IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

CRAIG PUDDICOMBE and JOHN DUNHAM,

Plaintiffs,

vs.

MICHAEL A. CONNER, JOANNE CONNER FITZGERALD, JAMES V. KRACKER, et al.,

Defendant.

Case No. 3PA-91-00391 CIVIL

ORDER SUPPLEMENTING NOVEMBER 22, 1996 DECISION AND ORDER ON REMAND

On November 22, 1996, I entered an order cancelling a previously-set evidentiary hearing and granting Joanne Fitzgerald's motion for entry of judgment. A copy of that decision is attached to this order. Having reviewed that order more than once, I have concluded that one section of my decision should be further explained. I do this on my own motion, as I feel that without further explanation, the reviewing court might conclude that all issues encompassed by its remand order have not been considered.

The remand order required me to determine the "precise location and extent of the right of way." November 22 Order at 1. In determining the "extent" question, I said: "By 'extent' the Court meant width and not uses. Therefore, I need not rule on this issue." Id, at 5 (¶ III). On further consideration, I now believe this statement of the Supreme Court's intent may have been incorrect. Although the "extent" issue might appropriately be limited to consideration of the width of the trail, an issue resolved by the language of AS 19.10.015, it could also be expanded to include issues of permissible uses or "scope" of the R.S. 2477 right-of-way.

This issue was briefed by the parties. See, Fitzgerald's memorandum in support of motion to rule on legal issues (filed October 31, 1996 at Volume 7 of trial court file) at 2; Fitzgerald reply brief re location and extent of right-of-way (filed October 31, 1996, Volume 7) at 6, 7. The State of Alaska, in its Amicus Curaie memorandum at p. 6 (filed October 21, 1996, Volume 7) contends it may reserve "the authority to regulate and control the width of the right-of-way as well as the manner of public use."

In narrowly interpreting the Supreme Court's remand order, I may have unduly restricted the inquiry, as "extent" in the remand order may be equivalent to issues of "scope" that are often discussed in R.S. 2477 cases. Therefore, issues of scope will be discussed below.

R.S. 2477 has always been interpreted as "an open offer from Congress that could be accepted by actions taken locally." Barbara G. Hjelle, Ten Essential Points Concerning R.S. 2477 Rights-of-Way, J. 14 Energy, Nat. Resources, & Envtl. L. 301 (1994). Such acceptance could occur numerous times resulting in cumulative property rights: "Because the grantor, the federal government, was never required to ratify a use on an R.S. 2477 right-of-way, each new use of the [right-of-way] automatically vested as an incident of the easement." Id. Property rights could vest until 1976, when Congress repealed R.S. 2477.

Once an R.S. 2477 is "perfected" by acts of acceptance, the scope of the right-of-way must be defined. "The 'scope' of a right-of-way refers to the bundle of property rights possessed by the holder of the right-of-way. This bundle is defined by the physical boundaries of the right-of-way as well as the uses to

which it has been put." Sierra Club v. Hodel, 848 F.2d 1068, 1079 n.9 (10th Cir. 1988) (emphasis added). State law is used to determine the scope of an R.S. 2477: "[T]he weight of federal regulations, state court precedent, and tacit congressional acquiescence compels the use of state law to define the scope of an R.S. 2477 right-of-way." Id. at 1083.

Alaska views the scope of an R.S. 2477 generously. In Dillingham Comm. Co. v. City of Dillingham, 705 P.2d 410 (Alaska 1985), the court held that the public had accepted a grant of federal land by using a corner of a surveyed portion of land to access a beach and haul freight into town. The owner of the land argued that the public could not use the road to access the city dock, implying that such use would be inconsistent with the scope of the right-of-way. The court disagreed: "If there is a public road on Survey 2541, it may be used for any purpose consistent with public travel."

In Fisher v. Golden Valley Elec. Ass'n, Inc., 658 P.2d 127 (Alaska 1983), the issue was whether a utility could construct a powerline on an unused section line easement reserved for highway purposes under an Alaska statute. The statute constituted Alaska's acceptance of the federal government's offer to grant an easement in R.S. 2477. The appellants argued that federal law governed whether the utility line was permissible, but the court applied Alaska law and stated:

> The fact that the section line easement was not actually used for highway purposes does not dictate a different result. Since a highway could be built, a powerline, which is a subordinate and less intrusive use, may be. "The rule is, that use of an easement in lands cannot be extended or made greater than the terms of the reservation authorizes, but it may be less." (citations omitted).

Sierra Club (the preeminent scope case) defined "scope" in a similarly generous manner, referencing Utah's easement law. The Sierra Club argued that proposed improvements to a recognized R.S. 2477 road would make it suitable for uses not in existence in 1976. The court dismissed this argument: "[T]he intended use for the proposed road - the promotion of economic development - was found to square with the Burr Trail's historic uses, including service as 'a vital link between the county's major centers of activity.'" Sierra Club, 848 F.2d at 1084.

The proposed uses of this trail, as shown in the motion practice leading to my November 22, 1998 order are:

> -any purpose consistent with public travel. Fitzgerald brief filed September 30, 1996 at 11, 12 [citing Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 415 (Alaska 1985)].
> -any manner of public use determined by the State to be appropriate. Amicus Curiae memorandum filed October 21, 1996 at 6,7.
> -access into the Metal Creek area by miners, hikers, hunters, and other recreational users that may use the area. See, State DNR Department Decision, October 30, 1995, attached as part of Exhibit 1 to Puddicombe's response to State and Conner briefs at 15, 16 (filed October 28, 1998).
> - vehicular traffic and heavy equipment use, including access by mining equipment and a dozer presently on at least one of the claims. Memorandum of defendants Kracker and Fidler regarding location and extent of right-of-way at 2, 3 (filed october 29, 1997).

All of the above uses are consistent with appropriate R.S. 2477 public use as described by Alaska case law. Therefore, in addition to the location and width issues decided in my November 22, 1997 order, I should have made it clear that the "extent" of the right-of-way allows, as required by Dillingham, 705 P.2d at

415, use "for any purpose consistent with public travel."[1] This supplemental order is entered to clarify that issue. It shall be transmitted to the appellate court to complete the record and avoid any confusion that might exist on this aspect of the decision on remand.

DONE this 12th day of February, 1998, at Anchorage, Alaska.

Brian Shortell
Superior Court Judge

I certify that on 02/12/98
a copy of the above was mailed to
each of the following at their
addresses of record:

Patricia Hefferan
Michael Conner
John Steiner
Erica Kracker
Joanne Fitzgerald

Deborah Hopper
Secretary

[1]The State's contention that it has authority to regulate and control the manner of use has not been resolved as part of this decision, as it would appear to be beyond the scope of the remand order.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

CRAIG PUDDICOMBE and JOHN DUNHAM, Plaintiffs, v. MICHAEL A. CONNER, JOANNE CONNER FITZGERALD, et al., Defendants.	)	FILED IN THE TRIAL COURTS State of Alaska, Third District NOV 22 1996 Clerk of the Trial Courts By _____ Deputy Case No. 3PA-91-00391CI

Order

Background

On April 26, 1996, the Alaska Supreme Court found that an R.S. 2477 public right-of-way existed across lands owned by Puddicombe and Dunham ("Plaintiffs"). Fitzgerald v. Puddicombe, 918 P.2d 1017 (Alaska 1996). On remand, the court instructed this court to determine the "precise location and extent of the right-of-way." Id. at 1022. Joanne Fitzgerald ("Defendant") now moves for a decision regarding the legal issues and a finding that the evidentiary hearing scheduled for December 2, 1996 is unnecessary and also moves for an entry of judgment.

Discussion

I. Location of the Right-of-way

Defendant relies on the testimony of James Hermon, Al Frey and Doug Sumner who testified about the various trails to the mines during the 1940s, 50s and 60s. These three establish that several trails existed along the property, but no one predominated, and that Sumner, in building his driveway, generally followed these trails. The Supreme Court found this testimony sufficient to

create an R.S. 2477 right-of-way[1] and that the driveway followed the previous trails, though it may not follow them exactly. Id. at 1021-22.

The Supreme Court held that an R.S. 2477 right-of-way is established by a showing of a "generally followed route." Fitzgerald, 918 P.2d at 1021-22. The Supreme Court apparently resolved the location issue because it concluded that "a fair reading of Sumner's testimony reveals that he generally followed the trail's established route in constructing his driveway...." Id. at 1020.[2] It follows, therefore, that this court must locate the right-of-way along this route.

Plaintiffs offer little evidence to support any different conclusion. Plaintiffs' main argument is that the testimony only proves that several trails existed across the property and that there is no legal basis upon which the court can "consolidate" these trails into a single right-of-way along Sumner's driveway.

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[1]Although I strongly disagree with the Supreme Court's factual and legal analysis in this case, the doctrine of civil disobedience is not available to me to remedy the injustice that results. I must apply the appellate court's orders and I will do so to the best of my ability.

[2]In Dillingham Comm. Co. v. City of Dillingham, 705 P.2d 410 (Alaska 1985), the court relied on the testimony of two long-tim Dillingham residents as sufficient to establish the requisite amount of public use and to distinguish the case from Hamerly v. Denton, 359 P.2d 121 (Alaska 1961) in which the court found that a "dead end road or trail, running into the wild, unenclosed and uncultivated country," insufficient to create an R.S. 2477 right-of-way. Id. at 125. Rather, the court found the evidence sufficient to establish a road that connects "two essential transportation arteries." Dillingham Comm. Co., 705 P.2d 414. In Fitzgerald, the Court quoted the same Hamerly language, again distinguished that case and found enough evidence to create the right-of-way from the river bed to Metal Creek and to the lands beyond USS 5265. Fitzgerald, 918 P.2d 1022. The court thus found that there were "definite termini." Id.

Memorandum in Opposition at 4-6. However, this is exactly the location that the Supreme Court infers is proper. That Court found a right-of-way does exist based on the previous trails and that Sumner's driveway generally follows these trails. Fitzgerald, 918 P.2d at 1020. There is no doubt that Sumner's driveway should serve as the foundation from which to set the right-of-way.

II. Width of the Right-of-Way

The scope of a right-of-way is defined by state law. Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir. 1988). This court must look to Alaska law to determine the scope of the right-of-way in this matter. In Sierra Club, the Tenth Circuit first looked to Utah state law (that was the situ state) to resolve the scope issue. Ultimately, that court relied on state common law because, though a statute did apply, the statute delegated to the state and/or local authorities the responsibility to set the width for rights-of-way and those authorities had not done so.[3] Id. at 1083. Sierra Club leaves little doubt that had an applicable statute resolved the issue, that statute would govern. Id.

Alaska law is more straight-forward because AS 19.10.015 applies to conclusively establish the right of way at 100'.[4] AS

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[3]The Utah statute read
The width of rights-of-way for public highways shall be such as the highway authorities of the state, counties, cities or towns may determine for such highways under their respective jurisdiction.

[4]FLPMA, enacted in 1976, repealed 43 U.S.C. § 932 and put an end to R.S. 2477 rights-of-way while preserving those rights-of-way already created. See 43 U.S.C. § 1701(a) and (h). These provisions have been interpreted as "freezing" the scope of the rights-of-way as they existed on October 21, 1976 when FLPMA was enacted. See Sierra Club, 848 F.2d at 1078.
R.S. 2477 rights-of-way are also frozen once the property is

19.10.015 holds that:

> It is declared that all officially proposed and existing highways on public land not reserved for public uses are 100 feet wide....

Furthermore, the statute defines a highway as

> a highway..., road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof,....

AS 19.05.130.[5] Read together, these provisions include trails within the definition of a highway and set the right-of-way for such passages at 100'.[6]

Plaintiffs argue that AS 19.10.015 can not apply to R.S. 2477 rights-of-way because the wording of that statute requires a conjunctive ie, that the highway be both "officially proposed" and "existing." Memorandum in Opposition at 10-11. This construction of the statute, however, is unsupported and makes little sense. The natural reading of AS 19.10.015 suggests a listing of the two types of highway that are affected by its provisions. It does not suggest a two-prong test.

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entered. Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961). The Supreme Court noted that Sumner entered USS 5265 in 1965. Fitzgerald, 918 P.2d at 1018. To define the scope of the right-of-way, this court needs to ascertain the Alaska state law as it existed in 1965 when Sumner entered the property and "froze" the then existing R.S. 2477 right-of-way.

[5]Now AS 19.45.001.

[6]The scant legislative history for AS 19.10.015 is interesting. This provision, as first proposed by the Senate in 1963, read:

> It is declared that all officially proposed and existing highways on the public domain are 100 feet wide.

The House State Affairs Committee amended the bill to its current version which substitutes the words "public lands not reserved for public uses" for "on the public domain." The bill as amended reflects the exact language of 43 U.S.C. § 932 which created the R.S. 2477 rights-of-way.

Plaintiffs also argue that AS 19.10.015 can not set the width for all R.S. 2477 rights-of-way because such a carte blanche rule would require that all public rights-of-way be 100'. This argument is also without merit. Defendant's argument only extends to R.S. 2477 rights-of-way and does not try to apply AS 19.10.015 to any other public rights-of-way.

III. For what uses may the right-of-way be used?

The Supreme Court remanded with instructions to determine the location and extent of the right-of-way. By "extent" the Court meant width and not uses. Therefore, I need not rule on this issue.

IV. The Schultz Reversal

As discussed above, an R.S. 2477 right-of-way is governed by state law. In rendering the Fitzgerald decision, the Supreme Court found an R.S. 2477 right-of-way existed and defined Alaska common law on this issue. This is the common law of the state and it is this law which this court must apply, regardless of the outcome of Schultz.

V. The Evidentiary Hearing

Evidentiary hearings are proper where there are unresolved material issues of fact. Perry v. Newkirk, 871 P.2d 1150, 1156 (Alaska 1994). Absent genuinely disputed factual issues, the trial court has broad discretion to dispose of issues without an evidentiary hearing. Wylie v. State, 797 P.2d 651, 656 (Alaska 1990). I need only have an evidentiary hearing if disputed factual issues exist. The briefs of the parties make clear that there is no new evidence for me to consider. On remand, the location issue

will again depend on the testimony of Hermon, Frey and Sumner. Their testimony was heard during the original trial. Unless Plaintiff can demonstrate that something new would be learned from this trio, an evidentiary hearing is unnecessary.

VI. Entry of Judgment

Once the Supreme Court remanded Fitzgerald, full jurisdiction over matters in that litigation also returned to this court. See Appellate Rule 507(b). This jurisdiction extends to any cost awards made by the appellate court and allows the clerk of the trial court to issue writs of execution for the collection of such awards. See Appellate Rule 508(h). The Supreme Court awarded Defendant her costs of appeal. Defendant is entitled to an entry of judgment as to these costs.

During the original trial, I entered an order for judgment in Plaintiffs' favor that specifically was to include attorneys' fees and costs. Order, 2/8/94. The Clerk of Court thereafter filed a taxation of costs for $2,169.11 (3/8/94) and this court ordered attorneys' fees for $7,641.90 (5/12/94). The Clerk collected a total of $2,958.70 from Defendant. On appeal, Defendant contested this court's award of attorneys fees and the Supreme Court vacated that award.

I have the authority to award costs by Alaska Rule 54 and have regained jurisdiction over these matters by Appellate Rule 507(b). I also have the authority and jurisdiction to amend previous cost awards and fees. Because the Supreme Court reversed the Superior Court, ruled in favor of Defendant and reversed this court's attorneys fees award, it is proper to return the money collected

from her. Defendant's motion for entry of judgment is granted.[7]

Conclusion

It is ordered that the evidentiary hearing for December 2, 1996 is cancelled and that Defendant's motion for entry of judgment is granted.

Done at Anchorage, this 22 day of November, 1996.

B Shortell

Brian Shortell
Superior Court Judge

I certify that on 11-22-96
a copy of the above was mailed to each
of the following at their addresses of
record: Hefferan/Blankenship/Conner/Steines/Kraeter

A Roberts
Secretary/~~Deputy Clerk~~

[7]Defendant calculates that the total amount due as of October 20, 1996 is $5,922.85. This includes the $2,958.70 (plus interest) garnished from her pursuant to this court's original award and the $2, 417.29 (plus interest) awarded by the Supreme Court for costs on appeal.