6 Miles
10	ARC Order 40 Jan 1955.pdf	Local Roads: 950.12 Haines-Lutak Road – 9.3 Miles
11	ARC Order 40 Jan 1956.pdf	Local Roads: 950.12 Haines-Lutak Road – 11.0 Miles
12	ARC Order 40 Jan 1957.pdf	Local Roads: 950.12 Haines-Lutak Road – 12.0 Miles

The Alaska Road Commission reports and orders indicate that at least as early as November of 1949 and through 1954, the Haines-Chilcoot (Haines-Lutak) road is being reported as having been increased to 4.6 miles in length.

The Biennial Report for 1955 -1956 of the Alaska Territorial Highway Engineer²⁶ reports on p. 36 that between July 1, 1955 and June 30, 1956 the Alaska Road Commission issued work orders No. 55-24 on 7/6/55 in the amount of \$20,000 to extend Lutak Road to the Chilcoot River. Work Order No. 55-22 was issued on 5/10/56 in the amount of \$25,000 to extend Lutak road across the Chilcoot River.

36					
LIST OF WORK ORDERS ISSUED TO THE ALASKA ROAD COMMISSION ALLOCATING CONTRIBUTIONS FOR THE ROAD BUILDING PROGRAM					
Period - July 1, 1955 to June 30, 1956					
ROAD	PROJECT	W.O. NO.	DATE	ALLOCATION	USED BY ARC
<u>First Division</u>					
Lutak	extend to Chil-				
	koot River	55-24	7/6/55	\$ 20,000.00	\$ 20,000.00
Lutak	extend across				
	Chilcoot R.	55-22	5/10/56	25,000.00	18,692.96

Figure 8 – Excerpt from 1955-1956 Biennial Report

The Alaska Road Commission Order No. 40 from 1955 to 1957 reported the length of the Haines-Lutak Road as being lengthened from the earlier reported 4.6 miles to 9.3, 11.0 and 12.0 miles.

Additional history of Lutak Road is reported in the December 6, 2005 Bureau of Land Management report on the Navigability of the Chilcoot Lake and Chilcoot River²⁷. Excerpts relating to Lutak Road include:

²⁶ Attachment No. 13.

²⁷ Attachment No. 14. Sources for the Lutak road history included: 1) Phone interview with Cindy Jones, Sheldon Museum, Haines, Alaska February 3, 2005; 2) Program Recommendations for 1954 & 1955, Haines Sub-District, Alaska Road Commission Bureau of Public Roads, Project Correspondence, Juneau, Alaska 1916-1959, Alaska National Archives Office, Box 66, 10/06/09, Record Group 30; 3) Annual Report Alaska Road Commission, Haines Sub-District, Work Order No. 536, December 1, 1955 to November 30, 1956.

- “Today, the Chilkoot River and Lake is easily accessed by car or truck from Haines by the Lutak Road, an Omnibus Act road where the State was given a deed to roads withdrawn for U.S. Bureau of Public Roads. The road meanders for about 9 miles along the shore of the Lutak Inlet. At mile 8.3, just before the bridge over the Chilkoot River, a spur veers off to the left proceeding northerly for about one mile to Chilkoot Lake...”
- At the time of statehood, the Lutak Road extended to Chilkoot Lake. The Corps of Engineers reportedly build the first segment from Haines to the fuel tank farm and dock (about 4 miles).
- “In 1954, the Alaska Road Commission (ARC), a federal agency responsible for most road and trail building in Alaska prior to statehood, proposed to extend the Lutak Road toward the Chilkoot Lake area with \$4,000 of the Farm and Industrial Roads construction funds.”
- “In 1955, the ARC proposed that the Lutak Road be extended another 1.5 miles to Chilkoot Lake. The estimated cost was \$8,000 for the project and included installing culverts in the section roughed out in 1954 and the roadway shaped up and graveled. An office memorandum sent out by the ARC in December 1955 verified that the road had been pushed through to the south end of Chilkoot Lake. In 1956 the ARC built a 216-foot bridge across the Chilkoot River and extended the road approximately one mile along the north shoreline of Lutak Inlet. Additionally, the section of road along the Chilkoot River to Chilkoot Lake was improved.”

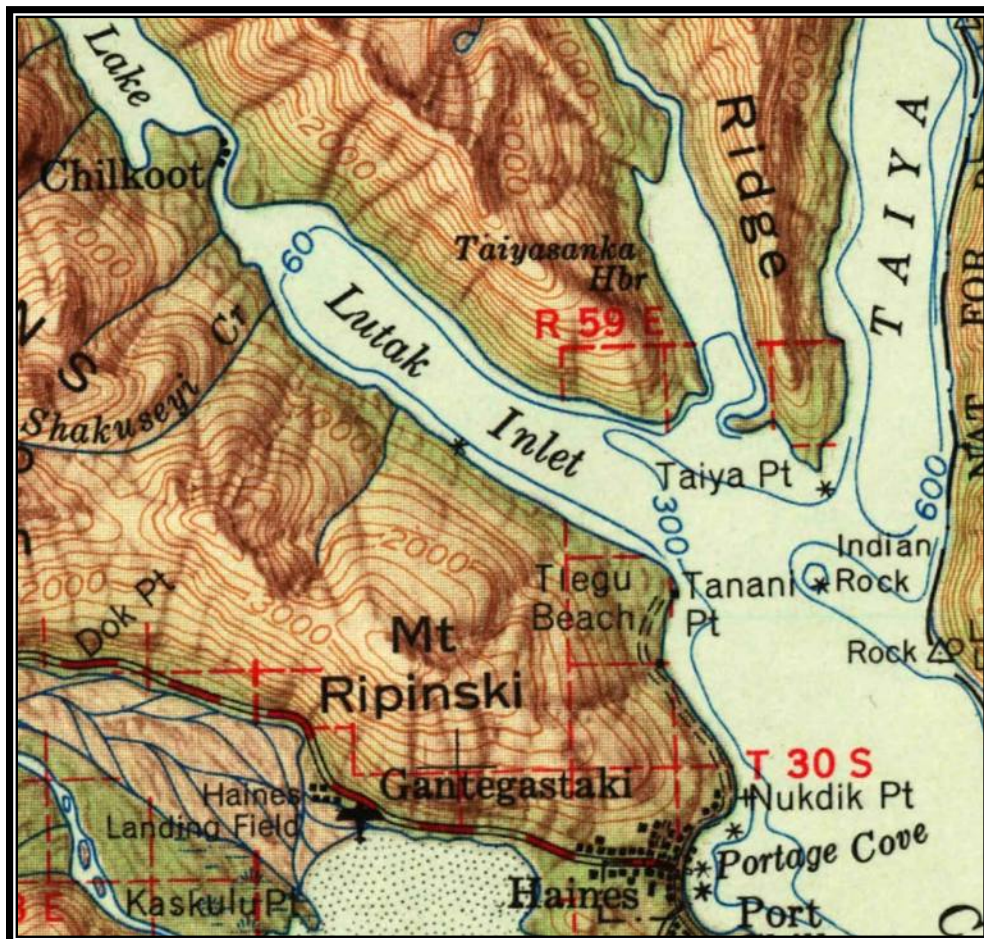


Figure 9 – USGS Quadrangle Skagway 1952

Figure 9 is an excerpt from the USGS Quadrangle Skagway 1952 with minor corrections dated 1956. The map indicates an existing road from Haines northwesterly up the shoreline of Lutak Inlet for approximately 3 miles. According to the map legend, the line type used is for an unimproved dirt road. The quadrangle map indicates that it was in part based on 1948 photography. The 3-mile length represented on the map is consistent with the pre-1950's ARC reports of the Haines-Chilkoot Road being 3 miles in length.

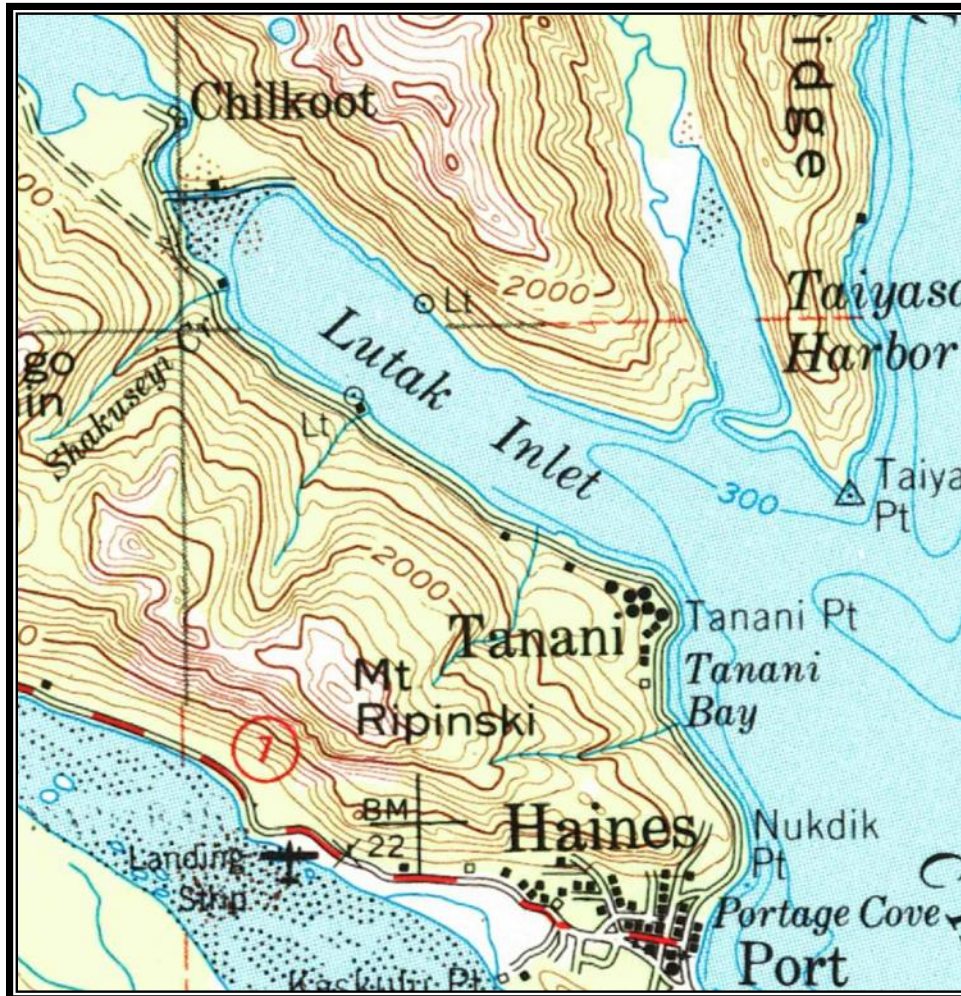


Figure 10 – USGS Quadrangle Skagway 1961

The figure 10 USGS Quadrangle Skagway 1961 indicates a light duty road extending from Haines northwesterly along the shoreline of Lutak Inlet to Chilkoot Lake with a spur heading east across the Chilkoot River. The map is dated 1961 with limited revision 1982 and based on a recompilation of the 1955 1:63,360 scale maps and revised based on aerial photography taken in 1978-79. This map is consistent with the reports of the road length between Haines and the Chilkoot River bridge of 9 miles with an additional mile to Chilkoot Lake and an additional mile east across the Chilkoot River.

Additional references to the length of Lutak Road are made in the Omnibus Act Quitclaim Deed (QCD) transferring roads from the federal government to the State of Alaska. The deed is discussed in the following section. The road descriptions in the QCD are often cryptic and its reference to Lutak Road is no different.

The portion of Lutak Road reported in the ARC records from 1949 to 1954 as being 4.6 miles in length is incorporated into QCD Federal Aid Primary Route 95-5 "*Haines to Canadian Border with spur to Army Dock at Lutak Inlet.*" The distance of this route is stated as 45.0 miles, which is consistent with the 40-mile distance between Haines and the Canadian Border. The remaining portion of Lutak Road from the Army Dock to Chilkoot Lake and to the east of the Chilkoot River is reported in the QCD as Federal Aid Secondary Class "A" Route 991 and is described as extending "*From end of FAP Route 95 Spur at Army Dock north of Haines northwesterly along southern shore of Lutak Inlet to Chilkoot Lake with a 1.0 mile spur east across Chilkat River*". Constructed length: 6.5 miles.

The conclusion that can be reached from this review of history and mileage is that the portion of Lutak Road adjoining U.S. Survey No. 3707, continuing east across the Chilkoot River and north to Chilkoot Lake were clearly constructed and maintained by the Alaska Road Commission/Bureau of Public Roads during the period of time that Secretarial Order No. 2665 was in effect and prior to the Native Allotment application of Robert David on May 31, of 1957.

- c. *Project RS-0991(2)ROW Acquisition: The Lutak Road ROW plans (Sheet 3 of 22) contains the following note: "The R/W for those portions of Lutak Road which do not have existing platted R/W was developed based upon three conditions; 1.) Restricted lands for Native Allotments claimed prior to April, 1949 – No existing R/W. 2.) Unrestricted Patented Lands entered upon prior to April, 1949* – A 60 foot wide prescriptive rights R/W centered on the existing gravel road centerline as maintained by D.O.T. /P.F. and located by field survey in 1979 and 1982. 3.) Those patented lands which were entered upon after April, 1949 – A 100 foot R/W centered on the existing gravel road as granted under Public Land Order 601, effective August 10, 1949, and Department Order 2665 on October 19, 1951." ["* Or restricted Native Allotments claimed after April 1949."]*

The note is not applicable to the portion of Lutak Road that passes through U.S. Survey No. 3707 because although U.S.S. 3707 was at one time a restricted native allotment, it was specifically subject to a ROW reservation for a road constructed by the United States.

Another curiosity of the project is that it appears that the ROW plans were initially developed to reflect a 100-foot wide existing ROW through U.S.S. 3707. The revision block on sheet 3 of 22 indicates that in June of 1983, DOT "*Revised Existing R/W as per PLO 2665*" and then in March of 1984 "*Changed R/W width to 60*". This is more clearly indicated in the acquisition documents for Parcels 19 & 20. (See Figure 6) Parcel 19 within Parcel 3 of Tract C, Chilkoot River Subdivision was acquired from Walter P. and Catherine L. Loewen in fee on October 5, 1983. The document was recorded in Book 10 Page 709 on November 15, 1983, Haines Recording District. Although the parcel plat attached to the deed is a bit blurry, the existing ROW for Lutak Road is shown as being 100-feet in width and Parcel 19 was designed to adjoin that existing ROW. After DOT revised the existing Lutak Road ROW width to 60-feet, a corrective deed was signed by the Loewens on May 30, 1984 to adjust the parcel acquired to adjoin the narrower 60-foot wide existing ROW. The document was recorded in Book 12 Page 159 on October 12, 1984, Haines Recording District. Parcel 20 adjoins Parcel 19. An acquisition in fee was made from Arthur A. and Mary A. Sundt from Parcel 4, Tract C, Chilkoot River Subdivision. The warranty deed was signed on October 14, 1983 and recorded in Book 10, Page 562 on October 24, 1983. The acquisition for Parcel

20 was based on a 100-foot wide existing Lutak Road ROW. A review of the Recorder's office database indicates that a corrective deed adjusting the take area so that it would adjoin the reduced 60-foot wide existing Lutak Road ROW was never obtained. This results in an apparent 20-foot wide gap between the westerly edge of the existing Lutak Road ROW (60-feet) as shown on the DOT ROW plans and the easterly boundary of Parcel 20 according to the acquisition document. The description for Parcel 18, located within Parcel 1, Tract C of the subdivision was not subject to a corrective deed as it was acquired after DOT revised the width for the existing Lutak Road ROW to 60-feet.

The project ends (EOP) at a point approximately in the middle of Parcel 3 of the Chilkoot River Subdivision and is indefinite with regard to the status of the existing ROW where it turns east to cross the Chilkoot River Bridge. The un-dimensioned existing ROW hatching to the east of U.S. Survey appears graphically to represent a 100-foot wide ROW but the hatching does not connect through Lots 1 & 2 of U.S.S. No. 3707 such that it connects with the northwesterly run of the existing ROW. While this is unusual, it may have been because the DOT&PF staff elected to end their existing ROW analysis at the End of Project (EOP).

- d. *Right-of-Way Interest:* Any pre-statehood interest in the Lutak Road ROW whether established by RS-2477, Act of 1917 or PLO was conveyed to the State of Alaska in 1959. Section 21(a) of the Alaska Omnibus Act, enacted on June 25, 1959²⁸ directed the Secretary of Commerce to convey to the State of Alaska all lands or interests in lands "owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska." On June 30, 1959, pursuant to section 21(a) of the Alaska Omnibus Act, the Secretary of Commerce issued a quitclaim deed to the State of Alaska in which all rights, title and interest in the real properties owned and administered by the Department of Commerce in connection with the activities of the Bureau of Public Roads were conveyed to the State of Alaska.

Federal-aid Secondary Class "A" Routes		-14-	BOOK Mt. McKinley	See also June
FAS Route No.	Description	Highway District No.	Constructed Mileage	
	Lake with a road from FAS Route 970 across the saddle of the peninsula to FAS Route 970, a spur to Anke Bay and a spur to Fritz Cove	30	5.4	
975	From FAP Route 95 at Thane southeasterly to Point Bishop	30	1.5	
987	From FAP Route 95 at Haines through Port Chilkoot to Mud Bay, with a spur to Presbyterian Mission Camp	30	8.2	
990	From junction with FAP Route 95 Spur at west limits, Town of Haines, easterly and southerly through Haines to FAP Route 95 and a spur north to a junction with FAP Route 95 Spur	30	1.5	
991	From end of FAP Route 95 Spur at Army Dock north of Haines northwesterly along southern shore of Lutak Inlet to Chilkoot Lake with a 1.0 mile spur east across Chilkat River	30	6.5	

Nanana Recording District
BOOK
PAGE 111
Fort Gibbon Recording District

Figure 11 – Excerpt from Omnibus Act Quitclaim Deed for Lutak Road

²⁸ P.L. 86-70, 73 Stat. 141

FAP Route Number	Fort Gibbon Recording District Description	Constructed Mileage	System Mileage
-4	At Juneau with ferry connection to Haines, with spurs to Douglas and to Juneau Airport.	93.5	93.5
95-5	Haines to Canadian Border with spur to Army Dock at Lutak Inlet.	45.0	45.0
97-1	From FAP 95 at Haines to Skagway.	16.0	16.0

Figure 12 – Omnibus Act QCD Excerpt for Haines Highway

Generally, unless specifically stated as a fee interest in an acquisition document, a road right-of-way would be considered an easement interest. The use of the term “excepting” in the David allotment certificate can sometimes cause confusion because it implies that the area for the road ROW is being excluded from the conveyance.

“Technically, a grantor who wishes to retain an easement should use the word ‘reserve’ because reservation implies the creation of a new interest in the grantor. On the other hand, the term ‘exception’ suggests that the right withheld from the operation of the grant already exists in the grantor. An exception usually involves the retention of a strip of land in fee simple.”²⁹

This should not be a significant issue because to segregate the allotment into multiple parcels separated by a road corridor would likely violate the standard for allotment parcel definition at the time of application. I believe it is clear that the intent of the grantor, the federal government, was to reserve an easement interest for the road over the David allotment.

Of the many authorities cited for the establishment of a public right-of-way, generally all of them, other than an express acquisition of a fee interest would result in an easement interest.

4. Conclusion

My review of the referenced documents leads me to conclude that the representation of a 60-foot wide existing ROW adjoining U.S. Survey No. 3707 according to sheet 22 of 22 of the ROW plans for Project RS-0991(2) Lutak Road – Haines, was in error.

An assertion of the 60-foot wide ROW based on RS-2477 or other authorities may have been valid prior to the construction and maintenance activities of the Alaska Road Commission/Bureau of Public Roads extension and maintenance of Lutak Road in the mid-1950s.

²⁹ The Law of Easements and Licenses in Land, Bruce & Ely, 2013, §3:7 Express reservation or exception.

However, the effect of Department of Interior Secretarial Order No. 2665 dated 10/16/51 and the extension of the Lutak Road to Chilkoot Lake in 1955-56 under the jurisdiction of the federal government served to impose a 100-foot wide "Local" road highway easement under the authority of S.O. No. 2665 in this area.

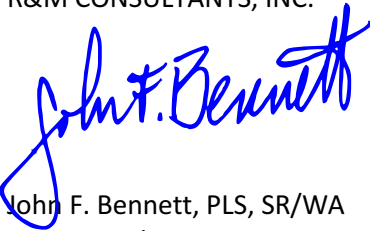
The effect of S.O. 2665 was not defeated by Robert David's Native Allotment application on May 31, 1957 as a "prior existing right" because prior to 1987, Alaska Native Allotments were considered to be subject to rights-of-way existing prior to approval as opposed to an earlier date of use and occupation. This is supported by the express reservation stated within the Allotment Certificate for a road constructed by the United States.

As the road in question was constructed across the Robert David allotment only a few years prior to his application, it is reasonable to conclude that it was the ROW for this road constructed by the Alaska Road Commission/Bureau of Public Roads that is referenced in the Certificate and that the federal staff processing the allotment application were aware of the DOI orders establishing the ROW widths for various classifications of highways.

We appreciate the opportunity to provide this review. Should you have any further questions, please feel free to contact me directly at jbennett@rmconsult.com or 907.456.4304.

Sincerely,

R&M CONSULTANTS, INC.



John F. Bennett, PLS, SR/WA
Senior Land Surveyor

Attachments: as stated

JFB:jfb