

**Decision to Identify and Accept  
Chitina Cemetery Road RST # \_\_\_\_\_**

**As a RS 2477 Right of Way  
43 U.S.C. §932**



*Figure 1: Chitina Cemetery Road center, McCarthy Road in foreground and Bunkhouse to left  
Photograph by Kevin Sorensen, DNR PAAD Unit, August 12, 2010*

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**RECOMMENDED ACTION**

A public inquiry was made into the blockage of a road in Chitina, Alaska to the State of Alaska Department of Natural Resources (the department), Division of Mining, Land and Water, Public Access Assertion and Defense Unit. The inquirer believed that it was a RS 2477 right of way.

Research by the department concluded that it had not been identified as a RS 2477 right of way by the State. That research also indicated that the route may qualify as a valid RS 2477 right of way. The department initiated the administrative process to determine if The Chitina Cemetery Road was a valid RS 2477 right of way. The department has determined that The Chitina Cemetery Road is a valid RS 2477 right of way.

## THE STANDARD OF REVIEW and PUBLIC NOTICE

The standard set by the Alaska Supreme Court is explained as follows:

RS 2477 was a congressional grant of right-of-way which provided: “The right of way for the construction of highways over public lands, not reserved for public use, is hereby granted.” 43 U.S.C. § 932, repealed by Pub. L. No. 94-579 Title VII, §706(a), 90 Stat. 2793 (1976), quoted in *Hamerly v. Denton*, 359 P. 2d 121, 123(Alaska 1961). The grant was self-executing; an RS 2477 right-of-way would have come into existence automatically if a public highway was established across public land in accordance with the laws of Alaska.

...In order to have completed the grant there must have been “either some positive act on the part of the appropriate public authorities of the State, clearly manifesting an intention to accept a grant, or ...a public user for such a period of time and under such conditions “as to indicate that the grant had been accepted. Id. at 413-14 (quoting Hamerly, 359 P.2d 123).

...RS 2477 granted rights-of-way over “public lands” only. Once the land had passed into private hands, the grant could no longer be accepted. Hamerly, 359 P.2d 123). Homesteads pass from the public domain to the private as of the date of entry. See Id. (When a citizen has made a valid entry under the homestead laws, the portion covered by the entry is then segregated from the public domain...

Quoted from Fitzgerald v. Puddicombe, 918 P.2d 1017, 1019 (Alaska 1996)  
(footnotes omitted)

In AS 19.30.400(b) the Alaska State Legislature charged the department with conducting “the necessary research to identify rights-of-way that have been accepted by public users under 43 U.S.C. 932.

The administrative process that the department is to use to identify RS 2477 rights of way is contained in 11 AAC 51.055.

The department researched and considered the evidence as to whether the Chitina Cemetery Road should be identified as a RS 2477 right of way pursuant to 11 AAC 51.055(c)(1) and prepared a NOTICE OF PROPOSAL TO IDENTIFY which contained the following;

A map from the McCarthy Road Improvement Project, Cultural Resource Survey, September, 2003, by Rolf Buzzell, which delineated the Chitina Cemetery Road in a scale that was one inch equal to less than one mile as required by 11 AAC 51.055(b)(1).

Evidence that the Chitina Cemetery Road crossed federal land that was unappropriated and not reserved for public use at the time of acceptance or 1910 as required by 11 AAC 51.055(b)(2).

History of the Chitina Cemetery Road, by Kevin Sorensen which provided a reliable historical account to show that public use and construction constituted acceptance of the right of way grant under RS 2477 as required by 11 AAC 55.051(b)(3)(A).

Pursuant to 11 AAC 55.051(c)(2) the department gave public notice starting on February 11, 2010 and took public comment for more than 30 days. The public was notified that the Notice of Proposal to Identify the Chitina Cemetery Road as a RS 2477 Right of Way could be viewed at the Chitina Post Office, at [http://dnr.alaska.gov/mlw/hottopics/pdfs/chitina\\_cemetery\\_roadinfopacket.pdf](http://dnr.alaska.gov/mlw/hottopics/pdfs/chitina_cemetery_roadinfopacket.pdf) or at 550 West 7<sup>th</sup> Ave. Suite 1420, Anchorage, Alaska. The public was notified to comment in support of or contrary to the evidence the department had presented regarding the identification of the Chitina Cemetery Road as an RS 2477 Right of Way. The public was notified that an appealable decision would be made after the public comment period ended.

Pursuant to 11 AAC 55.051(c)(2)(A), public notice was given on the Alaska Online Public Notice System beginning on February 11, 2010. Notice was published in The Alaska Journal of Commerce, a newspaper of statewide circulation, on February 21 and 28, 2010.

Pursuant to 11 AAC 55.051(c)(2)(B) public notice was published in the Copper River Record, a newspaper of general circulation in the vicinity of the Chitina Cemetery Road on February 18, 2010 and March 4, 2010.

Pursuant to 11 AAC 55.051(c)(2)(C) public notice was posted at the Chitina Post Office on about February 12, 2010.

Pursuant to 11 AAC 55.051(c)(2)(E) public notice was mailed by certified mail with return receipt to Ahtna, Incorporated, and the regional corporation in the area.

Pursuant to 11 AAC 55.051(c)(2)(F) public notice was mailed by certified mail with return receipt to Chitina Native Corporation whose village is within twenty-five miles of the Chitina Cemetery Road on February 10, 2010.

Pursuant to 11 AAC 55.051(c)(2)(G) public notice was mailed by certified mail with return receipt to the Alaska Department of Fish and Game on February 10, 2010.

Notice was also mailed by certified mail with return receipt requested to sixteen property owners whose property could be servient estates to the Chitina Cemetery Road on February 10, 2010. Eight of those mailings were returned to sender.

The comment period was left open until July 31, 2010 and due to the comments received, on August 12, 2010 a site visit was made by the department's Kevin Sorensen NRS II. The purpose of this site visit was to observe and measure conditions related to possible impacts of the assertion of the RS2477 right of way on the historic buildings and for a review of any existing signs of impact of the roadway on the surrounding area. After evaluating all the evidence the department found certain significant facts, evaluated the width of the right of way and responded to the public comments received.

The decision is written pursuant to 11 AAC 51.055(d). The department will give notice of the decision to any person who commented during the comment period. The decision may be appealed under 11 AAC 2 by a demonstration that there are unresolved factual questions pertaining to the route's qualification as a RS 2477 right of way. Claims of adverse impacts on private property are not grounds for an appeal, but may be considered in the management of the route or to vacate or relocate the right of way under 11 AAC 51.065.

## PUBLIC COMMENTS w/RESPONSES

**COMMENT 1:** Because of sloughing slopes caused by permafrost melt driving vehicles larger than ATV's could cause the road surface to fail and cause a vehicle to roll into the bunkhouse.

**RESPONSE:** The portion of the road currently by the bunkhouse was constructed no later than September 1910 by a mechanized blade cut. The cutback into the hill is still obvious after one hundred years. It appears the overburden was casted to the downhill side of the roadway. Some of that overburden formed an earthen berm on the downhill side of the roadway. This berm appears to be in place beginning about where the bunkhouse ends and continuing to the residential dwellings on Lots 8 and 9 of Block 6. It ranges from about two feet to five feet high except for a portion about midway. The roadway is largely resting on undisturbed soils. The slope and berm are heavily vegetated including mature trees.

There is no evidence that the integrity of the road prism<sup>1</sup> has a reasonable likelihood of failure in such a way as to roll a vehicle into the bunkhouse. To the contrary the road appears to be very stable for its historic uses. The bunkhouse is approximately fourteen feet (in the front) to seventeen feet (in the back) from the edge of the roadway. The slope in that section appears stable at approximately a 3 to 1 slope. The front end of the bunkhouse is at approximately the same grade as the roadway and the back is approximately six feet below the roadway.

It does not seem likely that this section of road that has been stable for one hundred years would fail to the point that from a six-foot elevation it would roll a vehicle through the trees and onto a structure seventeen feet away.



Figure 10: Photograph by Kevin Sorensen, DNR PAAD Unit, August 12, 2010. The red building is the bunkhouse.

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**COMMENT 2:** Vehicles could roll off the road and injure customers of the Chitina Bunkhouse B&B.

**RESPONSE:** There is no evidence that vehicles within the historic usage for the road pose any unusual danger to customers at the bunkhouse. The bunkhouse is fourteen or more feet from the edge of the roadway. There is a vegetative buffer with trees of substantial size between the road and the bunkhouse. The traffic is minimal and will be moving at a slow rate of speed. In one hundred years there is no evidence that any such accident has occurred or is likely to occur.

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**COMMENT 3:** Cars, trucks or heavy equipment could drive over graves.

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<sup>1</sup> Road prism is defined as material that structurally supports the roadway surface and the uses thereon.

**RESPONSE:** The Chitina Cemetery Road should be described to go to and not through the cemetery. Photos submitted by Carla Hilgendorf indicate something may have driven over what appears to be a grave marker. Although the use and maintenance of the cemetery is minimal, the evidence is clear that the cemetery is currently visited. There are people who visit the graves of loved ones and there are people who intend to be buried there when they die. The cemetery has been actively used since February 1911 and accessed by the Chitina Cemetery Road. Traffic within the cemetery is a matter for whoever maintains the cemetery. Identifying the road as an RS 2477 right of way will not change the road's historic use.

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**COMMENT 4:** In the last ten years the trail has been used regularly yet minimally by 4-wheelers, horses, hikers and snowmachines.

**RESPONSE:** This is consistent with other evidence of the road's historic use.

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**COMMENT 5:** Traffic by vehicles heavier than ATVs and snowmachines could be detrimental to the Chitina Bunkhouse B&B business.

**RESPONSE:** The road has been in place and in use since 1910. The road is visibly obvious even in the old low quality old photos. There is no known reason to think that any owner or potential owner of the bunkhouse would not have known the road was there and that there was a cemetery at the end of it. The railroad constructed the buildings several years after the road and cemetery were constructed and put in use. The owners purchased and developed the property with their eyes open to whatever risk the road may pose to their business and accepted that risk. Further, this owner drives and parks a heavy water tank truck in this roadway directly above the large cache.



*Figure 11: Photograph taken by Kevin Sorensen, DNR PAAD Unit, August 12, 2010. The truck is parked above the large cache.*

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**COMMENT 6:** The State has an obligation to protect the historic buildings.

**RESPONSE:** There does not appear to be a reasonably likelihood that the bunkhouse and messhouse are endangered by the road being used within its historic scope of use. The caches are already seriously deteriorated by the natural rotting of the wood. The larger cache to the north had its roof documented as collapsed in 1992 and that was confirmed in 2010. The collapse is 19 feet from the roadway at an elevation four feet below the roadway. There was no apparent evidence that the road contributed to the collapse or that the collapse has impacted or will impact the roadway or the road prism. On the August 12, 2010 inspection there was a water tank for the bunkhouse setting between the collapse and the roadway. The tank is estimated at five hundred gallons which would put its weight at over two tons. There was no evidence that the water tank was causing any structural breakdown of the cache or the road prism. The deterioration appears to be the natural rotting of the logs for almost one hundred years.



*Figure 12: Photograph by Kevin Sorensen, DNR PAAD Unit, August 12, 2010. Photo taken from the off the roadway. To the left is the water tank. The red building in the background is the Mess Hall and the hole is the collapsed roof of the cache filled with debris.*

The smaller cache has not collapsed, but because of obvious deterioration it is not deemed safe to enter. The nearest portion of the small cache to the roadway is eleven feet. The soils between the cache and the roadway appear on visual inspection to be stable. The caches and the road have co-existed for almost one hundred years and there is no evidence that the road has had a structural adverse affect on the caches. In addition the historic use of the road to access residences and the cemetery pre-date all the historic buildings in question.

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**COMMENT 7:** The caches are unstable and caving in, which could cause an accident with potential injury and damage to the bunkhouse

**RESPONSE:** The on-site inspection revealed that the caches are caving in, but there was no evidence that the caches deterioration has or will impact the road prism so that it would compromise the road surface and cause injury or damage to the bunkhouse. The larger cache is approximately nineteen feet from the roadway. The failure of this cache, given its separation from the roadway and the buildings are not likely to have any impact on the bunkhouse. The smaller cache is approximately 13 feet by 13 feet and within eleven feet of the roadway. There is a good likelihood that the cache is mostly if not entirely in the overburden cast off the roadway and not even in the road prism. In that case the complete structural failure of the cache would not likely have an impact on the road. Even if the deterioration of the caches caused a structural failure of the road prism there is virtually no chance that a vehicle would be in the spot at the time of the occurrence. In addition, if a vehicle was at that spot at the time of the



road prism failure it would not roll to the bunkhouse, but would roll toward the collapsed cache, which is at least twenty-five feet to the north of the bunkhouse and would have some large trees to pass through.

There is no reasonable likelihood that the caches would fail and cause a vehicle on the road to roll into the bunkhouse.

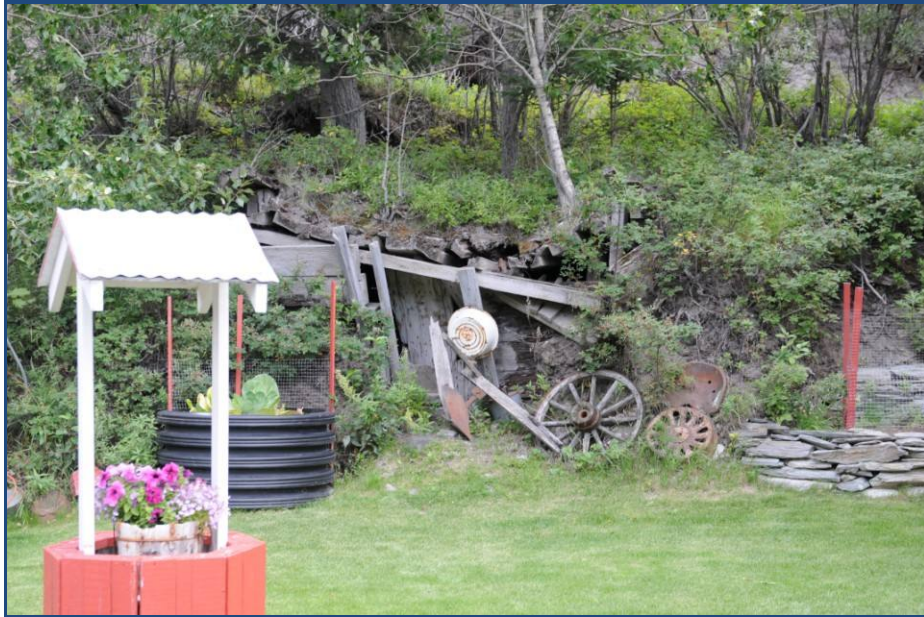


Figure 13: Photograph taken by Kevin Sorensen, DNR PAAD Unit, August 12, 2010.

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**COMMENT 8:** Uninsured drivers could crash into the Bunkhouse and place a financial burden on the Bunkhouse owners.

**RESPONSE:** There would be a much greater likelihood that an uninsured driver would crash into the bunkhouse from the McCarthy Road in the front of the bunkhouse. The traffic on the McCarthy Road would be far more frequent, travel at greater speeds and include much larger vehicles. There is also an earthen berm with heavy vegetation on the downward side of most the road on the stretch along the hill. Whatever the risk that an uninsured driver on the Chitina Cemetery Road will crash into the bunkhouse, the risk is exponentially greater that an uninsured driver from the McCarthy Road will crash into the bunkhouse. The fact that there is no evidence in the last one hundred years that vehicles crash into the bunkhouse indicates that the likelihood of that occurring is very small. The likelihood that a vehicle from the Cemetery Road would crash into the bunkhouse is even smaller. Presumably whatever protections the bunkhouse owner takes to financially protect themselves from an uninsured driver crashing into their building from the McCarthy Road will cover them for the Cemetery Road.

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**COMMENT 9:** Interested in buying a lot that would be accessed by the Chitina Cemetery Road.

**RESPONSE:** By claiming this RS 2477 right of way the State of Alaska is not committing to additional road maintenance or improvements.

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**COMMENT 10:** Supports the validity of the RS 2477 right of way for the Chitina Cemetery Road.

**RESPONSE:** No Response needed

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**COMMENT 11:** James A. Hatch (1/23/12-5/25/93) was buried in the Chitina Cemetery on May 30, 1993. Eighteen cars and trucks used the road to go to the cemetery for a graveside service.

**RESPONSE:** No Response needed



Figure 14: Photographs taken by Kevin Sorensen, DNR PAAD Unit, August 12, 2010. A sample of other recent burials.

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**COMMENT 12:** Intends to drive up anytime to visit husband's gravesite.

**RESPONSE:** Access to the cemetery by car or truck (particularly non four-wheel drive) is questionable during certain times and conditions. The State does not and likely will not plow the road during the

winter. A portion of the upper road just past the houses appeared to be steep and narrow<sup>2</sup>. It could be difficult for non-four wheel drive vehicles to access the cemetery in winter conditions. There is no evidence that the road has a history of being publically maintained. The public should not expect that the State will provide maintenance or improvements so that people can access the cemetery at all times.



Figure 15: Photograph by David W. Schade, DNR PAAD Unit, September 16, 2010. The road is currently blocked so that only a pedestrian could use the road and prosecution for trespass is threatened.

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**COMMENT 13:** The road should not be closed.

**RESPONSE:** No Response needed

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**COMMENT 14:** MaryAnn Ammi lived at the residence on Lot 8 and 9 Block 6 intermittently from before 1988 until her death. When she moved in the place was heated by oil which was trucked to the residence and stored in a 300-500 gallon storage tank in the yard. There was also a gasoline storage tank in the yard. The fuel was delivered by delivery truck. MaryAnn Ammi accessed the property by car.

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<sup>2</sup> These conditions are not so severe as to restrict most any passenger vehicle in good conditions. The August 12, 2010 inspection showed that the road would be passable for most vehicles even after a very rainy month.

**RESPONSE:** There does not appear to be any other way to access the property by fuel truck other than by the Chitina Cemetery Road.



*Figure 16: Photograph by Kevin Sorensen, DNR PAAD Unit, January 21, 2010. Jason Cheney, ADF&G in foreground. Photo of the residential structures on Ammi property, Lots 8-10, Block 6.*



*Figure 17: Photograph by Kevin Sorensen, DNR PAAD Unit, January 21, 2010. This abandon dwelling appears to be in the vicinity of the easterly common lot corner to Lots 7 and 8 Block 6. When it was constructed and when it was abandoned are not known at the time of this report.*

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**COMMENT 15:** MaryAnn Ammi's sister is her successor in interest and would like to move into the residence if there is access.

**RESPONSE:** No response needed.

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**COMMENT 16:** The residence is served by overhead electrical power and buried telephone lines.

**RESPONSE:** This is visibly confirmed by photos taken on site visit January 21, 2010 and again August 12, 2010. There are two electric poles along the road where the road makes its first turn just before the Ammi residence. The electric distribution lines come from the east, then turn to the north roughly paralleling the cemetery road, and then turn west towards Chitina. The Chitina Cemetery Road appears to be the only service access to the electric distribution lines.



*Figure 18: White lines delineate the overhead electric lines. Photo courtesy of Judy Block. Origin is unknown. Note the residential structures where the road bends after climbing the hill. These would be the Ammi property.*

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**COMMENT 17:** The Chitina Fire Department needs the access available to fight potential wildfires and structure fires. Response time delay could be the difference between a minor event and a major one.

**RESPONSE:** There are structures accessible only by the cemetery road. As for fighting wildfires, since the comment came from the Fire Chief, we will presume that information is accurate.

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**COMMENT 18:** The Chitina Fire Department has used the road since the early 1900's.

**RESPONSE:** No detail of the historic use by the fire department was provided.

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**COMMENT 19:** Rita Hatch intends to be buried in the Chitina Cemetery.

**RESPONSE:** No Response Needed

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**COMMENT 20:** Property owner in Chitina Townsite has been approached by GCI for a tower location which would increase the cell phone and internet coverage and improve emergency services.

**RESPONSE:** This is not relevant to whether or not the road qualifies as a valid RS 2477 right of way or to its historic scope of use.

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**COMMENT 21:** Personal knowledge of the following uses of the Chitina Cemetery Road since 1966: hunting, outings/camping, accessing cemetery, wood cutting for heating, access to private lots, berry and herbal plant gathering, photography, fuel delivery (heating oil, propane and bulk gasoline), electric and phone facilities and access for home and forest fires.

**RESPONSE:** Comment is consistent with other information.

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**COMMENT 22:** Father-in-law is buried in cemetery.

**RESPONSE:** No Response Needed

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**COMMENT 23:** Dan and Val Boone intend to be buried in the Chitina Cemetery.

**RESPONSE:** No Response Needed

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**COMMENT 24:** Cannot climb the hill to visit cemetery because of health issues.

**RESPONSE:** No Response Needed

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**COMMENT 25:** Many residents intend to be buried in the Chitina Cemetery

**RESPONSE:** No Response Needed

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**COMMENT 26:** A one hundred foot right of way will use up most of my land.

**RESPONSE:** See discussion above regarding width in [Evaluation of the Standard for Determining Width By Establishing the Date of Segregation.](#)

**COMMENT 27:** The cemetery road should be required to follow the platted rights of way.

**RESPONSE:** The rights of way in the Chitina Townsite were dedicated in 1919 when the plat was recorded. The grant for the Chitina Cemetery Road was accepted by construction and use no later than February 15, 1911. The fact that the subdivider overlaid a plat over the existing RS 2477 right of way is immaterial as to the legal validity of the Chitina Cemetery Road. The Katella Company received the property subject to that valid existing right.

It is possible to adjust the alignment of an RS 2477 right of way. However, in this case the topography and economics of the area at this time make that option unfeasible. An inspection of the area indicates that the builders of the road looked at the conditions on the ground and built the road in the logical place. The designer of the townsite was probably looking at the top of his desk in his New York office when he designed the Chitina Townsite.

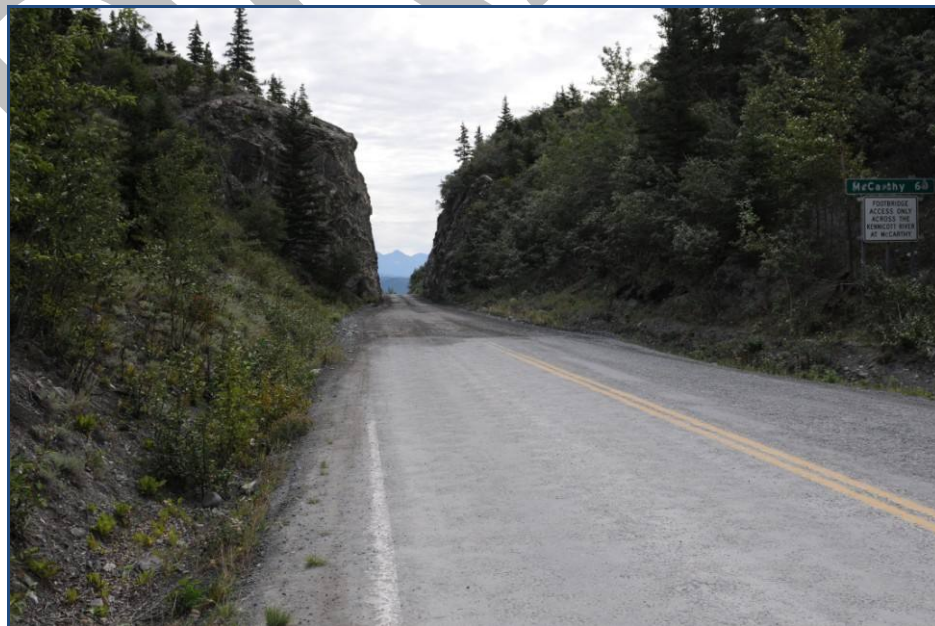


Figure 19: Photograph by Kevin Sorensen, DNR PAD Unit, August 12, 2010. Taken from where the Chitina Cemetery Road starts and looking east up the McCarthy Road. The Chitina Townsite is to the left. There are four platted rights of way that are perpendicular to the McCarthy Road in this view.

## FINDING OF FACTS

The department has considered all the evidence provided and finds the following significant facts:

- 1.) The Chitina Cemetery and the Chitina Cemetery Road are completely contained within that portion of US Survey 596 in Section 13, Township 4 South, Range 5 East, Copper River Meridian.

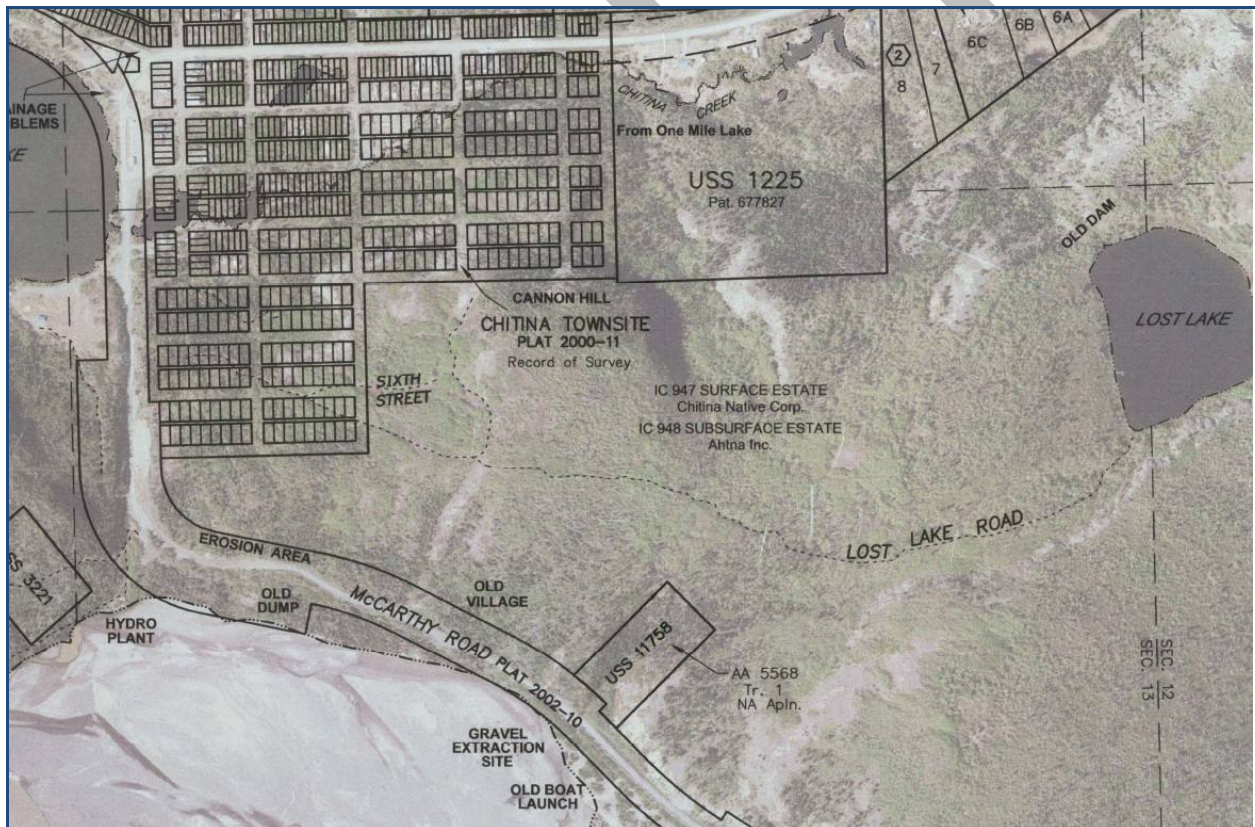


Figure 2: A portion of Area Use Map CHITINA, date unknown. North is to the right.

- 2.) On February 15, 1911 the Chitina Cemetery was in use and was accessed by the Chitina Cemetery Road which was evidenced by the documented funeral procession that accessed the cemetery for the interment of Marie Sherman.



The funeral took place on Wednesday afternoon at 3 o'clock, and the remains was the first to be interred in the new cemetery site on the hill overlooking the great Copper River. Perry Gibson officiated at the funeral, while six members of the Fraternal Order of Eagles, of which Mr. Sherman is a past worthy president, acted as pallbearers. A large funeral procession paid their last sad respects to the dead, and Mr. Sherman has the deep sympathy of all in his bereavement.

Figure 3: Excerpt from Chitina Leader February 18, 1911

- 3.) On February 15, 1911 US Survey 596 was federally-owned and was not appropriated or reserved for a public use.
- 4.) The Chitina Cemetery has been continually in use from February 15, 1911 to today and has been accessed by the Chitina Cemetery Road.
- 5.) On July 13, 1912 the Katella Company, filed for a soldier's additional homestead on US Survey 596 (159.98 acres).

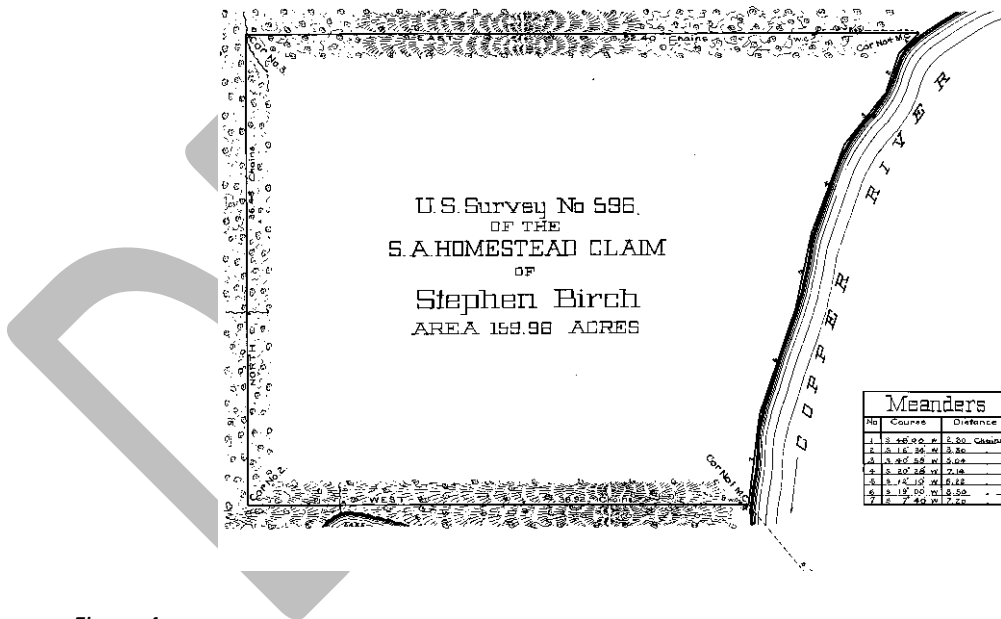


Figure 4

- 6.) On March 15, 1915 the Katella Company filed the amended US Survey 596 which was entirely contained within US Survey 596 (80.98 acres).

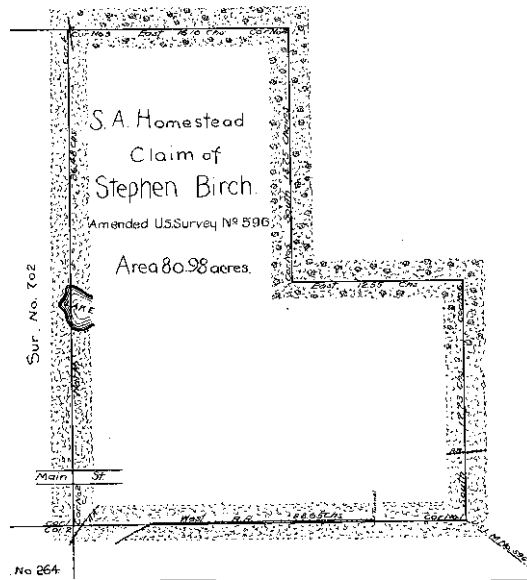


Figure 5

- 7.) The Chitina Cemetery and about three hundred feet of the Chitina Cemetery Road are not within amended US Survey 596
- 8.) On May 3, 1916 a patent was issued to the Katella Company for amended US Survey 596 (Patent No. 527307).
- 9.) On September 28, 1984 the United States conveyed lands to the Chitina Native Village (Interim Conveyance No. 947). The intent appears to be to convey the remainder of US Survey 596 though that is not the express declaration.
- 10.) On September 8, 1919 the Chitina Townsite plat was recorded on behalf of the Alaska Development and Mineral Company, a New York corporation.
- 11.) People have expressed the desire that they or their loved ones be buried in the Chitina Cemetery and to visit one of at least twenty-seven graves in the Chitina Cemetery.
- 12.) The Chitina Cemetery is on land that the United States appears to have intended to convey to the Chitina Native Village and the State of Alaska is not asserting ownership of the Chitina Cemetery based on its RS 2477 right of way claim.

T. 4 S., R. 5 E. (Unsurveyed)  
Sec. 1, excluding the Copper River;  
Sec. 2, excluding U.S. Survey No. 1506;  
Secs. 3 to 10, inclusive;  
Sec. 11, excluding U.S. Survey No. 1506 and U.S.  
Survey No. 1875;  
Sec. 12, excluding the Copper River;  
Sec. 13, excluding U.S. Survey No. 596, U.S. Survey  
No. 1225, U.S. Survey No. 3221, Native allotment  
AA-5568 Tract 1 and the Copper River;

Figure 6: Excerpt from Interim Conveyance 947.

- 13.) Prior to 1976 there was residential use along the Chitina Cemetery Road and the road was the only vehicular access to those residential properties.



Figure 7: Photograph taken between 1912 and 1919 shows depot is in foreground, Chitina Hotel to the left, bunkhouse to the right, Chitina Cemetery Road in center and residential dwellings above. Photo curtesy of Judy Block, origin unknown.

- 14.) The Chitina Cemetery Road crosses over privately owned lots in the Chitina Townsite and land in US Survey 596 that is outside of amended US Survey 596 as well as undeveloped dedicated public rights of way.
- 15.) The Chitina Cemetery Road is in close proximity, and has been for approximately one hundred years, to structures which were listed on the National Historic Register on December 5, 2002, which includes the former Copper River & Northwestern Railway bunkhouse.



Figure 8: A portion of 1974 aerial photograph with the rights of way and blocks of Chitina Townsite overlain. Taken from *Community Map*, prepared by Arctic Environmental Information and Data Center, University of Alaska, 1977.

- 16.) The Chitina Cemetery Road was constructed before the Copper River & Northwestern Railway bunkhouse was constructed.



Figure 9: Photo courtesy of Judy Block. Origin is unknown. Railroad depot at left was constructed after the Chitina Cemetery Road was constructed according to other photography. A photo dated March 1, 1912 has depot and road, but not bunkhouse. Note: residence on hill

- 17.) There is no evidence that use of the Chitina Cemetery Road has structurally damaged any of the historical structures or that the historical structures have structurally damaged the road.

### Evaluation of the Standard for Determining Width By Establishing the Date of Segregation

AS 19.10.015 specifies that highways on public land not reserved for public uses are 100 feet wide. This statute was passed in 1963 by the Alaska State Legislature. In 1923 the Territorial Legislature set the width of 66 feet for highways at section lines. In 1917 the Territorial Legislature set the width of all roads and trails constructed and maintained by the Territorial Board of Road Commissioners to be 60 feet. The question of whether any of these widths apply will be dependant on when the offer was accepted by construction and use and when the offer was withdrawn.

The offer was accepted by construction and use by no later than February 15, 1911 and remained open until US Survey 596 was reserved for a public purpose which occurred no later than May 3, 1916

The question about when the land was no longer unreserved is dependant on some of the unique features of the soldier's additional homestead which has significant differences from an ordinary homestead. The soldier's additional homestead was a gratuity the U. S. Congress granted the veterans of the "war of the rebellion" for services already rendered. See 43 U.S.C. 274. It allowed the veterans of the Civil War to augment their homestead rights if they had not acquired the full 160 acres under the Homestead Act. There was no requirement to set up residence on or to improve the property. In fact no physical presence of any kind was required. The lands did not have to be continuous to those originally entered. The veteran's rights would vest to his widow or children and were an assignable property right that was not to have its alienation constrained. The entry occurred when the veteran, his successor or his assignee filed a qualifying claim. Until a qualifying claim had been filed, the land in question was unreserved. See Robinson v. Lundrigan, 227 U. S. 173, 33 S. Ct. 225, 57 L.Ed 468 (U.S. Supreme Ct. 1913); Webster v. Luther, 163 U.S. 331, 16 S. Ct 963, 41 L. Ed. 179 (U.S. Supreme Ct. 1896); United States v. Poland, 251 U.S. 221, (U. S. Supreme Ct. 1920); Anderson v. Clune, 26 U.S. 140, 46 S.Ct. 69, 70 L.Ed. 200.

The property is segregated and reserved after the holder of the soldier's rights files an application and there has been a classification decision. Simply filing is not sufficient. See Kale v. United States, 489 F.2d 449 (Ninth Cir. 1973)

In this case the Katella Corporation filed for the soldiers additional homestead in 1912 using the assigned rights of five different veterans, three of whom were deceased. Presumably they purchased those rights because a corporation would not have veteran rights on its own. They may have purchased those rights from owners who had never been to Alaska since it is a property right that is without restriction on alienation. In 1914 US Survey 596 was amended to reduce the size to 80.98 acres. The rights of two of the assignors were dropped. The notes are not clear, but it seems very likely that the two did not qualify for some reason. On March 15, 1915, the Katella Corporation provided the amended US Survey 596 with the field notes. On May 3, 1916 the patent was issued for amended US Survey 596..

The question of the precise date that the lands in amended US Survey 596 were segregated is immaterial in this case. The date of segregation would be sometime between the filing date (July 13, 1912) and the patent date (May 3, 1916). Any time in this timeframe would have the offer to grant closed as to the lands in amended US Survey 596 before any of the legislative actions above that would mandate the width of the right of way. The grant would have been made and subsequent action by any entity other than the servient property owner can not enlarge that grant.

The standard for that portion located in amended US Survey 596 that should be used for the width of the road is that width that is reasonably necessary given the traffic volume, anticipated use in the reasonably near future and the historic uses of the road. See Clark v. Taylor, 9 Alaska 298 (D. Alaska Terr. 1938) Regardless of the width, the right of way is a right to use and not a possessory interest. Fee title remains with the servient estate owner who may use the servient estate in any otherwise permissible manner that does not interfere with the uses allowed by the right of way grant.

Considerations for the width include that the use has been infrequent and a single lane. The use has been subject to the conditions of the road and it has not had official maintenance. The roadway is approximately 9 feet wide. Because of the terrain the right of way requirement must consider the ability to maintain the integrity of the road. Just because there does not appear that there has been official maintenance of the road in the past, does not mean that sufficient room for maintenance is not necessary. For example, the owner of residences may need to clear snow to access their property or a funeral may occur in the winter that would require winter maintenance to allow a funeral procession.

For that portion of Chitina Cemetery Road that is outside of amended US Survey 596 which was not conveyed before 1963 the standard would be different than that land within amended US Survey 596 which was conveyed on May 3, 1916. That land was unreserved until after the Alaska Legislature passed AS 19.10.015, so that statute would apply to those lands.

## DISCUSSION

The department has not received any comments that challenge the legal validity of the Chitina Cemetery Road's status as a valid RS 2477 right of way. More particularly that there is no contrary evidence or challenge to evidence presented that the public accepted the Chitina Cemetery Road by construction and use while the lands were not reserved for another public purpose.

## DECISION

**THE GRANT:** Amended U.S. Survey 596 was segregated no earlier than July 13, 1912 and no later than May 3, 1916 when the Soldier's Additional Homestead was classified. That portion of US Survey 596 not in amended US Survey 596 was unreserved until RS 2477 was repealed in 1976. Documentation in the file proves that Chitina Cemetery Road was constructed in 1910 and was used as the access for the Cemetery by no later than February 15, 1911. The grant of the RS 2477 right of way for Chitina Cemetery Road was accepted by construction and use when the land was not reserved for another public purpose.

The State of Alaska does adopt the finding of facts contained herein and identifies the public's acceptance of the grant of the Chitina Cemetery Road as described herein by construction and use

**LOCATION:** The Chitina Cemetery Road shall begin at the McCarthy Road right of way and follow the existing route to the Chitina Cemetery.

**WIDTH:** The right of way shall be twenty-five feet wide centered on the road as constructed, for that portion of the right of way in lands that were in amended US Survey 596. An additional ten feet shall be added in that portion beginning at the McCarthy Road right of way and ending at the lot line common to Lot 4 and 7 Block 6 Chitina Townsite. The right of way on lands not within lands that were in amended US Survey 596 shall be one hundred feet wide.

**THE SCOPE OF USE:** Continuation of the historic uses on the road would include pedestrians, small off-road recreational vehicles, passenger street vehicles and other street vehicles of a moderate size such as delivery trucks, service vehicles emergency response vehicles and maintenance vehicles.

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SIGNED

DATE

**APPEAL or REQUEST FOR RECONSIDERATION**

An appeal or request for reconsideration of this decision must be timely filed in accordance with 11 AAC 02, to Tom Irwin, Commissioner, Department of Natural Resources, 550 W. 7<sup>th</sup> Avenue, Suite 1400, Anchorage, Alaska 99501-3561. Any appeal must be received at the above address, received by email to [dnrappeals@alaska.gov](mailto:dnrappeals@alaska.gov) or received by fax to 1-907-269-8918, within 20 calendar days after the date of “issuance of the decision”, as defined in 11 AAC 02.040. If no appeal or request for reconsideration is filed before the end of the period specified in 11 AAC 02.040, this decision then goes into effect.