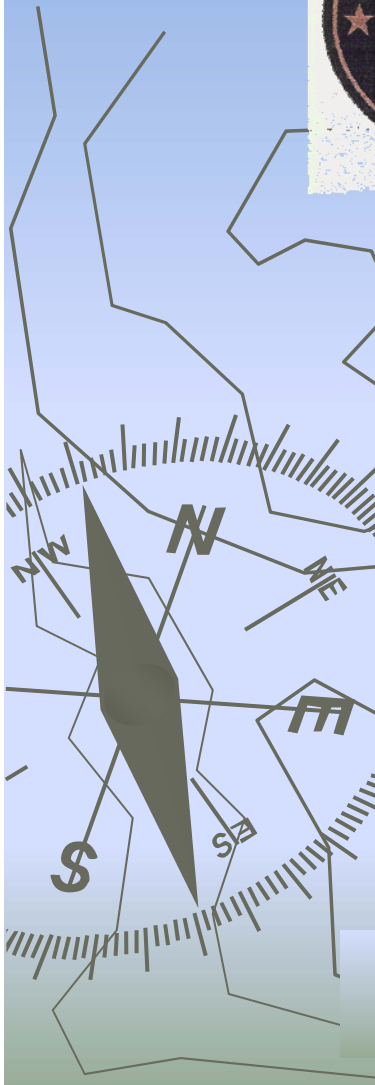


Key to the Highway



Unlocking the Mysteries of Right of Way Research



Alaska Surveying & Mapping Conference 2016

What do you want to know when researching a historical road or trail in Alaska?

- When was the route constructed?
- Who constructed the route?
- Who owned the land at the time of construction?
- Was public money spent on the route?
- Who used the route?
- Who maintained the route?

*Now that you have the historical background,
you can move on to the tougher questions:*

- Is there a ROW?
If so, what type of ROW is it?
- Who "owns" the ROW?

Most ROW research involves private lands that have left federal ownership...

Land status and history of road construction are key elements in this research...

Form L-407 (Jan. 1955) UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT

Form approved: Budget Form No. 42-REG.

Serial No. 029196

Form \$ 12.00 Contd \$ 0.00 For Mon \$ _____

Receipt No. 226318

APPLICATION FOR HOMESTEAD ENTRY
(Before filling in this form see specific instructions on the reverse side)

Mr. Gerald A. Protzman
(Print full name)

of Boz305 SPENARD, ALASKA
(Street and number of R. D. number) (City or Post Office and State)

hereby apply to enter, under Section 2289, Revised Statutes, 48 U. S. C., Section 161, the public land describe as follows: S15W, Sec. 11 and 12, T. 5 N., R. 8 W., Sec. 14

Section 14 Township 5 North Range 8 West Seward Meridian
Alaska, containing 160 acres
(State or Territory)

Do you own more than 160 acres of land in any State or Territory? No.
(If answer is yes, give acreage)

9. PERIODS OF ACTUAL RESIDENCE ON THE LAND IN THE HOMESTEAD

RESIDENCE YEAR*	I ACTUALLY RESIDED ON THE LAND		MY FAMILY ACTUALLY RESIDED ON THE LAND	
	FROM (Give month, day, & year)	TO (Give month, day, & year)	FROM (Give month, day, & year)	TO (Give month, day, & year)
1955	May 9, 1955	November 1956	May 9, 1955	November 1956
1956	March 1957	March 1958	March 1957	March 1958

10. CHARACTER OF LAND EMBRACED IN THE HOMESTEAD

SECTION	LEGAL SUBDIVISION	GENERAL CHARACTER OF THE LAND	NUMBER OF ACRES			BOARD FEET OF SAW TIMBER
			NOW CULTIVATED	NOT CULTIVATED BUT CULTIVABLE	CONTAINING TREES OR BRUSH	
14			22 A.	80 A.	8	100 A. None

Anchorage 029196 and 033928

The United States of America

To all to whom these presents shall come, greeting:

WHEREAS, a certificate of the Land Office at Anchorage, Alaska, is now deposited in the Bureau of Land Management, whereby it appears that pursuant to the act of Congress of May 20, 1862 (12 Stat. 392),

and the acts supplemental thereto, the claim of Gerald A. Protzman

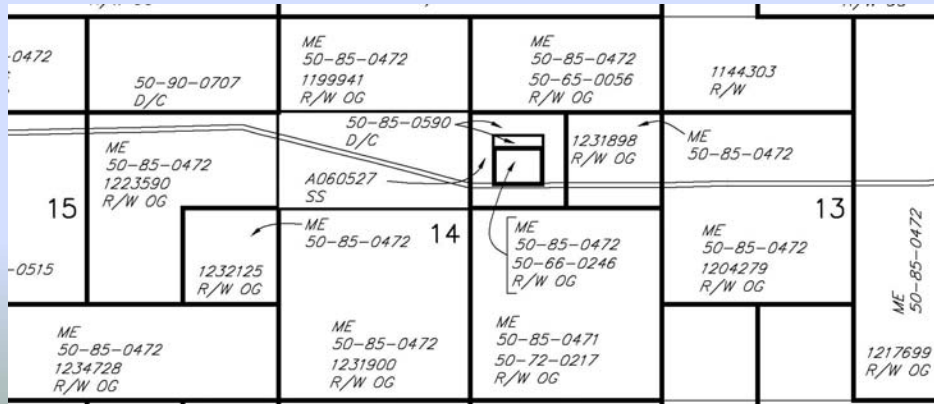
has been established and that the requirements of law pertaining to the claim have been met, for the following-described land:

Seward Meridian, Alaska.

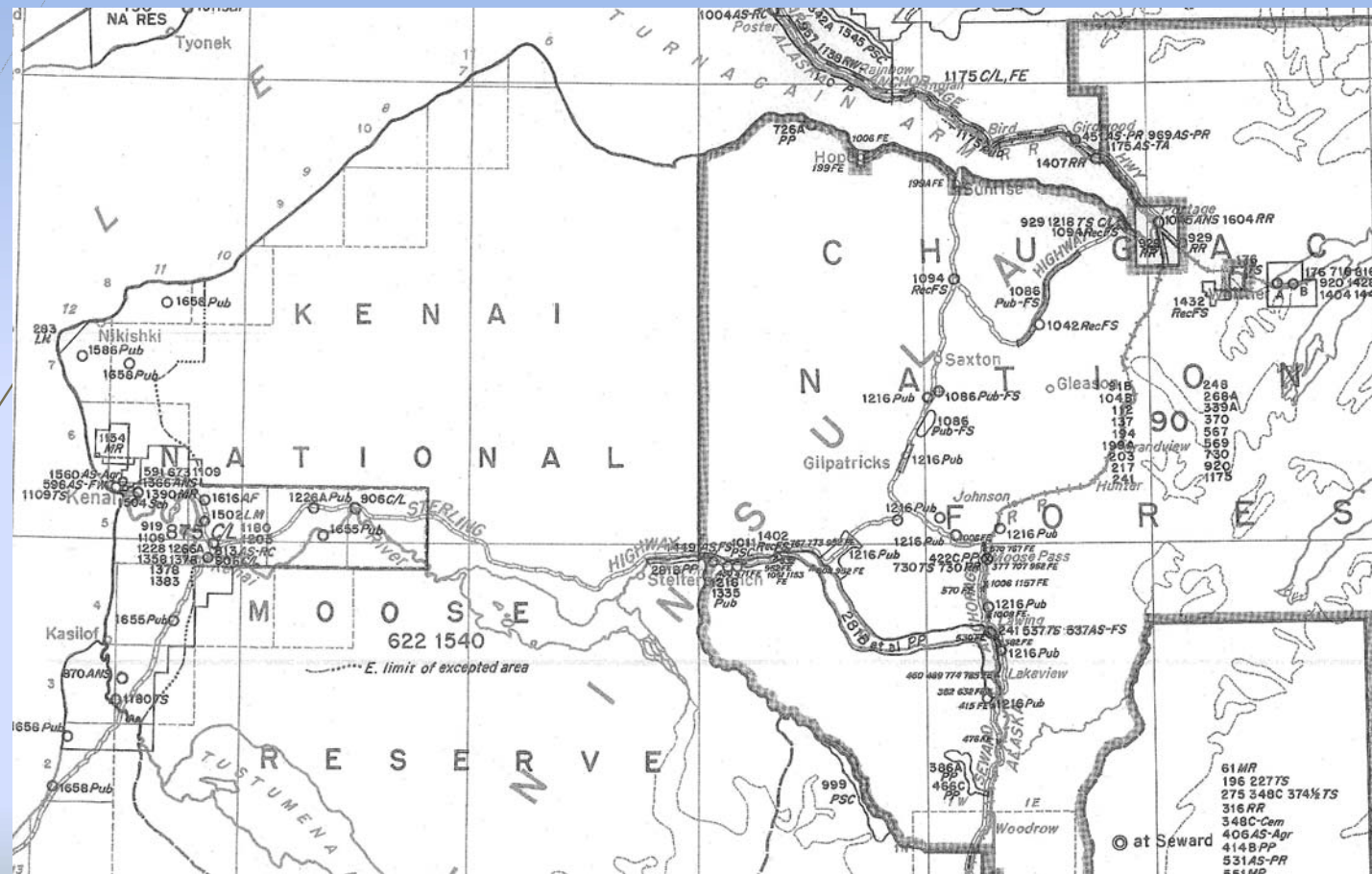
T. 5 N., R. 8 W.,

Sec. 14, NW 1/4.

The area described contains 160.00 acres, according to the official plat of the survey of the said land, on file in the Bureau of Land Management:



But how do we evaluate the ROW of a road constructed across federal lands that have never left federal ownership?



...as it turns out, you start with the same set of questions.

Basic land status and road construction history for this project discussion:

- *Land withdrawn for a wildlife reserve in 1941*
- *Alaska Road Commission (ARC) built a highway across the reserve 1946-1950*
- *In 1971, a federal agency issued an easement deed with restrictions to the State for the highway*

Basic assumptions (at the beginning):

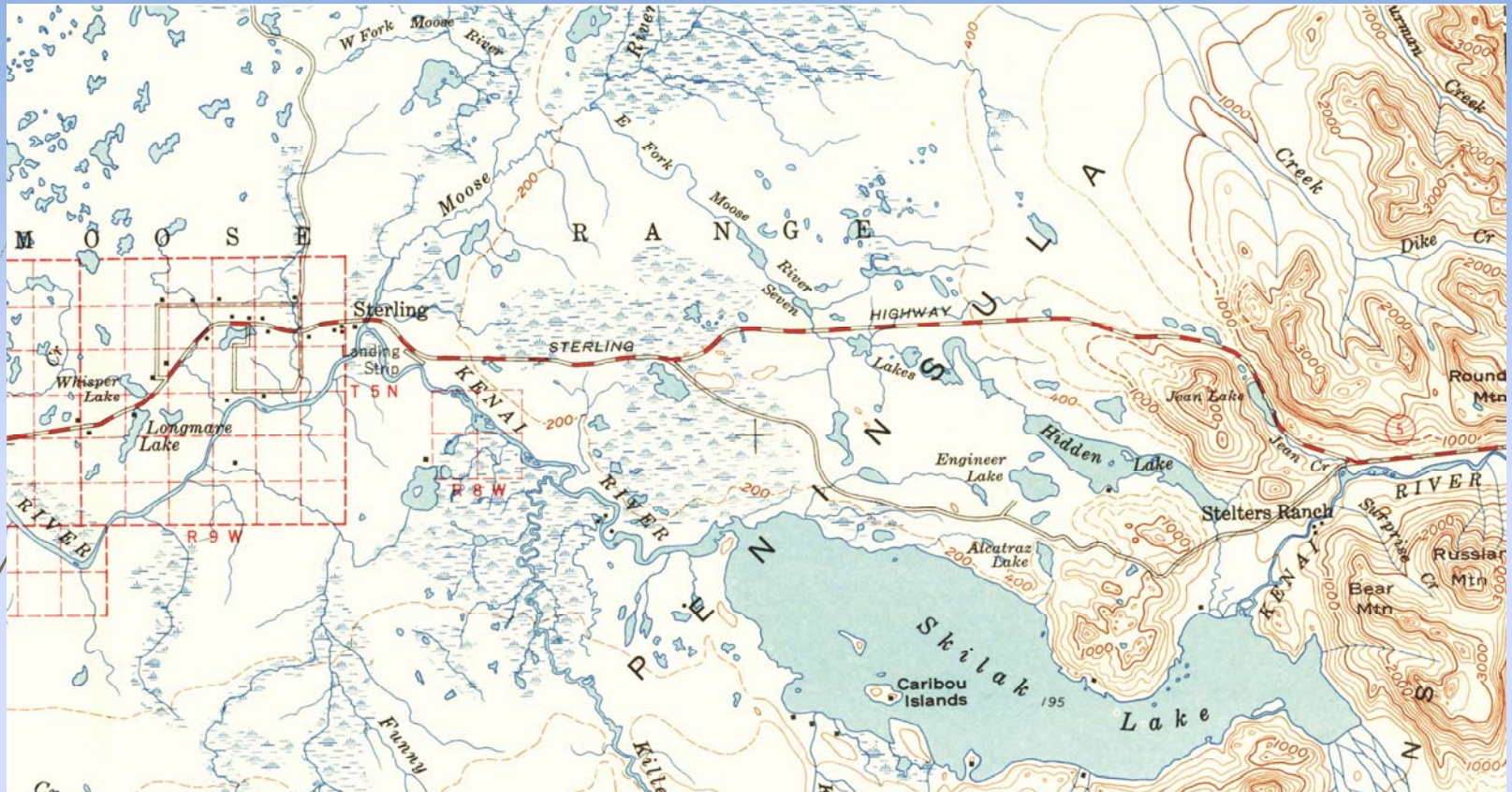
- *ROW cannot attach to withdrawn or reserved public land*
- *Therefore, the existing ROW must have been established by the 1971 easement deed*

Although the land status and history of road construction for this route is well documented,

...there is much more to the story.

Sterling Highway MP 58-79

Basis of Right of Way

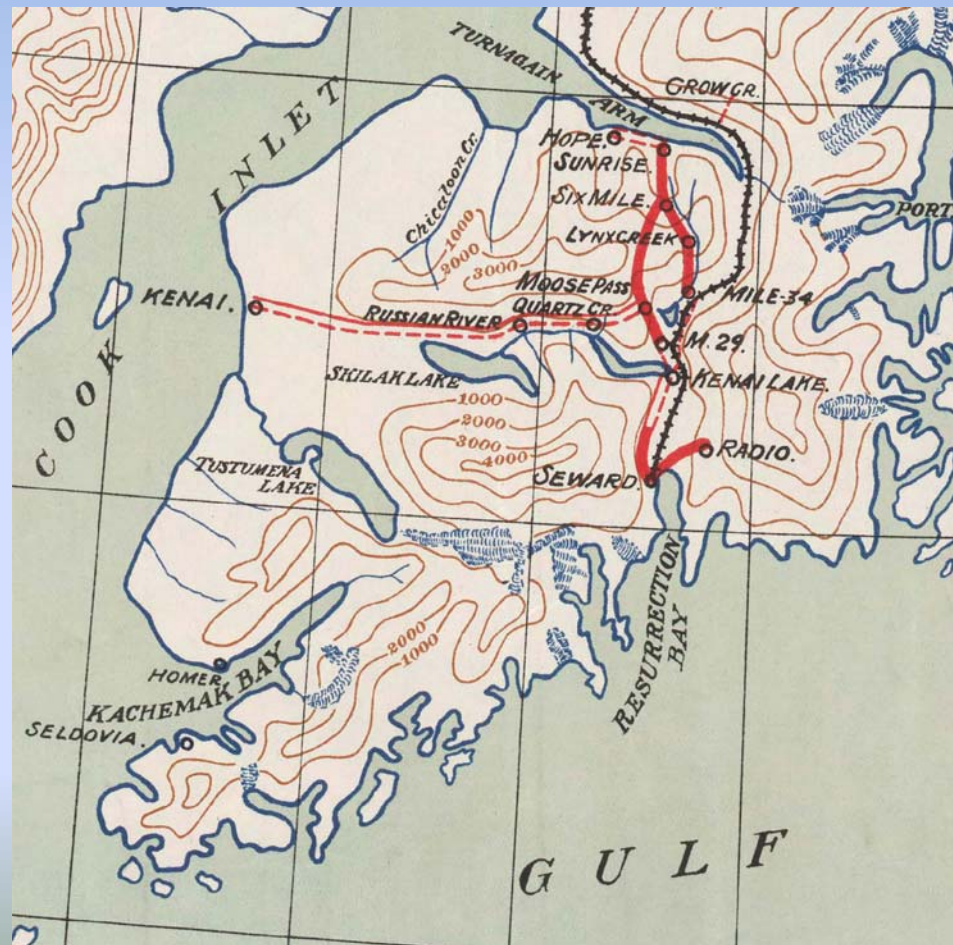


Excerpt from Kenai quadrangle (1944), imprinted 1959, Alaska Reconnaissance Topographic Series
(USGS Historical Topographic Map Collection)

Lying mainly within the Kenai National Wildlife Refuge,
formerly the Kenai National Moose Range

History of road construction:

Decades before the wildlife reserve was created in 1941, a trail from Kenai Lake to Kenai existed, designated as ARC Route 55.



Excerpt from:
“Map of Part of Alaska, showing connected system of roads and trails constructed and proposed by the Alaska Road Commission”, 1920

Source: Alaska State Archives, Series 1380, Alaska Road Commission maps and drawings

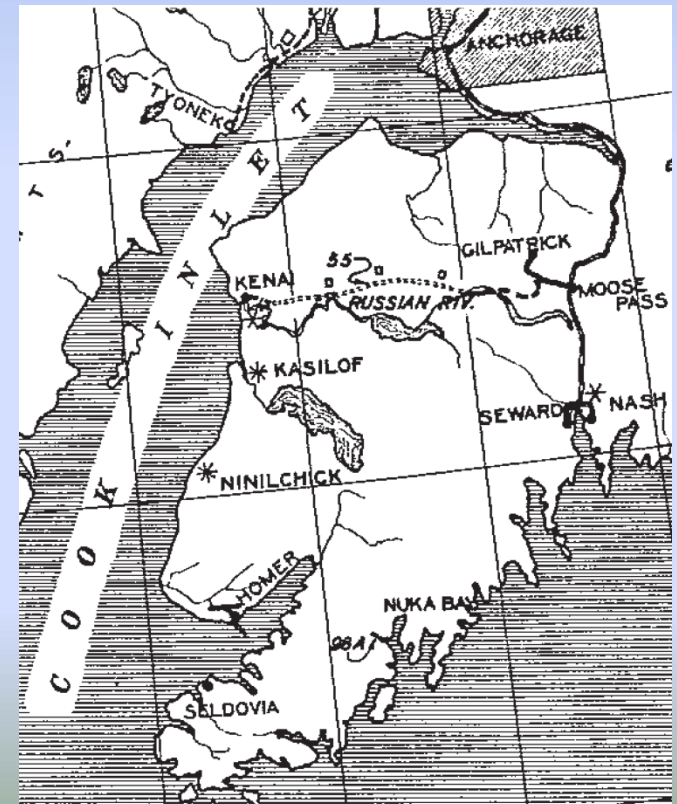
ARC Route 55

Excerpt from:
Southwest District Map
ARC Annual Report,
1932



Excerpt from:
*ARC Map of Cook
Inlet District, 1923*
Updated July 1929

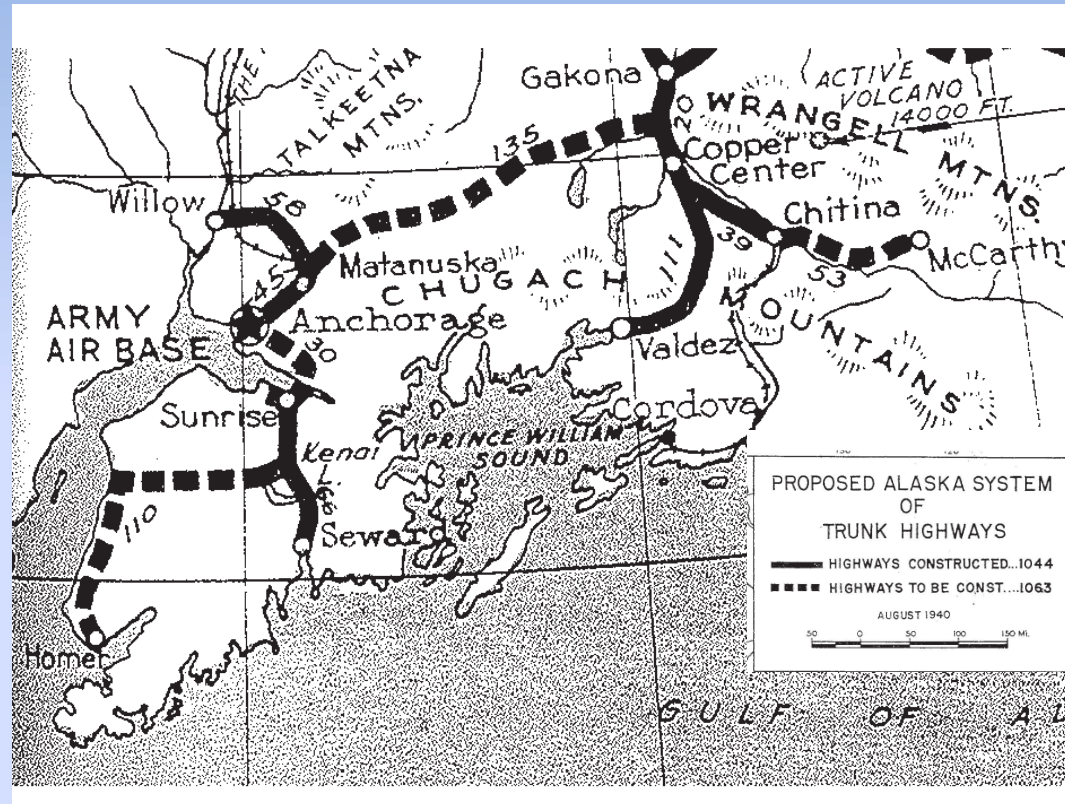
Source: UAF Rasmuson
Library, Map No. 03985



Planning for the “Kenai Lake to Homer” Road

- ❖ 1933: Territorial Gov. John Troy submits funding request for \$600,000 for “Kenai-Kenai Lake” route
- ❖ 1936: AK Territorial congressional delegate Anthony Dimond describes the “Kenai Lake-Kenai-Homer” route, saying “...This is one of the most important road projects in all of Alaska...A farmer away from a road on the Kenai Peninsula is so effectively isolated that the settlement of the country cannot proceed until the road is built.”
- ❖ 1939: ARC Annual Report includes “Kenai Lake-Homer Road” in a list of project recommendations with a funding request of 2.5 million dollars.

- ❖ 1940: Map from Biennial Report of the AK Territorial Highway Engineer shows the proposed route "to be constructed".



Planning for the “Kenai Lake to Homer” Road

Kenai Lake-Homer Road. (Third Judicial Division)

5. Description of project:

(a) Physical description: This proposed road, 120 miles in length, would run west from the end of the Kenai Lake-Russian River Road to the town of Kenai on Cook Inlet, a distance of 45 miles, thence south 75 miles to the Homer farming district, passing through the settlements of Kasilof and Ninilchik. It would pass through a country suitable for farming, fur farming and cattle raising.

With the completion of this road and a section now being constructed, Homer and all the settlements enroute would be connected into one road system and with the railroad.

(b) Purpose: Increase railroad traffic
 Open farming and cattle raising areas.
 Open a vast game country
 Unite all settlers of this region
 Give an outlet to the town of Seward.

6. Total est. cost (including land), \$ 1,100,000

7. Status of Congressional approval:

(a) Authorized by not required

(b) Authorized limit of cost, \$ none

8. Status of plans: Sketch plans completed

9. Method of construction:

~~Contract~~ Force account

~~Continuing contract~~ ~~Partial contracts~~

10. Plan of land acquisition:

Public domain

❖ August, 1940: ARC submits their Six Year Plan for road construction to the Division of Territories and Island Possessions in Washington, D.C.

What happened next?

...World War II...

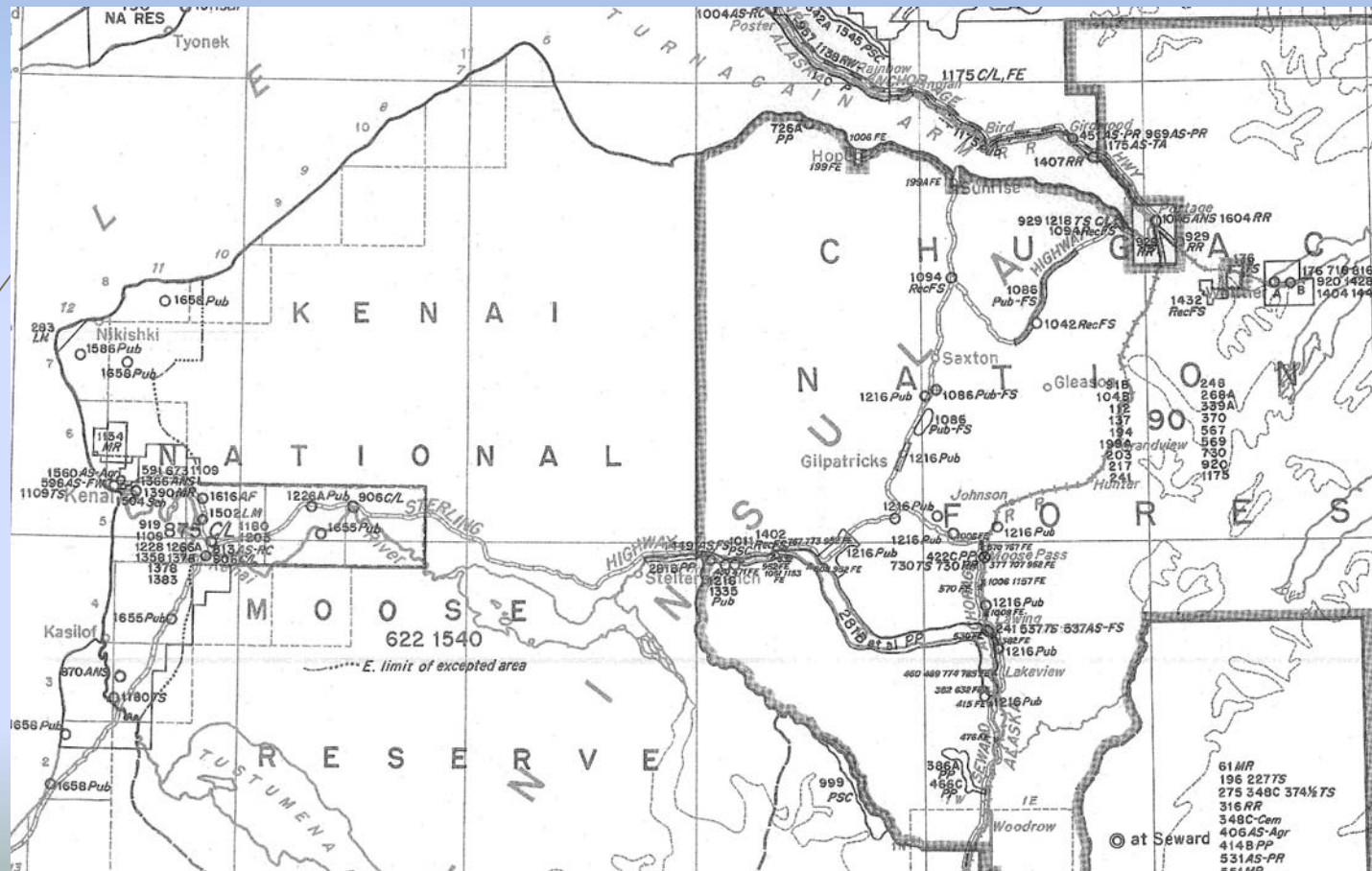
Routes of strategic military importance took precedence over most new road construction in Alaska:

- ❖ *Palmer-Richardson (Glenn Highway)*
 - ❖ *Richardson Highway*
 - ❖ *Alaska Highway*
- ❖ *Port of Whittier Access*

Construction of the Kenai Lake to Homer Road will be deferred until the post-war years.

Meanwhile...in Washington, D.C...

Executive Order (EO) 8979, signed by President Franklin D. Roosevelt on December 16, 1941 establishes the Kenai National Moose Range



Excerpt from map atlas entitled "Alaska Federal Land Withdrawals and Reservations, July 1958, U.S. Department of the Interior, Bureau of Land Management, from Alaska Resources Library and Information Services (ARLIS)

The Kenai National Moose Range is “withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose...”

EXECUTIVE ORDER ESTABLISHING THE KENAI NATIONAL MOOSE RANGE ALASKA

By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose for carrying out the purposes of the Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192-211, as amended:

SEWARD MERIDIAN

Beginning at the point of intersection of the west boundary of the Chugach National Forest with the line of mean high tide on the south shore of Chickaloon Bay, in Turnagain Arm of Cook Inlet, in latitude $69^{\circ}53'$ N., and longitude 150° W.;

Thence from said initial point, northwesterly with the meanders of the line of mean high tide, on the south shore of Chickaloon Bay to Point Possession;

Thence southwesterly with the meanders of the line of mean high tide on the east shore of Cook Inlet to the Kaslof River;

Thence southeasterly, upstream along the right bank of the Kaslof River to the meander corner on the south boundary of sec. 33, T. 3 N., R. 11 W., Seward meridian;

Thence west, 4.69 chains, to meander corner on south boundary of sec. 32, T. 3 N., R. 11 W.;

Thence southwesterly, along the crest of the watershed, to the divide between the waters flowing into Tustumena Lake and the waters flowing into Cook Inlet and Kachemak Bay;

None of the above-described lands excepting Tps. 5 N., Rs. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kaslof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled "An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes", 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C., title 48, secs. 471-471o: *Provided, however,* That as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the national moose range shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska: *Provided further,* That the lands in the said excepted areas shall be classified by the General Land Office, Department of the Interior, and those lands classified as not suitable for settlement shall no longer be available for that purpose: *Provided further,* That the reservation for the national moose range shall not operate to prevent the construction and operation of a highway to connect the area open to settlement with the Seward-Sunrise road by the most practicable route: *Provided further,* That any lands within the described area that are otherwise withdrawn or reserved shall be affected by this order only so far as may be consistent with the uses and purposes for which such prior withdrawal or reservation was made.

The provisions of this order shall not prohibit the hunting or taking of moose and other game animals and game birds or the trapping of fur animals in accordance with the provisions of the said Alaska Game Law, as amended, and as may be permitted by regulations of the Secretary of the Interior prescribed and issued pursuant thereto.

This reservation shall be known as the Kenai National Moose Range.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
December 16, 1941.

[No. 8979]

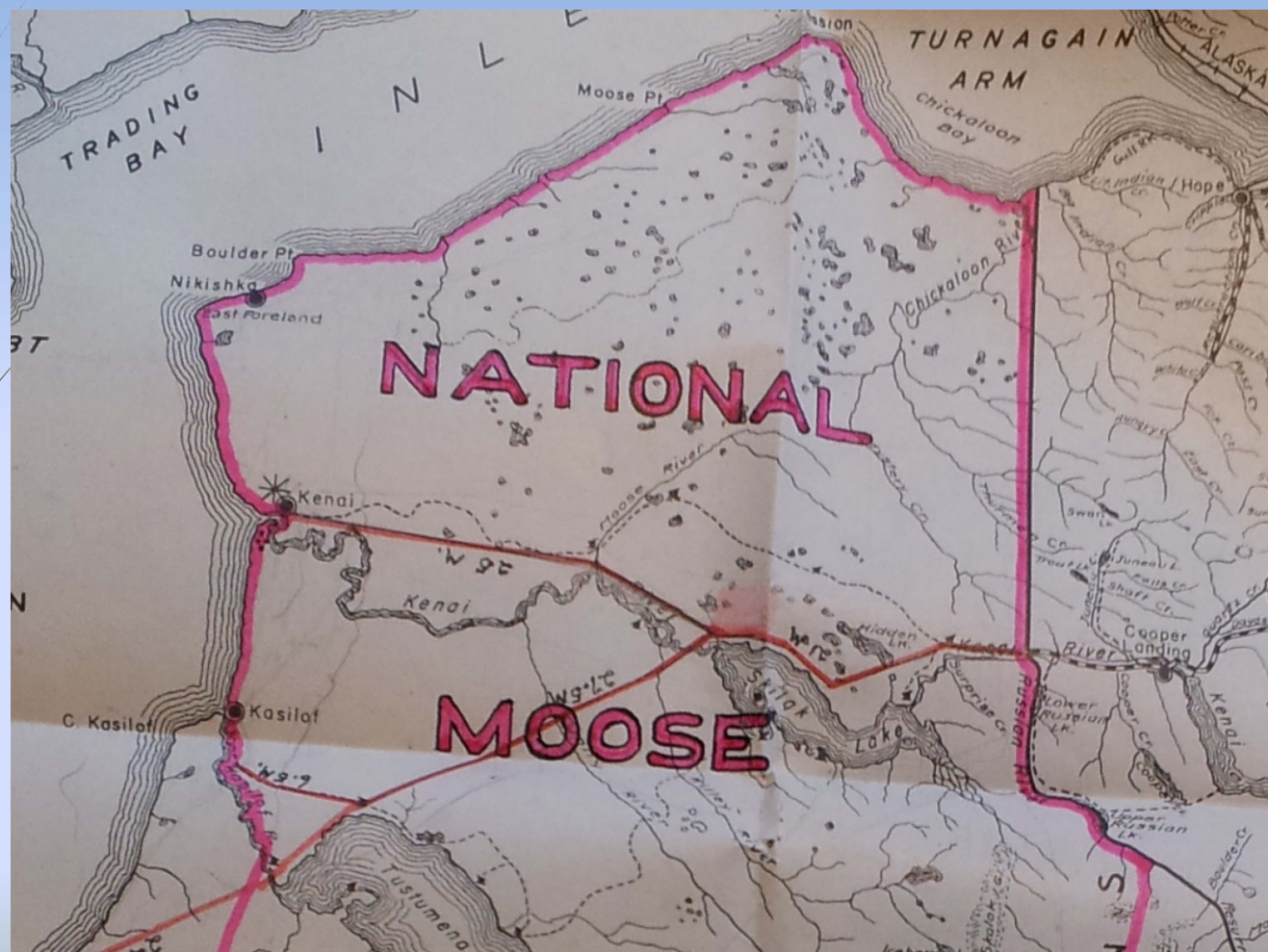
[P. R. Doc. 41-9501; Filed, December 17, 1941;
11:55 a. m.]

...*Provided further,* That the reservation for the national moose range shall not operate to prevent the construction and operation of a highway to connect the area open to settlement with the Seward-Sunrise road by the most practicable route...

The Kenai Lake to Homer Road is finally built...

- ❖ The route is ARC's #1 post-war project
- ❖ Reconnaissance & route selection completed in 1945 by ARC Asst. Chief Engr. Hawley Sterling

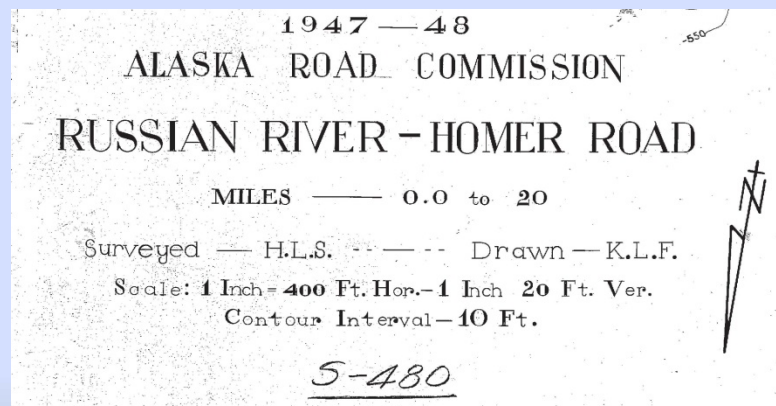
- ❖ In January of 1946, ARC notifies USFWS Regional Director of proposed alignment; some modification in alignment appears to have occurred in response to FWS comments.



Excerpt from Map of the Kenai Peninsula delivered to FWS Regional Director, Juneau, Alaska by Ike P. Taylor, Chief Engr. ARC (source: RG 22, FWS, E. 162, General Correspondence, 1890-1956, Box 75, NARA Washington, D.C.)

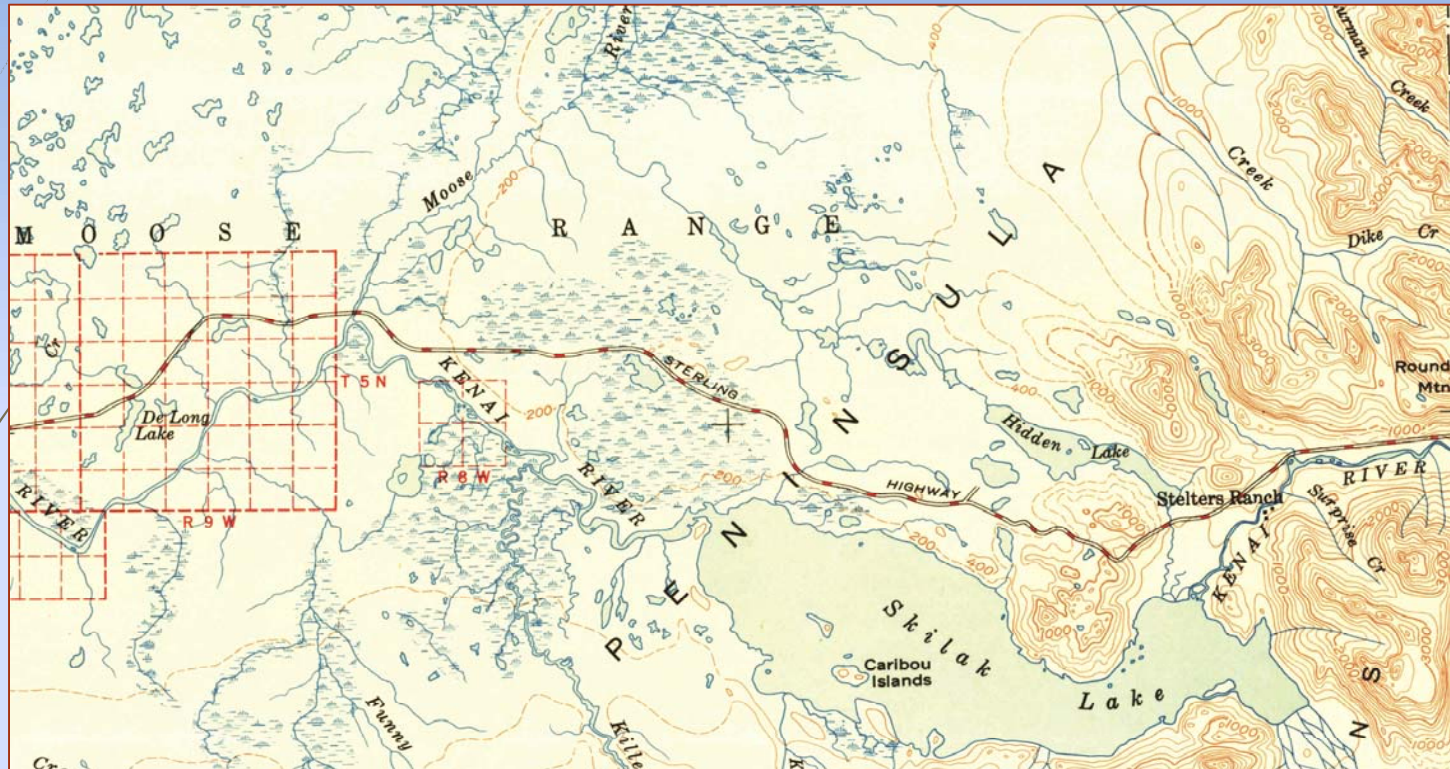
The Kenai Lake to Homer Road is finally built...

- ❖ Construction funding was provided in 1946, ARC completes construction to Kasilof by 1948
- ❖ ARC prepared mapping for Russian River to Homer Road in four segments covering 120 miles of construction



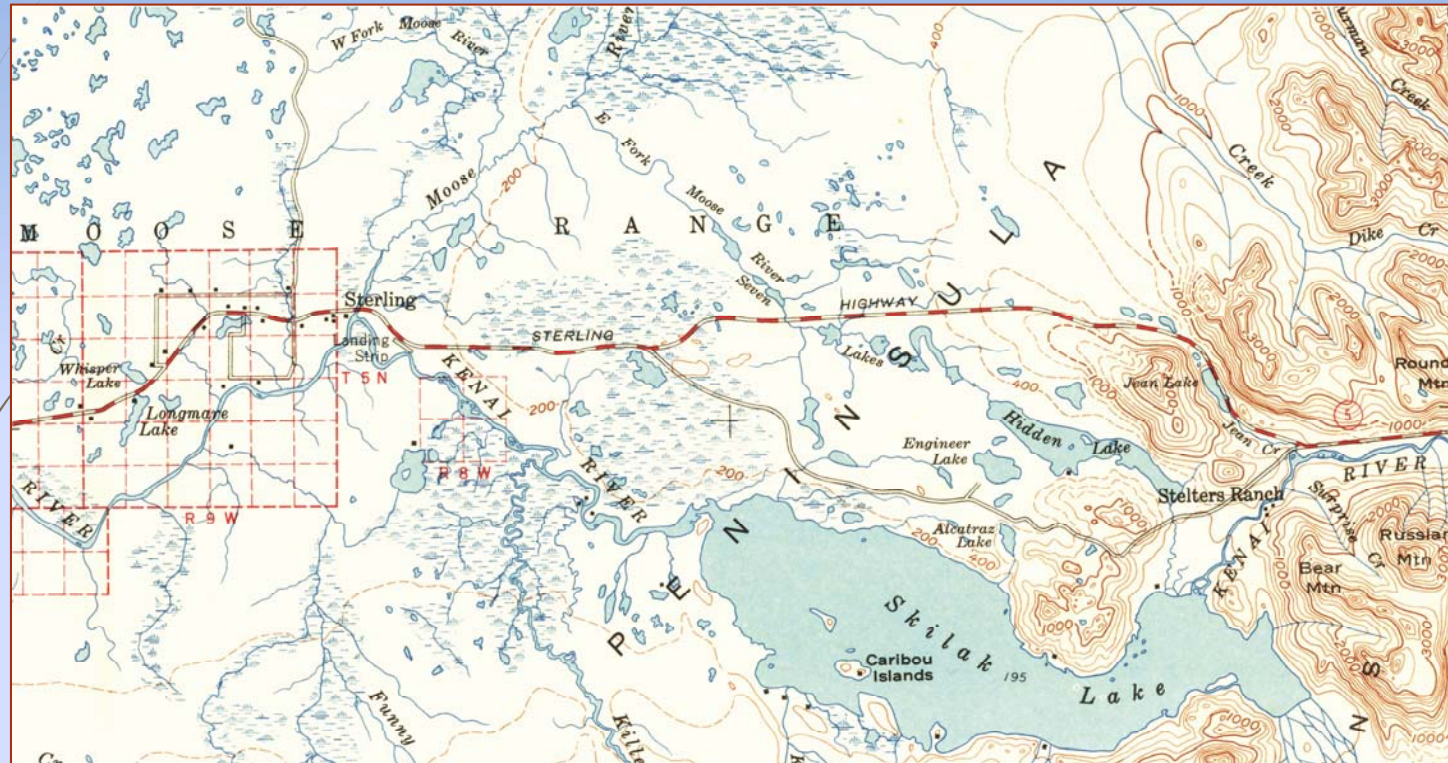
- ❖ The Sterling Highway opened officially in September 1950

The Sterling Highway as constructed through the Kenai National Moose Range:



Excerpt from Kenai quadrangle (edition of 1950), Alaska Reconnaissance Topographic Series
(USGS Historical Topographic Map Collection)

And as reconstructed by ARC 1955-57:



Excerpt from Kenai quadrangle (1944), imprinted 1959, Alaska Reconnaissance Topographic Series (USGS Historical Topographic Map Collection)

The Sterling Highway was included in the highway PLOs and the Omnibus QC Deed:

- ❖ PLO 601 (1949) was a withdrawal of the ROW corridor of named and unnamed roads. “Kenai Lake to Homer Road” is listed as a feeder road with a 200’ wide ROW.
- ❖ PLO 757 (1951) amended PLO 601 by releasing the corridors of feeder and local roads from the withdrawal. On the same day, SO 2665 established a 200’ wide easement for the Sterling Highway
- ❖ SO 2665 Amd 2 (1956) widened Sterling Highway ROW to 300 feet
- ❖ Omnibus QCD (1959) lists FAP Route 21, Sterling Highway, and FAS Route 480 (Old Sterling Highway) in the schedule of routes conveyed.

Fast forward to November, 1970:

- ❖ A USFWS representative asks Department of Highways (DOH) for copies of ROW permits for the Old and New Sterling Highways, Funny River Road, and material sites in the Kenai National Moose Range.
- ❖ DOH had only BLM ROW grants for the material sites, issued after 1964 earthquake.
- ❖ In 1971, DOH applied for ROW easements for the Sterling Highway and Funny River Road, apparently convinced that they had none. USFWS included the Old Sterling Highway and three minor roads serving Hidden, Alcatraz and Skilak Lakes.
- ❖ A single easement document with 18 restrictions was signed by USFWS (representing the Secretary of the Interior), accepted by DOH and recorded in January of 1972.

Fast forward again to 2013:

- ❖ DOT&PF had plans to reconstruct MP 58-79 for the first time since the 1980s.
- ❖ R&M was under contract to do the surveying and mapping of the existing ROW.
- ❖ The 1971 easement deed was considered the basis of ROW across federal lands.
- ❖ The Kenai National Moose Range is now part of the Kenai National Wildlife Refuge, established in 1980.
- ❖ USFWS and DOT&PF could not agree on the extent of wildlife mitigation efforts required by the terms of the 1971 easement deed. The cost of required mitigation could derail the project entirely.

What is the basis of ROW for the Sterling Highway in the Kenai Moose Range?

We've answered quite a few of the basic questions...

- ✓ When was the route constructed?
- ✓ Who constructed the route?
- ✓ Who owned the land at the time of construction?
- ✓ Was public money spent on the route?
- ✓ Who used the route?
- ✓ Who maintained the route?

But we are not quite ready to answer these questions yet:

- Was there a ROW for the Sterling Highway before statehood?
If so, what type of ROW is it?
- Who “owns” the ROW?

How much do we really know about the history of the refuge, ARC’s authority and the highway PLOs?

What exactly did the language in EO 8979 mean?

Alaska Case Retrieval Enterprise System (ACRES)

Note: Reports are generated from a replicated database. Information can be one day old.

Case Retrieval by Document Type/Number

EXECUTIVE ORDER 0000008979

Cases Retrieved for EO 0000008979		
Serial Number	Case Type	Case Status
Abstract AKA 056784	231401 WDL-FWS NATL REFUGE SYS	INTERIM 06-Apr-1988

The first place to look is the BLM case file for EO 8979...

PART 1 IS AN ARCHIVE FILE AND MAINLY CONSISTS OF
INFO RELATING TO EO 8979
PART 2 IS AN ARCHIVE FILE AND CONTAINS INFO RELATING
TO EO 8979 AS WELL AS INFORMATION UP TO THE TIME
PLO 3400 WAS ISSUED
PARTS 3&4 CONTAIN COPIES OF SOME DOCUMENTS FROM BOTH
PARTS 1 & 2, AS WELL AS DOCUMENTS CREATED SINCE
THE ISSUANCE OF PLO 3400.
PARTS 3&4 ARE TO BE RETAINED AT ASO DOCKET.

Parts 1 & 2 of the casefile had been transferred to NARA in Anchorage

History of EO 8979...from correspondence in the BLM casefile

UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
WASHINGTON
December 6, 1940.

MEMORANDUM for the Secretary.

In accordance with your instructions there is transmitted herewith a draft of a proposed proclamation establishing the Kenai National Moose Range in Alaska.

The proposed range is to be established on all that area of land and water lying in the northwest portion of the Kenai Peninsula, Alaska, comprising 2,300,000 acres. The purpose of the proposed proclamation is to reserve these lands for the use of the Department of the Interior as a refuge and breeding ground for moose. This area is a natural habitat for these animals and its location affords an opportunity for effective administration.

Dec 1940:
FWS transmits
draft order
withdrawing
2.3 million
acres of
public land
on the Kenai
Peninsula for
the Kenai
National
Moose Range

Comments on the proposed Moose Range...

GLO District Cadastral Engineer George Parks (Juneau), on plans for the highway connection:

"I know that plans have been suggested for connecting by highway the agricultural districts on the south end of the Kenai Peninsula with the road system already constructed north of Seward to Turnagain Arm. The Bureau of Public Roads, Territorial Highway Engineer, and the Alaska Road Commission have collaborated in investigations of the several projects. If the area south of the Kenai is included in an absolute reserve there will not be sufficient area remaining on which settlers could make entry to justify the expenditure of funds for roads or other necessary facilities."

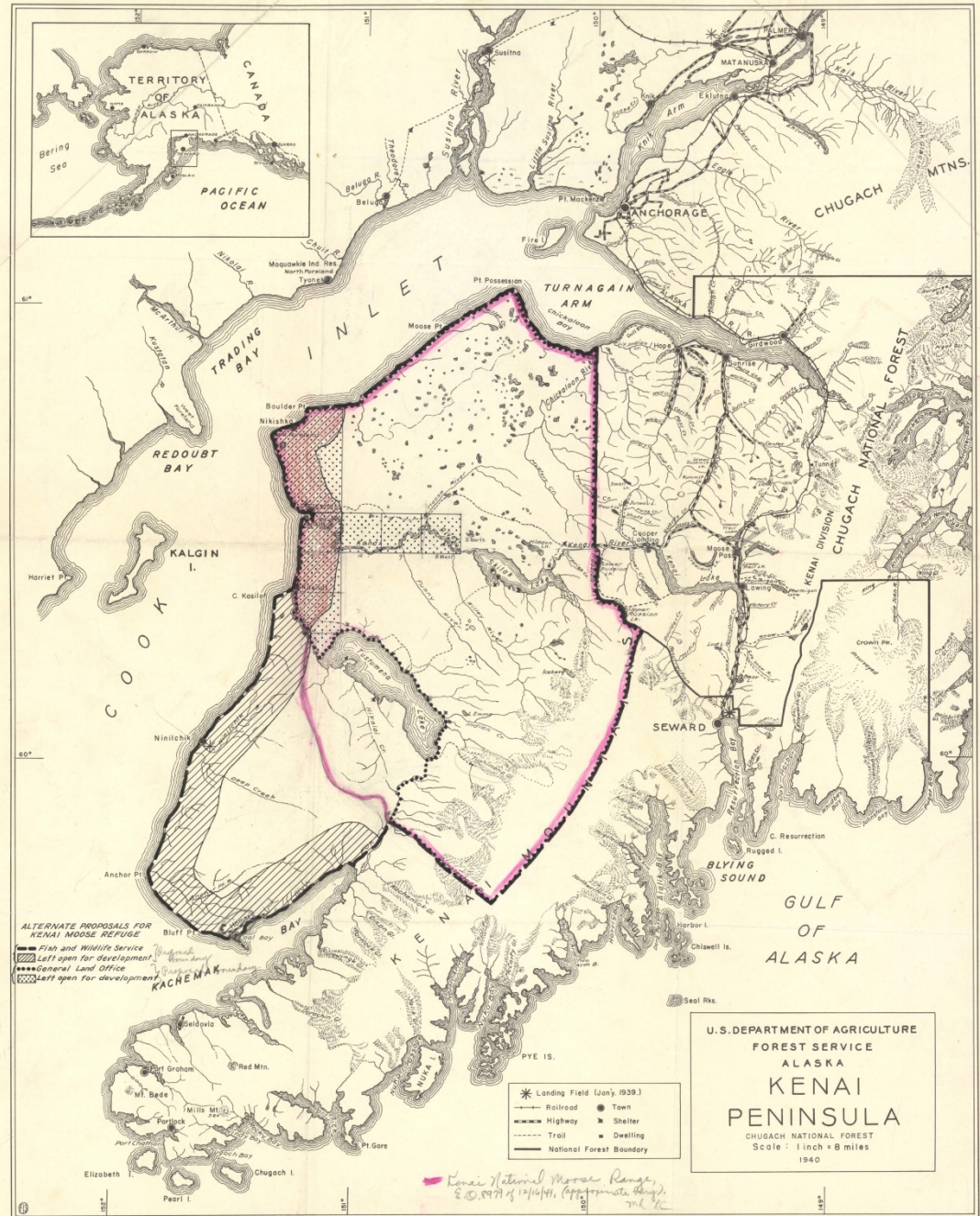
*from letter to GLO Commissioner, February 13, 1941
(emphasis added)*

GLO proposes an alternate configuration for the Moose Range...

"Recent settlement activity has brought proposals for highway connection with the Seward-Sunrise route and the Alaska Railroad. The road is so important from the viewpoint of settlement that special provision for it should be made in the establishment of the moose range. The proposed highway connection has been predicated upon continued settlement, and if the area were largely withdrawn from entry, it is doubtful whether the road would be built."

*GLO Commissioner Fred Johnson
From Memorandum to the Secretary, June 30, 1941
(emphasis added)*

Map from NARA files shows final Moose Range boundary as a compromise between GLO and FWS



GLO proposed the language included in EO 8979

"...Provided further, That the reservation for the national moose range shall not operate to prevent the construction and operation of a highway to connect the area open to settlement with the Seward-Sunrise road by the most practicable route..."

The Moose Range reservation is subject to construction of the highway at a later date...

Why is the language in the EO important?

"R.S. 2477 (43 USC 932) grants a right of way for the construction of highways over public lands, not reserved for public uses."

43 CFR 244.54 (1939)
(emphasis added)

What was ARC's relationship to other agencies within the Department of the Interior?

1932 – the duties and authority of the Board of Road Commissioners for Alaska (est. 1905) is transferred to the Department of the Interior and is officially named the Alaska Road Commission



ARC's budgets were meager in the early years, but the post-war era brought many changes.

ARC's funding increases dramatically in the post war years

In 1948, Congress approved a six year road program for Alaska worth 125 million dollars.

This funding level is more than three times as much money than the ARC received in the prior 43 years.

The Secretary of the Interior delegated authority to the ARC

July 19, 1948 – Department Order 2448

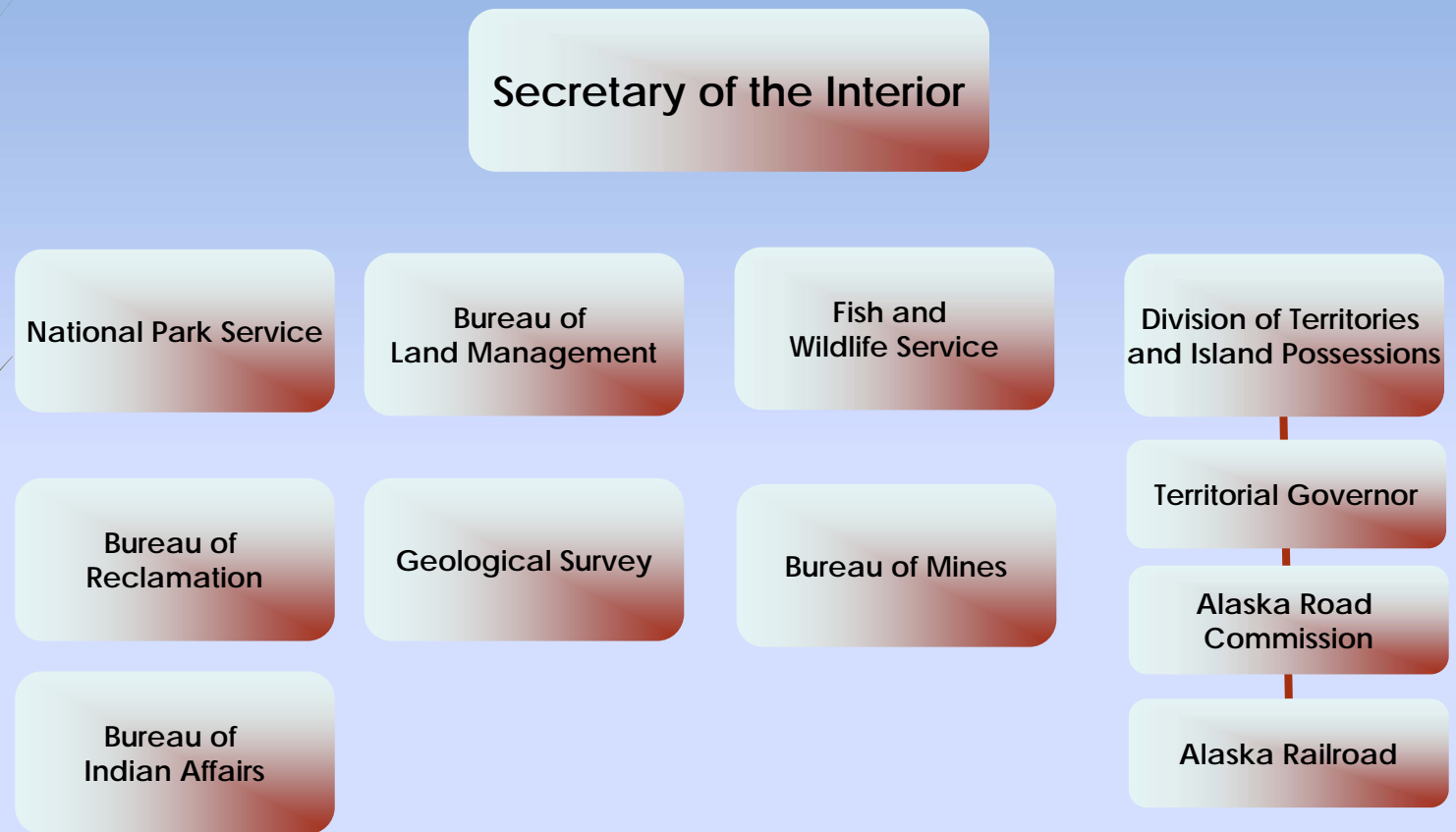
The functions and authority granted to the Secretary by the Act of June 30, 1932 is delegated to the Alaska Road Commission acting through the Commissioner of Roads for Alaska.

This order, approved by the President, vested in ARC the permission to construct and maintain roads, trails and other projects on the public lands in Alaska with the same authority as the Secretary.

The “Alaska right-of-way” problem is finally fixed:

- The “Alaska Field Committee” (est. 1948) was a working group of Alaska-based DOI agency representatives
- In October 1948, committee members developed a road classification that was incorporated into ARC Memorandum No. 2, dated January 1, 1949
- The committee recommended that the Alaska Road Commission be given complete jurisdiction over all Alaska highways controlled by DOI

Department of the Interior agencies (circa 1948) represented on the Alaska Field Committee



DOI Policy of ROW widths and jurisdictions set prior to PLO 601

Assistant Secretary William E. Warne, in a letter dated February 8, 1949, commented on the decisions made as to ROW width and jurisdiction:

600 Feet for the Alaska Highway

300 Feet for other primary roads

200 Feet for secondary or feeder roads

100 Feet for local or farm roads

Responsibility for designating the class of roads would rest with the Alaska Road Commission.

“This decision represented the Department’s views and as such is, of course, binding on everyone in the Department”.

PLO 601 was the public statement of DOI policy

- ❖ The major DOI agencies in Alaska were represented on the Alaska Field Committee and were fully aware of the policy, the public land order and its intended effects.
- ❖ The PLO 601 withdrawal did not revoke the reservation of the Kenai National Moose Range, but it did designate another public use for this public land

What were the circumstances behind the 1971 easement deed?

The USFWS representative that contacted DOH in 1970 was the refuge manager of the Moose Range.

Although USFWS correspondence indicates that they were aware of the language in the EO, there was no mention of the highway PLOs and Omnibus QCD:

“This road was constructed in about 1947... but no legal right-of-way was ever issued.”

Staff of the USFWS Realty Division of the Portland Office assisted in drafting the ROW easement.

Was the 1971 easement deed really necessary?

The Right of Way for the Sterling Highway and Old Sterling Highway was established at construction by R.S. 2477, PLO 601 and SO 2665.

These routes were conveyed to the State of Alaska without conditions by the Omnibus QCD in 1959.

In 1971, it seems that neither DOT&PF nor USFWS had enough historical documentation to support a determination of the status of the ROW for the Sterling Highway.

Neither agency understood that the ROW existed and had already been conveyed to the State.

Where it stands now...

- ❖ DOT&PF provided my report and research to the State of Alaska Attorney General's Office for review and comment in late 2013.
- ❖ Assistant AG Kent Sullivan prepared a memorandum addressed to DOT&PF entitled "Legal Characterization of the Sterling Highway", in which he concluded:

"The State's interest in the Sterling Highway right-of-way did not arise from the 1971 easement agreement, which, with respect to the Sterling Highway, is a legal nullity. The State's ownership of the right-of-way predates creation of the Range and arose from either of two independent legal mechanisms..."

The mechanisms described by Mr. Sullivan include highway PLO/SOs and R.S. 2477.
- ❖ Mr. Sullivan's memorandum and my report & research were provided to the USFWS.
- ❖ It is my understanding that USFWS & the State have agreed to disagree about the Sterling Highway ROW issue.
- ❖ Sterling Highway MP 58-79 Rehabilitation project is moving forward.

Observations and Lessons Learned:

- ❖ This research project made me rethink the general principle that ROW cannot attach to land withdrawn for public purposes.
- ❖ The language in the EO was included to allow the construction and operation of the highway, including the appropriation of a ROW corridor.
- ❖ It is very important to understand the administrative history of the agencies involved. Both ARC and FWS were agencies within DOI with very specific missions and authority.
- ❖ ARC's construction of roads and trails on lands under DOI's jurisdiction was an authorized use of public lands with the full support and authority of the Secretary of the Interior.
- ❖ ROW widths and jurisdiction of Alaska's road system was set by DOI policy before PLO 601 was issued.
- ❖ Although we have learned much from this research project, the best recommendation I can give you is to evaluate every route for its unique circumstances.