

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

AHTNA, INCORPORATED, an)
Alaska corporation, and)
CHITINA NATIVE CORPORATION,)
an Alaska corporation, and)
the CHITINA TRADITIONAL)
COUNCIL, an Alaska Native)
village,)

Plaintiffs,)

vs.)

STATE OF ALASKA DEPARTMENT OF)
TRANSPORTATION & PUBLIC)
FACILITIES,)

Defendant.)

Case #3AN-91-6957 Civil

OPPOSITION TO STATE'S MOTION FOR PARTIAL SUMMARY
JUDGMENT

I. Introduction.

The court should deny the first and second parts of the State of Alaska's Motion for Partial Summary Judgment. The court should deny summary judgment on the State's right of way claim because the Copper River Railroad right of way was extinguished upon abandonment by the railroad in 1939, and neither the federal nor state government performed the necessary preconditions to attachment of a new reservation of right of way between Chitina and the Allen River prior to the 1959 quitclaim to the State, nor did a new easement attach before the 1969 federal land freeze which protected the right of plaintiff Native Corporations to selection and conveyance of some of the subject lands. The court should enter summary judgment against the State, see Ak.R.Civ.P. 56(c) ("Summary

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judgment, when appropriate, may be rendered against the moving party."), by declaring that the State has no valid right of way for the Copper River Highway between Chitina and the Allen River except where the requirements of the public land laws were fulfilled prior to the land freeze.

The court should deny summary judgment against plaintiffs' trespass claim because the State, acting through its employees and/or agents, has made entry and inflicted damage upon plaintiff's lands of a temporary character, not leading to transfer of title to the State, and therefore not appropriate for relief under a theory of inverse condemnation, viz., camping upon Ahtna lands by DOT&PF crews during the summer construction activity.

Plaintiffs do not oppose partial summary judgment in accordance with the third part of the State's motion because plaintiffs concede that, as a matter of law, punitive damages are not available against the State of Alaska. A.S. 9.50.280.

II. Trespass by Defendant.

A. Statement of Genuine Issues of Fact.

The affidavit of John Devenport establishes that individuals have been using lands belonging to plaintiff Ahtna, Incorporated, as a campsite during the construction of the road from Chitina to the Tiekkel River during the summer of 1991. Exhibit 1, attached. Circumstantially, it appears that the users were employees or agents of the Department of Transportation and Public Facilities. *Id.* Further discovery is necessary to establish with certainty the identity of the trespasser(s).

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B. Memorandum of Law.

Alaska case law does establish that trespass is not actionable against the state for a taking of, or damage to, private property otherwise compensable under inverse condemnation. State v. Crosby, 410 P.2d 424, 728-29 (1966). Recognizing this, plaintiffs have stated a cause of action for inverse condemnation damages directed toward the building of a road on private lands without a valid right of way.

On the other hand, other activities of defendant have damaged the property interests of one or more of the plaintiffs without rising to the level of a taking of title. Establishment of an unauthorized campsite on Ahtna private lands is an example. If the court considers this kind of damage to be compensable under a theory of inverse condemnation, then plaintiffs do not oppose summary judgment against the trespass claim; in the alternative, however, plaintiffs will need to recover damages in trespass to obtain full relief.

III. Title to the Right of Way.

A. Introduction.

The historical record shows that the right of way for the Copper River and Northwestern Railroad was abandoned by the railroad and cancelled by the United States. Thereafter, the United States Department of the Interior established criteria for the reservation of new rights of way across federal lands in Alaska. Neither the United States nor the State of Alaska met the criteria for the establishment of a new right of way for a Copper River Highway between Chitina and the Allen River prior to 1959, when the United States Department of Commerce quitclaimed its interest in federal roads in Alaska to the new state. Nor

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

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

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

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

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

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

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

and that

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

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

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

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

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

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

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

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

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

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

right-of-way be used, as far as practicable, as a public highway."

Id. (emphasis in original). Both the language of the 1941 act and its historical context disprove the State's assertion.

First, the legislative history of the 1941 Act shows that it was not so much intended to create a public highway, as by dedication, as to prevent the attachment of segments of the railroad corridor to adjoining private lands between Chitina and McCarthy. See discussion of the Act of March 8, 1922, *supra*. The creation of a public highway was left to the Secretary of the Interior:

The Secretary of the Interior is hereby authorized and empowered to accept, on behalf of the United States and without cost to the United States, gifts and conveyances of said properties to be used, operated and maintained **as far as may be practicable or necessary**, as a public highway, tram road, or tramway under the provisions of the Act of June 30, 1932 (17 Stat. 446), notwithstanding anything within any Act to the contrary.

Act of July 15, 1941, Pub.L. 176, ch. 300; 55 Stat. 594 (emphasis supplied). (The 1932 Act cited in the statute transferred jurisdiction over Alaska roads from the Secretary of War to the Secretary of the Interior. Lloyd Schade, 116 IBLA 203 (1990).)

The State's interpretation would deny any meaning to the words "as far as may be practicable or necessary" in the statute, contrary to a basic rule of statutory construction that statutes are to be read to give effect to the entire text. See, e.g., Alaska Transportation Commission v. AIRPAC, Inc., 685 P.2d 1248 (1984). The quoted text expresses a Congressional direction that the Secretary evaluate the suitability of the route as a public highway prior to withdrawal, reservation, dedication, conveyance, or

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any other act which would unalterably affect its status. Moreover, the use of the words "as far as practicable or necessary" rather than simply "if practicable or necessary" strongly implies that Congress anticipated that the Secretary could find some portions of the route to be suitable for highway purposes, and other portions unsuitable.

Within this context, the findings of the Interstate Commerce Commission, Appendix 1 to State's memorandum, take on added significance. There, the ICC expressed its conclusion that providing public access from Chitina east to McCarthy was necessary for the maintenance of the communities along the old railroad route. *Id.* at 3-5. Were the Secretary of Interior to adopt that conclusion, he presumably would then inquire whether maintenance of public access between Chitina and McCarthy was practicable; if the answer was affirmative, then the 1941 Act would provide authority to establish a "public highway, tramroad, or tramway" linking the two settlements.

In contrast, there was no pre-enactment finding or history to show that the route from Chitina south to Cordova was either practicable or necessary as a public highway. We must look to the post-1941 period to resolve the issue.

D. The United States Did Not Reestablish a Right-of-Way between Chitina and the Allen River prior to the 1959 Quitclaim Deed.

In 1941, Congress authorized the Secretary of the Interior to accept relinquishment of the railroad right of way. In 1945, the Department of the Interior canceled the right of way on its records. In 1959, the United States Department of Commerce quitclaimed to the new State of Alaska all of its interest in Federal Aid Secondary Route 851, spanning 170.0 miles from the Port of Cordova through Chitina

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to the Richardson Highway. See Appendix 15 to the State's Memorandum, at 1 and 3; accord State's Memorandum, at 4. The State's right of way claim hinges on the definition of the preconveyance interest of the Department of Commerce in FAS 851.

The State argues that the federal government dedicated a right of way to public use as a highway by the terms of the 1941 statute. That argument is refuted by the legislative history and the express terms of the statute, as discussed above. The dedication argument is also contradicted by the subsequent executive history, which shows that the rules for creation of a right of way for the Copper River Highway were not promulgated until the 1950s, and the preconditions which they established were probably never met for the lands at issue in this case.

The State's memorandum recites the regulatory history as follows:

On August 10, 1949, the Department of the Interior issued Public Land Order 601 withdrawing for road purposes land along each side of the center line of roads existing at the time in Alaska. On October 16, 1951, the Department of Interior issued Departmental Order 2665, which provided for a 300 foot width for through roads. See appendix 12. On September 15, 1956, Amendment 2 to Departmental Order 2665 added the Copper River Highway to the list of through roads, thus creating a 300-foot-wide withdrawal for all portions where not entry under federal land laws had occurred. See appendix 13. Finally, in 1958, Interior issued PLO 1613, which revoked the reservation for through roads and simultaneously established rights-of-way for those roads.

State's Memorandum, at 5.

Before analyzing the intricacies of the various regulatory orders, it is instructive to note that the "Copper

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River Highway" was added to the list of roads subject to the associated withdrawals in 1956, fifteen years after the passage of the 1941 Act which the State interprets as a dedication statute. If the State's dedication argument were correct, the application of the withdrawal regulations would have been redundant or, alternatively, the route from Chitina to Cordova would have been included in the 1951 list of roads subject to the withdrawals. Instead, the more likely interpretation is that by 1956 the Secretary of the Interior had determined that a right of way along some part of the length of the "Copper River Highway" was "practicable and necessary", at least to the extent that it should be withdrawn from entry under the public land laws.

It is fundamentally incorrect, however, to equate inclusion upon the list of federal through roads with reservation of a right of way for the entire route from Cordova to Chitina. The 1956 regulatory amendment simply made the "Copper River Highway" (no further definition is provided in the order) subject to the provisions of Public Land Order 2665; that 1951 order, which defined the widths of various reservations and easements, also established important preconditions to the reservation of a right of way. PLO 2665 thus requires careful scrutiny.

The 1951 Public Land Order, attached to the State's Memorandum as Appendix 12, has 4 sections. The first section states that the purpose of the order is not only to "fix the width of all public highways in Alaska", but also to

prescribe a uniform procedure for the establishment of rights-of-way or easements over or across the public lands of such highways.

Appendix 12 to State's Memorandum, at 1, § 1(a)(2). Section

12 sets out three categories of public highways in Alaska: through roads, feeder roads, and local roads. *Id.*, at 1-2. The 1956 amendment would add the "Copper River Highway" to the first category, but note for present purposes that the Copper River Highway does not appear in either the list of through roads (300 foot widths, except for the 600 foot Alaska Highway) nor the list of feeder roads (200 foot widths). If the 1941 Act actually dedicated the 200 foot railroad right of way as a public highway, it would be reasonable to expect it to appear on the list of feeder roads; this further weakens the State's dedication argument. The category of local roads (100 foot widths) is a residual category, with no specific listing.

Subsection 3 of PLO 2665 defines the conditions for the existence of a reservation or easement for roads in any of the categories of the previous section. While not appearing in the original order, the "Copper River Highway" was integrated into Section 2(a)(1) by the 1956 Amendment, and thereby became subject to the requirements of Section 3. The text of this section is so important to the question of title that it is set out here in its entirety:

Sec. 3. Establishment of rights-of-way or easements.

(a) A reservation for highway purposes covering the lands embraced in the through roads mentioned in section 2 of this order was made by Public Land Order 601 of August 10, 1940, as amended by Public Land Order No. 757 of October 16, 1951. That order operated as a complete segregation of the land from all forms of appropriation under the public-land laws, including the mining and mineral leasing laws.

(b) A right-of-way or easement for highway purposes covering the lands embraced in the feeder roads and the local roads equal in extent to the width of such roads as established in section 2 of this order, is hereby established for such roads over and across the public lands.

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(c) The reservation mentioned in paragraph (a) and the right-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.

Subsection (c) of section 3 distinguishes between existing roads and "new construction", and states that the reservation or easement, as the case may be, does not attach until survey stakes are set and the required notices are posted at appropriate points. To determine the effect of PLO 2665 on a particular road, such as the Copper River Highway, it is therefore necessary to inquire what portion of the road existed as of October 16, 1951, and what portion was not constructed at that time. Fulfillment of the staking and posting requirements of Section 3(c) is a precondition to a claim of title to post-1951 construction flowing from PLO 2665.

State records show no evidence of the existence of a public highway south from Chitina in 1951, nor do they show the staking and posting necessary after 1951 for the attachment of the reservation for new construction. Plaintiffs' lands lie approximately between miles 110 and 131 of the old railroad grade. The State's Appendix 16 to its Memorandum for Summary Judgment shows no activity in that area prior to "Preliminary Engineering" in 1961, two years after the 1959 Quitclaim Deed. The State's 1988 Compendium Report, at 60, says that "[n]o highway survey is available..." Page 3 of the State's Appendix 15, which describes the Federal Aid Secondary Class "A" Routes quitclaimed by the Department of Commerce, shows that only 88 of the 170 system miles of FAS 851 were constructed at the time of the 1959 conveyance to the State. The constructed

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areas are not specifically described in the appendix, but seem to correspond to approximately thirty-eight miles from Chitina northwest to the Richardson Highway and approximately fifty miles north from Cordova to the Million Dollar Bridge, accord 1988 Compendium Report at 3 and 7, leaving eighty-two miles from Chitina south to the Million Dollar Bridge outside the scope of any PLO 2665 reservation of right of way.

The Federal-Aid Highway Act of 1956, 70 Stat. 377, § 107(b), transferred administration of public highways in Alaska to the Secretary of Commerce, thus explaining why the 1959 quitclaim deed names the Department of Commerce as grantor. The establishment of rights of way across the federal lands between Chitina and Cordova, however, remained the province of the Department of the Interior as federal landowner. In 1958, PLO 1613 revoked the reservations for through roads and replaced them with easements, accord State's Memorandum at 5. The practical difference between the two is that subsequent entrants under the public land laws cannot gain title to lands subject to prior reservations, but can gain title to lands subject to easements so long as the easement remains an encumbrance on the title. Where reservations did not exist under PLO 2665, however, easements were not created by PLO 1613.

Therefore, in 1959, when the Department of Commerce quitclaimed its interest in FAS 851 (the "Copper River Highway") to the State of Alaska, it conveyed only what it held, which was a reservation of a 300 foot right of way for portions of the highway constructed before October 16, 1951, or staked and posted in accordance with PLO 2665 after 1951. It did not convey any interest in a right of way from Chitina south to at least mile 110 of the old railroad grade, the lands at issue here.

E. The State of Alaska Did Not Reestablish a Right-of-Way between Chitina and the Allen River prior to the 1969 Federal Land Freeze.

The State makes no argument that it obtained a right of way across federal lands from the Department of Interior subsequent to statehood, but bases its claim of title on the 1959 quitclaim deed. Appendix 16 to the State's Memorandum shows no construction activity between miles 110 and 131 prior to 1971, but only the "Preliminary Engineering" mentioned above.

In 1969, the Secretary of the Interior issued a public land order that suspended all entry upon federal lands in Alaska pending resolution of Alaska Native land claims. PLO 4582, 34 Fed.Reg. 1025 (January 23, 1969). The result was the 1971 Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 et seq. Pursuant to that Act, plaintiff Native Corporations selected and received conveyance of the federal interest in three townships at issue here: Township 4 South, Range 5 East, Copper River Meridian (Chitina Native Corporation surface, Ahtna subsurface), and Townships 5 South, Range 5 East, and 6 South, Range 4 East (Ahtna surface and subsurface).

The State argues in its Memorandum, at 5-6, that "[t]he highway right-of-way, was conveyed out of federal ownership in 1959, and could not be conveyed by ANCSA to the corporations." As explained at length above, the 1959 quitclaim deed conveyed only the interest of the Department of Commerce at the time, which did not include a reservation of right of way across the subject lands south of Chitina. The ANCSA conveyances to plaintiffs state that their titles are subject to

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[a]ny right-of-way interest in the Copper River Highway (FAS 851), transferred to the State of Alaska by quitclaim deed dated June 3, [sic] 1959, executed by the Secretary of Commerce....

Interim Conveyance #442, October 23, 1981 (Ahtna subsurface (emphasis added); I.C. Nos. 947 (Ahtna surface) and 1021 (Chitina surface) contain similar language; see Exhibits 2-4). As demonstrated by the use of the qualifier "any", the Interim Conveyance documents do not purport to settle the question of the existence or scope of the Copper River Highway right of way as it affects the plaintiffs' lands.

III. Conclusion.

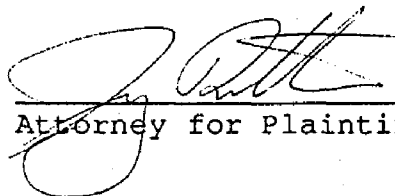
The court should deny the State's motion for summary judgment on its claim of title to a right of way for the Copper River Highway from Chitina south across plaintiffs' lands. Instead, in accordance with Rule 56(c) of the Alaska Rules of Civil Procedure, the court should summarily rule that the State has no title to a right of way for the Copper River Highway from Chitina south across plaintiffs lands except where it can show construction of a public highway prior to October 16, 1951, or compliance with the conditions of PLO 2665 Section 3(c) after October 16, 1951. The parties can then proceed to discovery and an eventual evidentiary hearing on the extent of the State's actual right of way, if any.

The court should deny the State's motion for summary judgment against plaintiffs' claim for trespass damages unless it concludes that any such damages are compensable under a theory of inverse condemnation, in which event the plaintiffs do not oppose summary judgment for the State on the trespass issue.

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The plaintiffs do not oppose summary judgment declaring that the state is immune from punitive damages under A.S. 09.50.280.

DATED this 21th day of September, 1991, at Anchorage, Alaska.



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