

Bennett, John F (DOT)

From: Bennett, John F (DOT)
Sent: Wednesday, September 19, 2007 1:23 PM
To: 'Rick Bennett'
Subject: FW: Wasilla-Fishhook Road

Rick, you'll never guess what I got drug into.....Parcel 1 of the Wasilla Fishhook Road project. This still isn't settled because even though the parcel was reduced to just reflecting the area of existing ROW by prescriptive easement, the owner still hasn't accepted that. So I was asked by the AGO and Bob Wright last May to review the file particularly regarding the issue of whether a public prescriptive easement could be terminated by prescription or abandonment. This is what they claimed happened to any prescriptive easement when the Bogard Road project moved the road to the east. If we can convince them that the area we had claimed as a public prescriptive easement did not terminate by moving the road, then we will have to support our assertion that the area of the prescriptive claim covered the entirety of parcel 1 and not just 14 feet on each side of the old centerline which was coincident with the easterly boundary of the parcel. In any event, it seems that you were heavily involved in this parcel at the time. I suspect all of your old records either ended up in a bonfire or are in some forgotten corner of the R&M warehouse. But nonetheless, I have to ask you whether the TNH field notes locating the toe of slope on this parcel are still available or whether a prelim topo map that shows the location of both sides of the road at the time of the 2000 survey is available. Any other thoughts you might have as to how to kill this thing would also be appreciated. No rush, I'm heading to Oregon for all of next week. Thanks in advance. JohnB

From: Bennett, John F (DOT)
Sent: Tuesday, September 18, 2007 4:30 PM
To: Stark, Jeffrey P (LAW)
Subject: Wasilla-Fishhook Road

Jeff, my mission was to contact Rick Bennett at R&M to determine when Tryck Nyman Hayes (TNH) surveyed the toe of slope which was the basis for the location of the existing ROW by prescription within Parcel No. 1. I looked again at the email I referred to (attached) and then noted a letter from R&M to DOT the next day (also attached). The letter states (para 8) that TNH commenced their surveys in August of 2000. Para 10 states that the Bogard road project (constructed in 2001 and 2002) shifted the roadbed to the east. Para 3 states that the Wasilla to Fishhook project was constructed between August 1973 to May 1974 and that the typical road section was 28 +/-, plus side slopes and ditches. Jay Sullivan's letter states that his research found that in 1971 the road was approximately 28' in width or 14' each side of centerline yet the TNH survey located the toe of slope 55-60 feet left of the centerline. Plat 71-27 indicated that the road centerline was coincident with the east boundary of parcel 1. So somewhere between Jay's estimate of 14' west of the easterly lot boundary (centerline) in 1971 to approximately 55-60' left of lot boundary by the TNH 2000 survey, the road width grew or the road was realigned. Rick Bennett says in his email that "the lack of as-builts and ROW maps for this project makes it hard to know exactly where the road was constructed in 1973, but the road had been there for at least 30 years before new construction." The 1973 Wasilla-Fishhook project was a typical section project so there was no planned alignment and was likely field adjusted by the project engineer. It is likely that some of the increased width is due to the extra width required for the fill slopes or ditches as indicated on the project typical section. But it is likely that most of the change is due to realignment in '73. Because of that I think I had better ask Rick for the original field notes or preliminary topo drawings if they are available as they would indicate whether the centerline of Fishhook prior to the Bogard road shift was still coincident with the east boundary line or if the road had in fact been realigned in 1973. JohnB

John F. Bennett, PLS, SR/WA
 Chief, Right of Way, Northern Region, DOT&PF
 2301 Peger Road, Fairbanks, Alaska 99709-5399
 Phone: 907.451.5423, Fax: 907.451.5411
 Toll Free: 1.800.475.2464

Not used since 1970 - Jay(?) when last used.
Ruling - TMA notes.

1. Agree w/ Jay - No P&O
2. Curson review of "Kink to Cottonwood" for PSZA77
 - 1915 Rect Survey Plat shows trail in close proximity to parcel.
 - 1911 Field notes
 - Trail existed prior to entry leading to patent
 - Reasonable proximity.
 - Weaknesses:
 - o Width - "ditch to ditch" - 8 to 12' maybe.
 - o actual location ambiguity.
 - Further research may clarify & solidify assertion -
 - Better to pursue easement by prescription.
3. Jay says 1971 Wausilla - Fishhook road 20' wide - 10' each side of

- April 13, 2004 email R. Bennett says -
 - o Westly ROW line on Panel 1 based on field survey of toe by TMA for this project.

- o Survey completed before Bogard road moved to east.

- o Likely represents what was in place since 1973

reconstruction of Fishhook Road.

4. Termination of a Public Prescriptive Easement. ^{Agree.} Full panel

- Brown & Ely - Termination by Abandonment or Prescription.

- o Can't be by prescription - "Time doesn't run against sovereign."

- o Abandonment - non use does not constitute abandonment

- o Easement holder - intent to abandon - affirmative conduct.

- o Party claiming abandonment must establish holders intent ^{to} abandon.

- o Note wide ROW occupation by narrow roadbed - not intent to abandon

- o We have a statutory process standardizing the affirmative

act to relinquish easement - Comm Deed of Vacation.

has agreed w/ most
of what we said
before.

Highway ROW
Corridor - Road
moves.

Timeline - Prescriptive Use

Lot 18A, Block 1, Parks Manor Subdivision (Formerly Lot 20, Block 1, Parks Manor Subdivision)

Current Owner:

Triple B's LLC: a Corporation composed of Bernie Cullen (Managing Partner), Kevin Frohling, and Bradley Laybourn.

- 1) Alignment of Wasilla Fishhook Road has been depicted in generally the same location from 1956 – 2001.
- 2) Centerline of Wasilla Fishhook Road shown on the Fred Nelson Subdivision Plat (Plat # 69-20, Recorded 8/29/1969). See Tracts 6 and 8.
- 3) Parks Manor Subdivision Plat (Plat # 71-27, Recorded 5/17/1971) states “Lots 20 subject to existing road R/W”. Width not specified but centerline shown on the easternmost boundary of Lot 20.
- 4) Right of way Maps for Project RS 0525(5) (B4972), dated 1/10/1973, depict the existing right of way and centerline of “as-built” road. Construction began on August 14, 1973.
- 5) Several projects in the mid to late 1970s.
- 6) June 1993 – Environmental Assessment performed for Wasilla Fishhook Road – Glenwood to Shrock. In 1994, project phased. First Phase, intersection improvements at the intersection of Main Street/Nelson Avenue/Bogard Road/Wasilla Fishhook. Second Phase, Wasilla Fishhook Road – Bogard to Shrock. Third Phase, Main Street – Glenwood.
- 7) Title:
 - a) 11/13/1995 – Brad Laybourn acquires Lot 20, Block 1, Parks Manor Subdivision.
 - b) 3/6/1998 – Brad Laybourn quitclaims Lot 20, Block 1, Parks Manor Subdivision to Kevin Frohling. Mr. Laybourn also quitclaims to Bernie Cullen the same day but the deed is recorded after the Frohling deed.
 - c) 10/13/2000 – Kevin Frohling quitclaims to Kelvco Partners (Frohling, Laybourn, and Cullen).
 - d) 4/9/2001 – Kelvco Partners quitclaims to Triple B's LLC.
- 8) Prescriptive Easement claim depicted on July 10, 2000 Right of Way Plans for HRO 0525(10)/51648.
- 9) 10/13/2000, survey begun on Lot 20, Block 1, Parks Manor Subdivision for STP-0525(12)/54302, Wasilla Fishhook Road Rehab. – Glenwood to Schrock Road.
- 10) Prescriptive Easement claim and construction limits depicted on November 1, 2000 “As Advertised” construction plans for HRO 0525(10)/51648.
- 11) 1/23/2001 – Public Meeting held for STP-0525(12)/54302, Wasilla Fishhook Road Rehab. – Glenwood to Schrock Road.
- 12) Notice to Proceed for construction on HRO 0525(10)/51648 given 3/27/2001. All construction commitments completed on September 14, 2002. The road moved further to the east on Lot 20, Block 1, Parks Manor Subdivision. Obliteration of old roadway.
- 13) 11/2001 – Design Study Report and Plans in Hand review for STP-0525(12)/54302, Wasilla Fishhook Road Rehab. – Glenwood to Schrock Road.
- 14) 9/2003 – Appraisals underway for STP-0525(12)/54302, Wasilla Fishhook Road Rehab. – Danna Avenue to Seldon (Schrock) Road.
- 15) 3/2004 – Offers underway for STP-0525(12)/54302, Wasilla Fishhook Road Rehab. – Danna Avenue to Seldon (Schrock) Road.

Order of Maps/Plats

1. GLO Survey of Township 17 North, Range 1 West, Seward Meridian, Approved 1915
2. BPR Map Wasilla Roads, December 1956
3. 1959 Omnibus Act Quitclaim Deed
4. Fred Nelson Subdivision Plat #69-20 Recorded 8/29/69
5. Parks Manor Subdivision Plat # 71-27 Recorded 5/17/71
6. Wasilla to Fishhook Junction Right of Way Maps, January 1973, Project No. RS-05025(5) (B4972)
7. Wasilla to Fishhook Junction Right of Way Certification, 4/25/73
8. Wasilla to Fishhook Grading and Drainage Project No. S-0525(6); Date began 8/14/73; Date ended 5/20/74
9. Wasilla to Fishhook Surfacing As-Built Plans; Project No. RS-0525(7); Date began 9/9/74, Date ended 10/7/74
10. Wasilla to Fishhook Paving; Project No. TQS-RS-0525(8); Date began 8/3/76, Date completed 7/18/77
11. Wasilla to Fishhook Junction Photo Overlays; 1982, Project No. RS-05025(5) (B4972)
12. Right of Way map dated 7/8/00; Bogard Road Intersection Improvements: Wasilla Fishhook/Nelson & Crusey Street Project No. RS-05025(5) (B4972) Project No. HRO-05025(10)/51648 and Wasilla Bogard Rd. & Crusey St. Pathway TEA-0001(90)/51705
13. Right of Way map dated 6/6/03; Wasilla - Fishhook Road Rehabilitation Bogard Road to Seldon Road (Partial) Project No. STP-05025(12)/54302 (except from)
14. Fax correspondence sent to Triple B's LLC Bernie Cullen
15. Parks Manor Subdivision Lot 18A Replat# 2004-114 recorded 7/27/04
16. Matanuska Electric Association, Inc. Right of Way Easement dated 11/17/04

12A. Except from "As advertised" construction plans for STP-0525(10)/51648

12B. 10/29/02 memo re final review of STP-0525(10)/51648

12C. 9/26/03 letter of project completion STP-0525(10)/51648

10-27

"nonuse alone does not constitute abandonment."

"party claiming abandonment must generally establish the easement holder's intent to abandon by clear & convincing evidence."

Can a prescriptive easement be terminated for non-use/abandoned when the nonuse lasts for the period of prescription?

Can this apply to public prescriptive easements?

Termination by abandonment vs. termination by prescription. 10-32

"redemption of a public road does not imply the public's intent to terminate abandonment"

10-44. (10-43)

"Termination by prescription" -

"generally accepted view is

a public ROW cannot be

terminated by adverse pos."