

9/11/91

75

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,)
v.)
STATE OF ALASKA, DEPARTMENT)
OF TRANSPORTATION & PUBLIC)
FACILITIES,)
Defendant.)

RECEIVED

SEP 11 1991

Chambers of Judge Karen L. Hunt
3rd Judicial District

Case 3AN-91-6957 Civil
Copper River Highway

STATE OF ALASKA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Introduction.

This court should summarily dispose of certain issues raised by plaintiff's complaint because there are no material facts in dispute and the state is entitled to judgment as a matter of law. Brock v. Rogers and Babler, Inc. 536 P.2d 778 (Alaska 1975). The state should have summary judgment on its right of way claim because the Copper River Railroad right of way was acquired by the federal government under an Act of Congress, and transferred to the State of Alaska at statehood. The state is also entitled to summary judgment as to the trespass causes of action asserted in the complaint. Finally, punitive damages are not available as a matter of law against the State of Alaska.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

1 **II. The State Acquired the Copper River Highway Right of Way at**
2 **Statehood.**

3 **A. History of the Copper River Railroad:**

4 The Copper River Railroad, which was completed in 1911,
5 started from Cordova and ran 30 miles in an easterly direction to
6 the mouth of the Copper River and then along the Copper River for
7 about 100 miles to Chitina. From Chitina, it ran easterly along
8 the Chitina River for approximately 65 miles, through the village
9 of McCarthy, and on to Kennecott, the northern terminus of the
10 line. See Opinion of Interstate Commerce Commission, Finance
11 Docket No. 12164, Copper River and Northwestern Railway Company
12 Abandonment, (April 21, 1939) at pp. 1 through 3; copy attached as
13 appendix 1.

14 The original right-of-way for the construction of the
15 railroad was acquired by the Copper River and Northwestern Railway
16 Company under the Act of May 14, 1898, ch. 299, 30 Sta. 409 (1898),
17 copy attached as appendix 2. The width of this right-of-way was
18 100 feet on either side of the center line of the railroad. See
19 section 2 of appendix 2.

20 The Copper River Railroad continued in operation as a
21 railroad until 1939. On September 13, 1938, the Copper River and
22 Northwestern Railway Company applied for permission from the ICC to
23 abandon the operation of the entire railroad line extending from
24 Cordova to Kennecott, a distance of approximately 195.2 miles. See
25 appendix 1 at p. 1. On April 21, 1939, the ICC granted the
26 railroad's request. See appendix 1 at p. 6.

1 Because it was thought that there was significant public
2 interest in maintaining a highway right-of-way along the route of
3 the railroad right-of-way, Congress enacted the Act of July 15,
4 1941, Pub. L. 176, ch. 300, 55 Stat. 594 (1941), copy attached as
5 appendix 3. This Act authorized the Copper River and Northwestern
6 Railway Company to convey to the United States the following:

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

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

18 The Act of July 15, 1941, required that the right-of-way
19 be used as a public highway, which operated as a dedication of the
20 original right-of-way for use as a public highway. See 23 Am. Jur.
21 2d Dedication (1983).

22 On March 29, 1945, the Copper River and Northwestern
23 Railway Company, in a relinquishment document, formally
24 relinquished all of its interest in the original railroad right-of-
25 way, including terminal and station grounds. See copy of
26 Relinquishment Document attached as appendix 4. On May 11, 1945,
the railroad's relinquishment was accepted by the Department of
Interior. See appendix 5.

 The Act of July 15, 1941; the relinquishment by the
railroad; and the acceptance by the United States establish that,
as of May 11, 1945, the United States became the owner of the

1 original 200-foot-wide Copper River Railroad right-of-way (plus
2 station grounds) subject to the requirement of the Act of July 15,
3 1941 that the right-of-way be used, as far as practicable, as a
4 public highway.

5 B. Use of the Copper River Railroad Right-of-way as a Public
6 Highway by the United States:

7 At the time of the original application for abandonment
8 of the railroad, i.e., September 13, 1938, the Alaska Road
9 Commission (the federal agency in charge of roads before statehood)
10 recommended immediate steps to maintain the railroad between
11 McCarthy and Chitina and operate it by means of light equipment.
12 See appendix 1 at p. 3. Other Alaska Road Commission Reports from
13 1939 to 1955 show project recommendations or expenditures on
14 portions of this right of way. See appendices 6--11. Of
15 particular note is the 1952 Report of the Alaska Road Commission,
16 which shows the Commission was actively pursuing a road project to
17 connect Cordova to Chitina utilizing the roadbed of the Copper
18 River Railroad. See appendix 10.

19 C. The State's Interest in the Copper River Highway:

20 On June 30, 1959, the Secretary of Commerce quitclaimed
21 to the State of Alaska all interest that the Department of Commerce
22 had in certain roads in Alaska, including the Copper River Highway.
23 See the Omnibus Act Quitclaim Deed, attached as appendix 15.
24 Attached as appendix 16 is a summary of the state's projects and
25 expenditures on this road from 1957 to 1988. Appendix 16 is an
26

1 excerpt from the Final Compendium Report, Copper River Highway,
2 State of Alaska DOT&PF, Summer 1988.

3 D. Width of the Copper River Right-of-way:

4 The right-of-way acquired by the railroad was 200 feet
5 wide as provided by the Act of 1898, appendix 2, p.1. However,
6 federal land orders widened the right of way of the Copper River
7 Highway to 300 feet by the time it was conveyed to the state in
8 1959.

9 On August 10, 1949, the Department of Interior issued
10 Public Land Order 601 withdrawing for road purposes land along each
11 side of the center line of roads existing at the time in Alaska.
12 On October 16, 1951, the Department of Interior issued Departmental
13 Order 2665, which provided for a 300 foot width for through roads.
14 See appendix 12. On September 15, 1956, Amendment 2 to
15 Departmental Order 2665 added the Copper River Highway to the list
16 of through roads, thus creating a 300-foot-wide withdrawal for all
17 portions where no entry under federal land laws had occurred. See
18 appendix 13.

19 Finally, in 1958, Interior issued PLO 1613, which revoked
20 the reservation for through roads and simultaneously established
21 rights-of-way for those roads.

22 In 1971, Congress passed the Alaska Native Claims
23 Settlement Act (ANCSA). The plaintiffs Ahtna Inc., and Chitina
24 Native Corporation are corporations organized pursuant to ANCSA.
25 As such, they hold title to various lands as surface or subsurface
26 estate owners. The highway right-of-way, was conveyed out of

1 federal ownership in 1959, and could not be conveyed by ANCSA to
2 the corporations. ANCSA Sec. 4 also extinguished all claims to
3 land in Alaska based on aboriginal title.

4 Any and all acquisitions of surrounding lands, including
5 Native claims under ANCSA, were subject to the existing 300 foot
6 right-of-way for the Copper River Highway.

7 **II. Plaintiffs Have No Cause of Action in Trespass.**

8 In Counts I and II of their complaint, the plaintiffs
9 allege that the state is trespassing on their lands either because
10 the state has no valid right of way, or because the road work is
11 outside the state's right of way. The state is entitled to summary
12 judgment on these allegations because there is no cause of action
13 in trespass against the state.

14 The Alaska Supreme Court first recognized this principle
15 in State, Dept. of Hwys. v. Crosby, 410 P.2d 724 (Alaska 1966). In
16 Crosby, the state took an easement and right of way across property
17 which the owner's grantor had obtained by patent from the United
18 States. The state did not condemn the property through an eminent
19 domain action because it believed the patent was subject to a right
20 of way reservation. The Supreme Court disagreed with that claim,
21 but reversed the lower court's action of allowing the case to
22 proceed on a trespass theory and in granting an injunction. The
23 court held that the plaintiff could pursue its claim in inverse
24 condemnation, but that trespass was not an appropriate claim
25 against the state because of its power of condemnation.

1 In Wickwire v. Juneau, 557 P.2d 783 (Alaska 1976), the
2 court reaffirmed the principle of Crosby. The court said:

3 Although appellant asserted a claim in trespass,
4 the trial court found the claim to be one of
5 inverse condemnation. Relying on [Crosby, supra],
6 we affirm that decision. The landowner's only
7 remedy in a situation such as the one presented is
8 an inverse condemnation action for just
9 compensation for the value of the easement on the
10 date of taking. . . An independent action based on
11 the antecedent trespass is not permitted because
12 that trespass, if nonnegligent, "necessarily
13 results from the imposition of the easement;"
14 therefore, the claim for damages from the trespass
15 is "properly . . . considered an element of the
16 property owner's damage due to the condemnation."

17 Id. at 784 (footnotes omitted).

18 See also, State v Doyle, 735 P.2d 733, 734 (Alaska 1987); Ostrom v.
19 Alyeska, 648 P.2d 986, 989 n.5 (Alaska 1982).

20 III. Punitive Damages May Not Be Awarded Against the State of 21 Alaska.

22 In adopting AS 9.50.250--AS 9.50.280, the legislature
23 waived the state's sovereign immunity subject to certain
24 limitations. One such limitation, set out in AS 9.50.280, is that
25 no punitive damages may be awarded against the State of Alaska.

26 This section provides:

Judgment for Plaintiff. If judgment is rendered
for the plaintiff, it shall be for the legal amount
found due from the state with legal interest from
the date it became due and without punitive
damages.

IV. Conclusion.

The state is entitled to a ruling that it has a valid 300
foot right of way for the Copper River Highway. The court should
dismiss the trespass claims in Count I and II of plaintiff's

1 complaint and rule that no punitive damages may be awarded in this
2 case.

3 Dated at Anchorage, Alaska this 14th day of September
4 1991.

5 CHARLES E. COLE
6 ATTORNEY GENERAL

7 By: *Virginia A. Rusch*
8 Virginia A. Rusch
9 Assistant Attorney General
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100