

# MEMORANDUM

## State of Alaska Department of Law

**TO:** John F. Bennett, PLS, SR/WA  
Chief, Right-of-Way  
DOT&PF, Northern Region

**DATE:** May 17, 2002

**FILE NO:** 665-01-0015

**TEL. NO.:** 451-2811

**FROM:** Paul R. Lyle  
Assistant Attorney General

**SUBJECT:** Right-of-Way Width for  
the McCarthy Road

You have requested our opinion as to the width of the right-of-way for the Chitina to McCarthy road ("McCarthy road") which lies between the Copper and the Kennecott Rivers. The width of the small portion of the McCarthy road to the west of the Copper River and the width of the McCarthy road where it traverses the McCarthy West Subdivision will be addressed in future memoranda.

### Summary of Advice

The right-of-way for that portion of the McCarthy road lying between the Copper and Kennecott Rivers (excluding the portion of the road that traverses the McCarthy West Subdivision) is 100 feet wide, 50 feet on either side of the roadway centerline.

### Factual Background

The history of the McCarthy road is closely linked with the history of the Copper River and Northwestern Railway. The Copper River Highway and the McCarthy road are located within the original railroad right-of-way. The history of the McCarthy road was reviewed in a published opinion of the Department of Law, which provides:

The Copper River Railroad, which was completed in 1911, started from Cordova and ran 30 miles in an easterly direction to the mouth of the Copper River and then along the Copper River for about 100 miles to Chitna [sic]. From Chitna, it ran easterly along the Chitna River for approximately 65 miles, through the Village of McCarthy, and on to Kennecott, the northern terminus of the line. See Opinion of Interstate Commerce Commission, Finance Docket No. 12164, Copper River and Northwestern Railway Company Abandonment, (April 21, 1939) at pp. 1 through 3.

The original right-of-way for the construction of the railroad was acquired by the Copper River and Northwestern Railway Company under the Act of May 14, 1898, ch. 299, 30 Stat. 409 (1898). The width of this right-of-way was 100 feet on either side of the centerline of the railroad.

The Copper River Railroad continued in operation as a railroad until 1939. On September 13, 1938, the Copper River and Northwestern Railway Company applied for permission from the ICC to abandon the operation of the entire railroad line extending from Cordova to Kennecott, a distance of approximately 195.2 miles. On April 21, 1939, the ICC granted the railroad's request.

The abandonment of the operation of the Copper River Railroad by its owners created a legal problem. What was to become of the 200-foot railroad right-of-way? Under the terms of the Act of March 8, 1922, Pub. L. 163, ch. 94, 42 Stat. 414 (1922), upon the voluntary relinquishment of the railroad right-of-way by the Copper River and Northwestern Railway Company, all right, title, and interest of the United States in the right-of-way would vest in the patentees to lands over which the railroad passed, where such patentees took their patents prior to the voluntary relinquishment. Because it was thought that there was significant public interest in maintaining a highway right-of-way along the route of the railroad right-of-way, Congress enacted the Act of July 15, 1941, Pub. L. 176, ch. 300, 55 Stat. 594 (1941). This Act authorized the Copper River and Northwestern Railway Company to convey to the United States the following:

- (1) all or any portion of its railroad right-of-way acquired under grants made by Congress or otherwise, including station and terminal grounds and lands used as sites for railroad structures or purposes of any kind, and (2) equipment, including telephone and telegraph poles and lines, ties, rails, rolling stock, bridges, buildings, and other properties in Alaska used in connection with the construction, maintenance, and operation of the railroad.

Act of July 15, 1941, 55 Stat. 594 (1941). The Act also authorized the Secretary of Interior, on behalf of the United States, to accept such a conveyance from the railroad company and further instructed the Secretary of Interior that the properties conveyed were

to be used, operated and maintained as far as may be practicable or necessary, as a public highway, tram road,[\*<sup>1</sup>] or tramway under the provisions of the Act of June 30, 1932 (17 Stat. 446), notwithstanding any Act to the contrary.

Act of July 15, 1941, 55 Stat. 594 (1941).

On March 29, 1945, the Copper River and Northwestern Railway Company, in a relinquishment document, formerly [sic] relinquished all of its interest in the original railroad right-of-way, including terminal and station grounds. On May 11, 1945, the railroad's relinquishment was accepted by the Department of Interior.[\*<sup>2</sup>]

As 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 provisions of the Act of July 15, 1941, i.e., that the right-of-way be used, as far as practicable, as a public highway.<sup>1</sup>

...

At the time of the original application for abandonment of the railroad, i.e., September 13, 1938, the Alaska Road Commission recommended that it take immediate steps to maintain the railroad between McCarthy and Chitna and operate it by means of light equipment. The 1939 Report of the Alaska Road Commission, at p. 8, shows the Chitna-McCarthy Road as part of the existing road system for which work was scheduled during the fiscal year ending June 31, 1941.

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<sup>1</sup> The requirement of the Act of July 15, 1941, that the right-of-way be used as a public highway operated as a dedication of the original right-of-way for use as a public highway. See 23 Am. Jur. 2d Dedication (1983).

1989 Inf. Op. Att'y Gen. (Apr. 18; 663-89-0162)(reprinted for publication July 1, 1989)(citations to attached documents omitted)(emphasis in original).

Our 1989 opinion reasoned that the Act of 1941 constituted a congressional dedication of the original 200-foot right-of-way to highway uses and concluded that the Copper River Highway is impressed with the full 200-foot railroad right-of-way. *Id.* at 3-

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[\*<sup>1</sup>] A "tramroad" or "tramway" is comprised of parallel tracks over which automobile-style vehicles fitted with flanged (railroad-type) wheels may travel. These vehicles are sometimes referred to as "speeders."

[\*<sup>2</sup>] The BLM decision accepting the relinquishment also canceled "the easements for the railroad rights-of-way . . . ." General Land Office Decision No. 1906338 "F" (May 11, 1945).

4 and n. 1 & n. 2. The opinion also concluded that the width of the Copper River Highway right-of-way was unaffected by subsequently issued Public Land Order 601 (PLO 601) and Departmental Order 2665 (DO 2665)<sup>3</sup> and remained 200 feet wide along its entire length after issuance of those orders. *Id.* at 5. However, we concluded that Amendment No. 2 to DO 2665, issued on September 15, 1956, was effective to expand the right-of-way of the Copper River Highway from 200 feet to 300 feet where it crossed lands that were unappropriated federal public lands as of that date. *Id.* at 4 n. 2, 5.

We re-affirm the accuracy of the history of the Copper River Railway right-of-way as summarized in our 1989 opinion and our conclusion that the Copper River Railway right-of-way was congressionally dedicated to highway use by the Act of 1941. However, we clarify our 1989 opinion to the extent that its conclusions concerning the 200-foot width of the Copper River Highway could be construed as being applicable to the McCarthy road.<sup>4</sup>

We conclude that the McCarthy road is an entirely separate road from the Copper River Highway and is impressed with a 100-foot wide easement centered on the roadway centerline.

## LEGAL ANALYSIS

### A. The McCarthy road was established by congressional dedication.

In our opinion, the McCarthy road was established as a tram road by congressional dedication of the Copper River Railway right-of-way under the Act of 1941, described above. The provisions of the 1941 Act, its legislative history, the interpretative principles applicable to congressional grants and the contemporaneous actions of the Alaska Road Commission support this conclusion.

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<sup>3</sup> PLO 601 and DO 2665 were issued by the Secretary of the Interior in 1949 and 1951, respectively. These orders set the width of public roads in Alaska. *See infra* at 9.

<sup>4</sup> This memorandum of advice does **not** address the right-of-way width of the Copper River Highway running between Cordova and Chitina along the former railroad right-of-way. Nothing in this opinion should be construed as affecting or modifying our 1989 conclusion that the width of the Copper River Highway between Cordova and Chitina is between 200 feet and 300 feet wide. 1989 Op. Att’y Gen. at 5; DO 2665, Amendment No. 2. (September 15, 1956); *Ahtna et.al. v. State*, Case No. 3AN-91-6957 Civil, *Order on Motion for Partial Summary Judgment*, entered April 3, 1992 (holding that the state owns a 300-foot right-of-way for the Copper River Highway between Cordova and Chitina where it crosses lands owned by Ahtna, Inc. and Chitina Native Corporation. These lands are described in the complaint as T. 4 S., R. 5 E.; T. 5 S., R. 5 E.; and T. 6 S., R. 4 E., CRM).

In construing the Act of 1941, we are guided by a longstanding interpretive principle applicable to congressional grants set out in *Missouri, Kansas and Texas Railway Co. v. Kansas Pacific Railway Co.*, 97 U.S. 491, 497 (1878):

It is always to be borne in mind in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties.

Under this interpretive principle, the 1941 Act did not have to use the word “dedicate” in order to effect a dedication of the railroad right-of-way to highway uses. Other federal statutes have been interpreted as constituting an offer of dedication or a direct dedication even though the word “dedicate” was absent from the legislation. For example, R.S. 2477, 43 U.S.C. § 932, *repealed with a savings provision*, Pub.L. No. 94-579, 90 Stat. 2793 (1976), has long been interpreted as an “offer to dedicate” public land to highway use even though the word “dedicate” is not used in the statute. *Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410, 413 (Alaska 1985); *Brice v. State*, 669 P.2d 1311, 1314 (Alaska 1983); *Lovelace v. Hightower*, 168 P.2d 864, 866 (N.M. 1946). In *Cook v. City of Burlington*, 30 Iowa 94, 1870 WL 317 at \*2 (1870), the Iowa Supreme Court held that a congressional act that merely “reserved [specifically identified federal public land] from sale . . . for public use . . . as public highways” constituted a dedication of that public land to highway uses.

We conclude that the language of the 1941 Act is a congressional dedication of the former railroad right-of-way to highway uses. Section 2 of the 1941 Act expressly required the Secretary to use the right-of-way as a highway or tram road. The need to convert the Chitina-McCarthy branch of the railroad to a tram road was recognized in the 1939 ICC decision allowing the railway’s abandonment.

The village of McCarthy, the only other community of importance in the tributary territory, is 60 miles east of Chitina, near the northern terminus of the line. It would have neither highway nor rail communication if the railroad were abandoned. Accordingly the applicant proposes to leave its railroad intact between McCarthy and Chitina to enable shippers to handle light freight and passengers thereover by means of automobiles fitted with flanged wheels or by any other means suitable to their convenience. The superintendent of highways in the Chitina district, whose work is under the supervision of the Alaska Road Commission, hereinafter called the road commission, testified that he made a study of the transportation problems in that district and afterwards recommended that the road commission take

immediate steps to maintain the railroad between McCarthy and Chitina and operate it by means of light equipment. The road commission has purchased a so-called speeder and some push cars for the purpose of experimenting with that method of transportation.

Opinion No. 12164 at 3. Furthermore, a letter from the Acting Secretary of the Interior, which accompanied the initial version of the 1941 Act, stated that:

Upon the conveyance of this right-of-way by the company to the United States, it is planned to utilize as a tramway that portion extending from the Copper River Crossing to McCarthy. The length of this portion of the right-of-way is approximately 60 miles. . . . The area which would be served by the combined highway-tramway running from Chitina to Kennecott is of great scenic attraction and is also the location of a number of operating mines. **It is considered essential that the proposed transportation facilities be provided.**

S. REP. No. 77-375, at 2 (emphasis added).

Section 3 of the 1941 Act exempted the relinquishment of the right-of-way from the provisions of the Act of 1922 (42 Stat. 414). The Act of 1922 provided that title to land within a relinquished railroad right-of-way would vest in the patentees of adjoining land crossed by the right-of-way unless a highway was located within the railroad grade prior to relinquishment. S. REP. No. 77-375, at 2, 4. The Secretary was concerned that a tram road would not fall within the definition of a “highway.” *Id.* at 2. Therefore, section 3 of the 1941 Act exempted the entire Copper River Railway right-of-way and all associated lands and structures from the vesting provisions of the Act of 1922 in order to remove any doubt as to the status of the railroad right-of-way following relinquishment. The Secretary stated that his purpose in recommending the exemption of the Copper River Railway relinquishment from the Act of 1922 was to prevent “**any portion**” of the right-of-way from vesting in adjacent patentees and

to avoid the necessity and cost of acquiring, for the [highway] purposes contemplated, portions of the right-of-way from the municipalities and patentees in whom title to such portions would otherwise vest.

S. REP. No. 77-375, at 2 (emphasis added). The Senate committee report succinctly stated that:

The purpose of section 3 is to insure the possession of the United States of the property so to be acquired for use for public highway purposes.

*Id.* at 4.

In addition, Congress used terms of conveyance to describe the contemplated land transaction authorized under the 1941 Act. Section 1 of the Act authorized the railway to “give and convey” its right-of-way and equipment to the United States. Section 2 of the Act authorized the Secretary to “accept” the “gift and conveyances” for highway purposes. The conveyance of the right-of-way was made by a “relinquishment” specifically describing the right-of-way. That relinquishment was expressly “accepted” by the Secretary in a May 11, 1945 General Land Office decision. Further additional evidence of the intention to dedicate the entire width of the railroad right-of-way to highway use is found in the congressional refusal to grant the Secretary authority to convey any portion of the right-of-way out of federal ownership in the absence of future special legislation. S. REP. No. 77-375, at 3.

The actions of the Alaska Road Commission lend further support to our conclusion that Congress intended to dedicate the Chitina-McCarthy branch line to public highway use. The Commission asserted its authority over the McCarthy road almost immediately after the ICC permitted abandonment of the railroad on April 21, 1939. The 1940 Alaska Road Commission Report, which records activity of the Commission from July 1, 1939 to June 30, 1940, states that:

Maintenance of 60 miles of the abandoned Copper River and Northwestern Railway, between Chitina and McCarthy, was assumed and this track is now used as a tram road.

1940 ARC Report, at 7-8.<sup>5</sup> The Commission actively maintained the McCarthy tram road and reflected it on its system mileage until June 30, 1946.<sup>6</sup> The 1948 ARC report indicates that the Commission expended maintenance funds on the road that year. 1948 ARC Report, at 28. In 1954, the Commission inaugurated surveys and investigations to convert the tram road to a highway and investigated the soils to construct a bridge over

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<sup>5</sup> The 1940 report also indicates a 60-mile increase in tram road mileage maintained by the Commission, from 80.25 miles in the previous fiscal year to 139.25 miles as of June 30, 1940. The 60-mile increase in the 1940 report reflects the addition of the McCarthy tram road to the system mileage in the 1939-40 federal fiscal year. Compare 1939 ARC Report, at 7 with 1940 ARC Report, at 8.

<sup>6</sup> The 1947 ARC Report reduced the tram road system mileage back to the 1939 mileage of 80.25 miles. 1947 ARC Report, 8. The local road listing for the “McCarthy Tram and Road System” was also reduced from 90 miles (60 miles of tram and approximately 30 miles of local roads in McCarthy) to 31 miles in 1947, thus reflecting maintenance of only the local roads within McCarthy and its environs. 1947 ARC Report, 8.

the Copper River at Chitina to link up with the McCarthy road. 1954 ARC Report, at 16-17.

Although the Road Commission may have ceased active maintenance of the McCarthy road between 1946 and 1948, there is substantial evidence of continued use of the road from 1939-40 to the present. Buzzell and McMahan, *McCarthy Road Cultural Resources Reconnaissance Survey, 1994-1995*, at 30-37 (December 1995) and sources cited therein. The Buzzell report includes circa 1950's photographs of speeders and push cars in actual use and the aerial tram used to ferry supplies across the Copper River. *Id.* at 31-32. The McCarthy road was converted in stages from a tram road to a standard road from the mid-1950s to 1963. The rails were pulled up between Long Lake and McCarthy in the middle and late 1950s. The remaining rails between Chitina and Long Lake were pulled up and a road established from 1961 to 1963 by a contractor under contract with the State. *Id.* at 34; *See also, Chitina-McCarthy Highway, Final Environmental Impact Statement, Project S-0850(4)*, pp. 5-6 (Alaska DOT&PF 1974).

In our opinion, the language of the 1941 Act and its legislative history evidences a congressional intention to dedicate the entire width of the Copper River Railway right-of-way for highway purposes for the McCarthy road and to ensure that no portion of the right-of-way vested in adjoining patentees as a result of the railway's relinquishment.<sup>7</sup>

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<sup>7</sup> The railroad grade was relinquished to the Secretary in March 1945 and was accepted by the General Land Office in May 1945, as stated above. The decision accepting the relinquishment cancelled the easements for the railroad rights-of-way, terminal and station grounds. General Land Office Decision (May 11, 1945). The cancellation removed the railroad right-of-way from the public land plats. However, since the purpose of the 1941 Act was to convert the former Chitina to McCarthy branch line to a tram road, and to prevent the land from reverting to the ownership of adjacent landowners, we conclude that the legal effect of this cancellation was to remove railway uses from the land embraced within the former railroad right-of-way and to leave that right-of-way fully intact for highway uses. In other words, the 1945 cancellation of the railroad right-of-way neither constituted a cancellation of the congressional dedication of the right-of-way for highway purposes under the Act of 1941 nor diminished the 200-foot width of the right-of-way for highway purposes. Any other conclusion as to the legal effect of the cancellation is inconsistent with the stated purpose of the Act of 1941 and the clear intent of Congress to preserve the right-of-way for highway uses to the extent necessary.

Moreover, to interpret the 1945 cancellation as entirely extinguishing the right-of-way would create a violation of the Property Clause of the U.S. Constitution. The Property Clause grants exclusive authority to Congress to dispose of public lands, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917), and prohibits both the courts and executive branch agencies from disposing of public lands contrary to an Act of Congress.

The only logical conclusion that can be drawn from the fact that Congress did not set a specific width for the right-of-way in the 1941 Act is that Congress knew the right-of-way was 200 feet wide under the Act of 1898 and intended the full width of the right-of-way to remain intact, at least for the time being.

However, as explained below, Congress also vested the Secretary of the Interior with the authority to alter the width of the right-of-way to the extent he deemed it advisable to do so in the future. Act of 1941 § 2.

**B. The McCarthy road is 100 feet wide, 50 feet on either side of centerline.**

The width of the McCarthy road has been a point of contention for some time. The issue is whether the road is 100 feet wide as a “local road” under PLO 601 and DO 2665, 200 feet wide under the original railroad right-of-way or the congressional dedication contained in the Act of 1941, or 300 feet wide under Amendment No. 2 to DO 2665 under the theory that the McCarthy road is a segment of the Copper River Highway. After considerable investigation, it is our opinion that the McCarthy road is generally 100 feet wide, 50 feet on either side of centerline.

**1. PLO 601 and DO 2665 apply to the McCarthy road.**

Under the Act of June 30, 1932 (47 Stat. 446), the Alaska Road Commission was transferred from the Department of War to the Department of the Interior (“Interior”) Interior expended funds to establish and maintain the McCarthy road in 1939-40 and exercised jurisdiction over it until 1956, when administrative authority for the road was transferred to the Department of Commerce, Bureau of Public Roads (BPR) under the Federal-Aid Highway Act of 1956. 70 Stat. 374, 377.

On August 10, 1949, Interior issued PLO 601. PLO 601 withdrew from all forms of appropriation the public lands within certain distances of roads located within Alaska. Alaska’s roads were classified as either “feeder roads,” “through roads” or “local roads.” All roads in existence as of August 10, 1949 which were established by or under the authority of the Secretary of the Interior, and which were not expressly listed as feeder or through roads, were classified as local roads. Local roads were 100 feet wide, 50 feet on either side of centerline.

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*United States v. State of California*, 332 U.S. 19, 27 (1947). To interpret the cancellation as completely extinguishing the railroad right-of-way would directly contradict the congressional purpose for the Act of 1941: to preserve the right-of-way for highway uses, to prevent any portion of it from vesting in adjacent patentees, and to avoid re-acquisition costs. The cancellation should not be interpreted to create an unconstitutional executive act.

On October 19, 1951, Interior issued PLO 757 and DO 2665, which revoked the PLO 601 withdrawals and simultaneously replaced them with easements of equal width. One purpose of DO 2665 was to:

fix the width of **all** public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior. . . .

DO 2665, § 1(a)(1)(emphasis added). *See also, State v. Alaska Land Title Assoc.*, 667 P.2d 714, 722 (Alaska 1983); *cert. denied*; 464 U.S. 1040 (1984) (“One purpose of DO 2665 was to define as a matter of local law or usage the width of roadway easements which had been created by the construction of roads . . . .”) As was the case with PLO 601, roads not listed as “through roads” or “feeder roads” were classified as “local roads” under DO 2665.

The McCarthy Road was an existing road under the jurisdiction of Interior on the dates PLO 601 and DO 2665 were issued. For that reason, the width of the McCarthy road is governed by the provisions of PLO 601 and DO 2665. Since it was not expressly listed as a “through road” or a “feeder road” in either PLO 601 or DO 2665, the McCarthy road falls within the “local road” classification of those orders. Therefore, as of August 10, 1949, the width for the McCarthy Road was set at 100 feet, 50 feet on either side of the roadway centerline. In 1951, the withdrawal of the 100-foot width for the McCarthy road was replaced with an easement of equal width under DO 2665.

**2. The 1941 Act dedicating the railroad property to highway uses granted the Secretary discretion to set the width of the McCarthy road right-of-way.**

Our conclusion that the McCarthy road right-of-way is 100 feet wide is unaffected either by the fact that the original width of the railway right-of-way was 200 feet, or our conclusion that Congress originally dedicated the road at a width of 200 feet. In the 1941 Act, Congress authorized the Secretary to use, operate and maintain the former railway property

**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 (47 Stat. 466)

. . . .

Act of 1941, § 2 (emphasis added).

Moreover, as an instrumentality of Interior, the Road Commission was vested with authority to “locate, lay out, construct and maintain” roads in Alaska under the Act of January 27, 1905, § 2 (33 Stat. 616). The Alaska Supreme Court’s decision in *Alaska Land Title* held, in part:

The authority of the Secretary of the Interior conferred by the [1905 and 1932] acts to ‘locate, lay out, construct and maintain’ public roads in Alaska **clearly implies the right to fix the width of the roads.**

667 P.2d at 721 n. 8 (emphasis added).

In our opinion, section 2 of the 1941 Act, and the provisions of the Acts of 1905 and 1932, were sufficient to vest in the Secretary the discretion to set the right-of-way width for the McCarthy Road. While Congress originally dedicated to highway use the entire width of the railroad right-of-way, it also gave the Secretary considerable discretion to set a different width in the future. Therefore, even though the right-of-way for the McCarthy road was originally 200 feet wide pursuant to the congressional dedication contained in the Act of 1941, the Secretary, in 1949, validly exercised his congressionally-granted discretion to reduce that width to 100 feet through the issuance of PLO 601 and DO 2665. The classification of the McCarthy road in DO 2665 as a “local road” constitutes the Secretary’s discretionary determination that the McCarthy road only needed to be 100 feet wide to provide adequate transportation for the McCarthy area.

The State successfully asserted in previous litigation that the Copper River Highway is 300 feet wide under DO 2665, Amendment No. 2. *See* footnote 2, *supra*. It is inconsistent to conclude that DO 2665 was effective to increase the right-of-way width of the Copper River Highway but ineffective to reduce the right-of-way width for the McCarthy road, which was carved out of the same railroad right-of-way pursuant to the same congressional act. If the Secretary was authorized to increase the right-of-way for the Copper River Highway under the second amendment to DO 2665, then he also was authorized to reduce the right-of-way for the McCarthy road in DO 2665, absent an express congressional prohibition to the contrary.

Our opinion that the McCarthy road is subject to PLO 601 and DO 2665 is further supported by *State of Alaska, DOT&PF (Billum)*, 127 IBLA 137, 143 (1993). In that case, the Interior Board of Land Appeals, relying on PLO 601 and DO 2665, concluded that the right-of-way for the McCarthy road was 100 feet wide where it crossed a Native allotment first occupied by the allotment applicant after 1949. *Billum* rejected the State’s argument that the McCarthy road was 200 feet wide as a segment of the Copper River Highway. 127 IBLA at 143.

In 1956, the functions of the Alaska Road Commission were transferred to the Department of Commerce, Bureau of Public Roads. In 1959, the Department of Commerce quitclaimed the McCarthy road to the State of Alaska. The legal effect of the 1959 quitclaim deed was to convey to the State that which the Department of Commerce

possessed, to wit: a 100-foot wide easement for the McCarthy road, 50 feet on either side of the roadway centerline pursuant to PLO 601 and DO 2665.

### **3. The McCarthy Road is not 300 feet wide as a segment of the Copper River Highway.**

At various times the State has asserted that the McCarthy road is 300 feet wide because it is a segment of the Copper River Highway. On September 15, 1956 the “Copper River Highway” was added to the list of “through roads” in DO 2665. DO 2665, Amendment No. 2. This action impressed at least portions of the Copper River Highway with a 300-foot right-of-way. 1989 Op. Att’y Gen. at 4 and n. 2. If the McCarthy road were considered to be a segment of the Copper River Highway, it would be impressed with this 300 foot right-of-way, at least insofar as the land adjacent to it was unappropriated public land as of September 15, 1956. *Id.*

Although the McCarthy road and the Copper River Highway were both originally part of the same railroad right-of-way, the evidence establishes that the Alaska Road Commission treated the McCarthy road and the Copper River Highway as separate roads. The McCarthy road was described as a road running easterly from Chitina to McCarthy for a distance of approximately 60 miles.<sup>8</sup> The Copper River Highway was described as a road leading from Cordova to Chitina and then running northwesterly over the Edgerton Cutoff from Chitina to a junction with the Richardson Highway for a distance of approximately 170 miles.<sup>9</sup>

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<sup>8</sup> The 1937 ARC report recommended construction of 60 miles of road over the soon to be “abandoned railroad grade from the existing road system at Chitina to McCarthy.” 1937 ARC Report, 9. The 1939 ARC Report, at 8, refers to the “Chitina-McCarthy Road.” The 1941 ARC Report, at 8, refers to the “McCarthy Tram and Road System” totaling 90 miles (This mileage appears to include the 60 mile tram road and 30 miles of McCarthy local roads collectively designated in 1951 as route number 020.1 by ARC Order No. 40, p. 10.) The 1940 ARC Report states that the Commission had assumed maintenance of 60 miles of tram road located within the abandoned railway right-of-way between Chitina and McCarthy. 1940 ARC Report, 7. The 1954 ARC Report describes the McCarthy road as a route extending from the terminus of the Edgerton Cut-off at Chitina to McCarthy. 1954 ARC Report, 16-17. (The Edgerton Cutoff branches off of the Richardson Highway near Willow Creek and terminates at Chitina.). The McCarthy road is designated as FAS Route No. 850 in the 1959 Omnibus quitclaim deed and is described as running from the “junction with FAS Route 851 [i.e. the Copper River Highway] at Chitina easterly to McCarthy” for a distance of 59 miles.

<sup>9</sup> The Copper River Highway is variously described as a road “from Cordova up the Copper River canyon to connect with the Richardson Highway” for a distance of more than 100 miles (1951 ARC Report, 25-26); a “route between Cordova and Chitina” with

The Alaska Road Commission and the Bureau of Public Roads gave the McCarthy road and the Copper River Highway different route numbers. The Road Commission assigned the Copper River Highway Route No. 122.<sup>10</sup> The Edgerton Cutoff was assigned Route No. 121. The McCarthy road was assigned Route No. 121.2. Under the route numbering system instituted by the Alaska Road Commission in Commission Order No. 40 (February 6, 1951), the McCarthy road (Route 121.2) was treated as a separate local road branching off the Edgerton Cutoff (Route 121). It was not treated as a segment of the Copper River Highway.

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a “[p]ossible relocation of the Edgerton Cutoff” being mentioned under the same “Copper River Highway” entry (1953 ARC Report, 16); a “route . . . along the . . . Copper River to Chitina, Mile 131, where it joins the 39-mile Edgerton Cutoff between that point and the Richardson Highway. . . .” (1953 ARC Report, 21); and a road being extended “up the Copper River to Chitina.” (1954 ARC Report, 17). These descriptions can not fairly be said to include the McCarthy road, which runs easterly from Chitina.

The 1954 ARC Report set out entirely separate entries for the “Chitina-McCarthy” road and the “Copper River Highway” and included a description for a different segment of the Copper River Highway as “Section B” of that highway. *Id.* at 16-17, 23. The 1954 ARC report also sets out separate funding for the Copper River Highway and the McCarthy Road. *Id.* at 52, 69. If the McCarthy road were considered a segment of the Copper River Highway, one would expect the “Chitina-McCarthy” road to be included in the Copper River Highway descriptions as a segment of that highway. However, both the descriptions of the road and the funding for the road projects are separately set out.

The Copper River Highway is designated as Route No. 851 in the 1959 Quitclaim deed and is described as running from

the Ocean Dock at the Port of Cordova through the Town of Cordova northerly paralleling the Copper River to a junction with FAS Route 850 [i.e. the McCarthy Road] at Chitina; thence Northwesterly to a junction with FAP Route 71 [i.e. the Richardson Highway]” for a total of 170 miles.

The combined mileage of the road from Cordova to Chitina (131 miles per the 1953 ARC Report) and from Chitina to the Richardson Highway (39 miles per the 1953 ARC Report) is 170 miles. The 60 miles of the McCarthy road is not included in this mileage. Nor does the McCarthy road run northwesterly from Chitina. The Edgerton Cutoff runs northwesterly from Chitina to a junction with the Richardson Highway. In fact, Bureau of Public Road maps depict the Edgerton Cutoff as part of the “Copper River Highway Route 851.” BPR Vicinity Maps, 563, 709 (June 1959).

<sup>10</sup> ARC Order No. 40, Supplement No. 1, 5 (August 11, 1952).

The Bureau of Public Roads continued to treat the Copper River Highway and the McCarthy road as separate roads when it instituted its new route numbering system in 1957. In the list that assigned new route numbers and cross-referenced the former Road Commission route numbers, the McCarthy Road was designated as Route 851 (Old Route No. 121.2). The Copper River Highway was route 850 (Old Route No.'s 121/122). Thus, at that time, the Copper River Highway was considered to consist of the Edgerton Cutoff (Old Route 121) and the route from Chitina to Cordova along the Copper River (Old Route 122). See Bureau of Public Roads List of Roads Transferred, Secondary System – “A” as approved February 26, 1957.

The route number assignments, standing alone, are not conclusive as to whether the McCarthy road was a segment of the Copper River Highway when Amendment No. 2 to DO 2665 was issued in September 15, 1956. However, when added together with the other evidence cited above in footnotes 8 and 9 *supra.*, the weight of the evidence establishes that the McCarthy road was not treated as a segment of the Copper River Highway prior to the issuance of DO 2665, Amendment No. 2. Rather, the McCarthy road and the Copper River Highway were treated as separate roads, which shared a junction at Chitina. The IBLA held that this evidence was sufficient to establish that the Road Commission treated the McCarthy road as a distinctly separate road from the Copper River Highway. *Billum*, 127 IBLA at 143. We conclude that the McCarthy road is not a segment of the Copper River Highway and, for that reason, the road is not impressed with a 300-foot right-of-way under Amendment No. 2 to DO 2665.

#### **4. The width of the McCarthy road where it crosses patented lands.**

Our conclusion that the McCarthy road right-of-way is generally 100 feet wide between the Copper and Kennecott rivers (excluding that portion of the road that traverses the McCarthy West Subdivision) does not end our inquiry. Since PLO 601 and DO 2665 apply to the road, the width of the road may be affected by those orders where it crosses lands conveyed from the federal government to the State or third parties under various federal statutes.

The Alaska Supreme Court has analyzed PLO 601 and DO 2665 and their effect on rights-of-way crossing patented land on several occasions. Whether a PLO easement attaches to patented land depends upon the date of entry under the applicable federal land law relative to the date that the PLO was issued. The following rules are generally applicable to determine the width of a DO 2665 easement across patented lands:

1. The full width of the PLO easement is impressed on a road which crosses patented lands if the road was constructed and the PLO was issued before the lands were validly entered by the patentee under the public land laws, regardless of whether the patent includes an easement of lesser width. *Keener v. State*, 889

P.2d 1063, 1065 (Alaska 1995); *Alaska Land Title*, 667 P.2d at 718-724; *State v. Green*, 586 P.2d 595, 600-03 (Alaska 1978), *appeal after remand*, 823 *Sq. Feet of Land v. State (Goodman)*, 660 P.2d 443 (Alaska 1983).

2. Where the date of entry for patented land preceded the issuance of the PLO, the PLO easement does **not** attach to the entered land regardless of the date on which the patent was issued. *Green*, 586 P.2d at 603-05; *Alaska Land Title*, 667 P.2d at 724-725 (discussion of Hansen parcel); *Resource Investments v. State*, 687 P.2d 280, 281 (Alaska 1984); *State v. First National Bank*, 689 P.2d 483, 485-86 (Alaska 1984).

3. Where the entry occurred between the date of actual road appropriation or construction and the date that the PLO was issued, the PLO easement does not apply. Rather, the road's width is set, on a case-by-case basis, by examining the evidence of actual staking, surveying, clearing, construction or other evidence of appropriation as of the date of entry. *Green*, 586 P.2d at 606; 823 *Sq. Feet of Land (Goodman)*, 660 P.2d 443.

4. An otherwise valid public right-of-way is impressed on patented lands by operation of law although the patent is silent as to the public easement. *Alaska Land Title*, 667 P.2d at 726-27; *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221, 1224 (Alaska 1975).

While these rules generally apply to all PLO rights-of-way in Alaska, in our opinion, Rules 2 and 3 above would **not** operate with respect to patented lands crossed by the McCarthy road that were first entered **after** the railroad's preliminary plats were filed in the early 1900's. There is a good legal argument that lands adjacent to the McCarthy road that were entered after the railroad's preliminary plats were filed in the early 1900's are subject to the 100-foot PLO right-of-way despite the fact that these lands were patented before PLO 601 was issued. This conclusion is based on the unique interplay between the Acts of 1898, 1922 and 1941, an interplay that the Alaska Supreme Court has not had occasion to examine or address.

Our analysis begins with the Act of 1898, 30 Stat. 409. Under section 4 of the Act of 1898, the filing of preliminary location maps for a railroad rendered "all the lands on which said preliminary survey and plat shall pass subject to [the railway's] right of way." 30 Stat. 410. Under section 5 of the 1898 Act, the railway was thereafter required to file maps of definite location. *Id.* Section 5 also required lands over which the right-of-way passed to "be disposed of subject to such right of way" after maps of definite location were filed and approved. *Id.* Therefore, as a threshold matter, entrymen on public lands crossed by the railroad right-of-way **after** the railroad's preliminary plats were filed gained no rights in the land within the right-of-way. Those entries were subject to the 200-foot right-of-way.

Under the Act of 1922, land within an abandoned railroad right-of-way vested in the adjoining patentees unless a highway was located before, or established in the right-of-way within one year after, an “abandonment . . . declared or decreed by a court of competent jurisdiction or by Act of Congress.” Act of March 8, 1922, 42 Stat. 414 (1922). It was unclear whether the McCarthy road “tramway” constituted a “highway” under the Act of 1922. Therefore, Congress specifically exempted the relinquishment of the Copper River Railway right-of-way from the vesting provisions of the 1922 Act. Act of 1941, § 3; S. REP. No. 77-375, at 2. As we demonstrated above, the purpose of this exemption was to prevent any portion of the right-of-way from vesting in adjoining landowners, thereby avoiding the necessity to re-acquire the right-of-way for highway or tramway uses in the future. S. REP. No. 77-375 at 2. The exemption of the Copper River Railway right-of-way from the provisions of the Act of 1922 was absolute; *i.e.*, it was not made subject to any valid existing rights of prior entrymen.

The combined effect of the Acts of 1898, 1922 and 1941 was to prevent patentees whose lands were crossed by the Chitina-McCarthy branch line from obtaining any rights in the land encompassed by the right-of-way either upon entry after the appropriate railroad preliminary location maps plats were filed, or upon the 1945 relinquishment of the railroad right-of-way. At most, patentees possessed an expectation that the right-of-way may be conveyed to them at some point in the future if the railroad were abandoned and no highway were established within it before abandonment or within one-year thereafter.<sup>11</sup> However, this inchoate expectancy never matured: The Act of 1941 and the Road Commission’s actions intervened to establish the McCarthy road within the former railroad right-of-way five or six years before it was formally relinquished.<sup>12</sup> Any other conclusion contradicts the express congressional intention underlying section 3 of the 1941 Act.

Our research has not shown on what dates the railroad’s preliminary plats were filed. However, we do know that the railroad was actually constructed by 1911 (233 I.C.C. 109) and that definite location maps for the Chitina-McCarthy branch line were

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<sup>11</sup> An expectation that the occurrence of a future event may give rise to an interest in property is not itself a property right under Alaska law. *Four Separate Parcels of Land v. City of Kodiak*, 938 P.2d 448, 452 (Alaska 1997); *Underwood v. State*, 881 P.2d 322, 327 n. 5 (Alaska 1994); *State v. Lewis*, 785 P.2d 24, 28 n.6 (Alaska 1990); *APEA v. State*, 776 P.2d 1030, 1034 (Alaska 1989); *Stroh v. ASHA*, 459 P.2d 480, 482 (Alaska 1969).

<sup>12</sup> In fact, even if the Act of 1941 were not considered, where a highway was established before or within one year of abandonment of a railroad right-of-way, the 1922 Act precluded the former right-of-way lands from vesting in adjoining landowners regardless of when they received their patents. The Act applied the vesting prohibition to any adjoining landowner “to whom . . . title . . . **may have been or may be granted . . .**” Act of March 8, 1922 (emphasis added).

filed between February and April 1914. *See* Relinquishment, entries 8-11 (March 29, 1945). With one possible exception of which we are aware, all patented lands crossed by the McCarthy road were entered after 1911.<sup>13</sup> Therefore, entries on lands crossed by the McCarthy road were subject to a 200-foot wide railroad right-of-way from the dates of entry until 1945 when the railroad right-of-way was cancelled. Cancellation of the right-of-way did not vest title to the right-of-way in adjacent patentees. Act of 1941, § 3. In addition, these entries were subject to an overlapping 200-foot wide highway right-of-way congressionally dedicated under the Act of 1941, from the effective date of that act until the highway right-of-way was reduced to 100 feet under PLO 601 in 1949.

At no time after at least 1914 could entrymen gain rights in land embraced within the original 200-foot railroad right-of-way. Congress had full authority to dispose of the land within the original railroad right-of-way as it saw fit.<sup>14</sup> It did so in 1941 by dedicating the 200-foot railroad right-of-way to highway use, exempting the land within the railroad right-of-way from the vesting provisions of the Act of 1922 without regard to prior existing rights, and granting discretion to Interior to reduce the right-of-way width in the future.

The land within 50 feet on either side of the McCarthy road centerline has not been open to appropriation under the various public land laws of the United States since at least 1914. In our opinion, patented lands crossed by the McCarthy road that were entered under the various public land laws of the United States after the filing of

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<sup>13</sup> In the case of the one possible exception, the patent is expressly made subject to the railroad right-of-way, leading us to conclude that initial entry on that land occurred after the preliminary survey plats were filed under the Act of 1898.

<sup>14</sup> The Property Clause of the U. S. Constitution vests plenary power in the Congress to manage and dispose of federal public lands. That power is without limitation. *United States v. City and County of San Francisco*, 60 S.Ct. 749, 756 (1940); *United States v. State of California*, 67 S.Ct. 1658, 1662-63 (1947). Moreover, the Secretary of the Interior may alienate federal public land “only within limits authorized by law,” *Union Oil Company v. Morton*, 512 F.2d 743, 748 (9<sup>th</sup> Cir. 1975), even where the courts find that “the statutory requirement borders on nonsense.” *Kidd v. United States*, 756 F.2d 1410, 1412 (9<sup>th</sup> Cir. 1985). All post-1914 patents issued on parcels crossed by the McCarthy road were issued subject to the original railroad right-of-way by operation of law. *Alaska Land Title*, 667 P.2d at 726-27. In addition, those patents are subject to the 1941 congressional dedication of that right-of-way to highway uses, which occurred before the railroad right-of-way was relinquished to the United States in 1945. All patents issued on parcels crossed by the McCarthy road must be interpreted to be consistent with the congressional intention expressed in section 3 of the Act of 1941 that “no portion” of the right-of-way vest in adjoining landowners or be subjected to re-acquisition for highway uses.

preliminary railroad survey plats in the early 1900's are impressed with a 100-foot right-of-way for the McCarthy road under the provisions of the Acts of 1898 and 1941 and PLO 601 and DO 2665. This conclusion holds true regardless of whether the patents to those lands contain references to the public easements so created. *Alaska Land Title*, 667 P.2d at 726-27.

If the patented lands were expressly made subject to a 200-foot right-of-way or if they were subsequently subdivided or conveyed and wider easement widths were dedicated or reserved in those documents, those easement widths may control. In some cases, the State may have a wider right-of-way based upon prescriptive use. AS 09.10.030; *Dillingham Commercial co. v. City of Dillingham*, 705 P.2d 410, 416 (Alaska 1985)(public easements may be acquired by prescription.); *Weidner v. State, Dep't. of Trans.*, 860 P.2d 1205-1209-10 (Alaska 1993).

We will be unable to definitively state the easement width for the McCarthy road where it crosses patented lands until a full title examination for each parcel has been conducted. However, based on the foregoing legal analysis and the preliminary parcel information we have reviewed, it appears that the State generally owns a 100-foot wide easement for the McCarthy road between the Copper and Kennicott Rivers. As we stated above, this opinion does not address the width of the right-of-way where it traverses the McCarthy West Subdivision. The width of the right-of-way through that subdivision will be addressed in a future memorandum.

If you have questions concerning this advice, please do not hesitate to contact us.