

State v. Offshore Systems – Kenai
Case No. 3KN-08-453 CI
AGO File no. 221-09-0136

Property Description: T.8N., R.12W., S.M. Section 36
Gov't Lot 1 (Beach)
Northwesterly corner of SE 1/4

Initial Review: The subject lands were patented from the federal government to the State, then patented to the Kenai Borough and ultimately quitclaimed to Offshore Systems all without reference to an easement for Nikiski (Nikishka) Beach road. The road may have been subject to a PLO "local road" highway easement, however the PLO's were subject to prior existing rights and Section 36 was reserved for the benefit of school by the Act of March 4, 1915, upon survey (June 12, 1923). Any "local road" ROW created by PLO 601 (August 10, 1949) would not have been effective against Nikiski Beach road due to the prior school lands reservation. August 19, 1964 AGO memo that appears to have been specifically written to address Nikishka Beach road concludes that "...*Order 2665 as amended did not operate to establish the width of highway right-of-way across school sections.*" The January 2, 1966 ROW plans for Wildwood North includes the existing and proposed ROW for Nikishka Beach road. The existing and proposed ROW is depicted as ending short of the beach. This may have been due to the scope of project limitation as the physical road is shown to continue along the beach. The proposed ROW is noted as a parcel to be acquired from DNR and the DNR status plats indicate an easement file having been created. (ADL 32264). The patent to Kenai Borough is specifically subject to this easement for Nikiski Beach Road. This review suggests that the public access by means of a PLO easement or specific DNR reservation falls short of the beach.

However, the State patent to the Kenai Borough is specifically "*Subject to valid existing trails, roads and easements.*" and the specific reservation for the 50 foot wide public easement along the ordinary high water line of Cook Inlet is to be accessed by a 50 foot wide public access easement to the easement along the public water. These points of access were to be identified by the grantee and platted. The patent requirement that it will be subject to existing trails and roads and the statutory authority under AS 38.04.055 for DNR to secure these reservations may imply that at least a 50' wide easement exists extending from the ADL 32264 easement to and along the beach road.

Alternative Review: The PLO requirement that they would be subject to prior existing rights suggests that a highway easement could not be impressed upon lands that were already in reserved status. Another view is that the PLO easement was impressed on the reserved lands but was just not available for public use until the prior reservation was released, allowing the PLO to rise to the surface. This argument was successfully made in the 1998 federal case SOA v. Harrison. The trust status of Section 36 was in place as of the approval of the federal township survey in 1923. The lands were vested in the State upon admission to the union in 1959 and conveyed by patent in 1962. In 1978, Ch. 182 SLA 1978 converted(?) the school land trust status to general State of Alaska public domain lands. At that point, it could be argued as in *Harrison*, that as the PLO easement was no longer subject to the prior existing trust reservation, it was now effective as a highway right of way.

However, an issue that may arise is merger of title. The PLO easement, to the extent that it existed, was conveyed to the State of Alaska through the 1950 Omnibus Act QCD. The lands crossed by the Nikishka Beach road were subsequently patented to the State of Alaska. Although I am not aware that a federal decision was issued for this potential conflict, BLM has on a regular basis, issued "Merger of Title" decisions noting that under federal interpretation, once the lands were patented to the state, the Omnibus QCD highway easement interest merged with the patented fee estate and was no longer in effect. I am not aware that the AGO has ever issued an opinion regarding the effect of merger of title between DNR and DOT. However, for practical purposes DNR and DOT manage their lands as if merger does not have an effect on state lands. To do so would create chaos and require that DNR have created specific

highway easements across every township it received from the federal government that was crossed by Omnibus QCD rights of way. Both DNR and DOT have separate statutory authority to acquire, manage and dispose of lands. DOT has assumed unilateral authority to dispose of Omnibus (PLO) highway easements by a Commissioner's Deed of Vacation. AS 38.05.030, discusses the application of the Alaska Land Act to DOT. In summary, the statute provides that the Land Act does not apply to DOT's authority to "acquire, use, lease dispose of, or exchange real property, or any interest in real property". However, land assigned (ILMA/ILMT/ROW Permits) by DNR to DOT will be returned to DNR when it is no longer needed. Except for land that is required to be returned to DNR (ILMA/ILMT/ROW Permits), DOT may dispose of real property acquired by it under AS 02, 19 and 35.

If we can accept the *Harrison* proposition that a PLO highway easement can become effective once the prior reservation is released, that the 1978 legislature did in fact release the school trust reservation, and that "merger of title" did not eliminate the highway easement, then the 100' wide PLO local road easement may still exist beyond the end of the DNR ADL 32264 right of way. The easement was not mentioned in the patent to Kenai Borough or the QCD to Offshore Systems, but the absence of an express reservation for a PLO ROW in a patent or other conveyance does not defeat the existence of the right of way. Also, to the extent that the PLO easement did exist, it cannot be lost by apparent abandonment or lack of maintenance. It can only be released through our AS 19 disposal authority.

Chronology

March 4, 1915: *"Pursuant to the Act of March 4, 1915, 38 Stat. 1214, when public lands in the Territory of Alaska are surveyed, secs. 16 and 36 in each township shall be reserved from sale or settlement for the support of the common schools in the Territory. Under the Alaska Statehood Act, Sec. 6, par. K, 48 U.S.C. Prec. § 21 (1976), title to these reserved school lands passed to the State of Alaska as of the date of the State's admission into the Union. The Statehood Act further provided that title did not pass as to any such school sections which were appropriated by the United States prior to the date of admission of Alaska into the Union."*

June 12, 1923: T.8N., R.12.W. S.M. including Sec 36 Federal Rectangular Survey approval.

August 10, 1949: PLO 601 - *"Local Roads...All roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior."* ROW 100' wide, 50' each side of centerline.

July 4, 1951: Aero-Metric photo pre-Nikishka road construction

October 16, 1951: PLO 757, SO 2665 - Released withdrawals and established highway easements for Feeder and Local roads.

August 25, 1954: ARC Anchorage 4-Week Report – Page *"Kenai Area – 5. Set ditch and slope stakes Nikishka No. 2 beach Road, Sta. 20+00 to Sta. 45+00"*

June 28, 1957: BPR Vicinity Map No. 168 depicting Nikishka Beach Road through Section 36

April 7, 1958: PLO 1613

July 1, 1959: Omnibus Act QCD - FAS Class "B" Route No. 4901 - North Kenai Branches - Nikishka Beach Road *"From a point on FAS Route 490 approx. 15.5 miles north of the Village of Kenai, north to Nikishka Beach, Length 0.8 mile."*

April 2, 1962: Federal Patent No. 1226102 to State of Alaska - incl. Section 36, T.8N., R.12W., S.M. -

School sections *TITLE TO WHICH VESTED IN THE STATE OF ALASKA UNDER THE ACT OF MARCH 4, 1915 (38 STAT.1214), UPON ITS ADMISSION INTO THE UNION ON JAN.3, 1959, BY PRESIDENTIAL PROCLAMATION. (caps from DNR LAS System)*

May 2, 1963: Aero-Metric photo post-Nikishka road construction

August 19, 1964: AGO Memo regarding Wildwood North ROW noting that Highway PLOs have no effect on withdrawn school lands. "...subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes..."

January 2, 1966: Project S-0490(2) Wildwood North ROW Plan approval (Incl. Nikishka Beach Road - Sheets 34 & 35) Existing ROW shown as 100' from intersection nearly to South boundary of Lot 1 - Not to water or beach

July 1, 1978: Ch. 182 SLA 1978 - In 1978, the state passed legislation making mental health lands and school lands part of the state's unrestricted grant public domain.

May 16, 1980: State Patent No 5124 to Kenai Borough - including Section 36, T.8N., R.12W., S.M. (SE 1/4 excluding ROW Permit for Nikiski Beach Road ADL 32264

October 1, 1980: QCD Kenai Borough to Offshore Systems - Kenai NW 1/4 NW 1/4 SE 1/4, Sec. 36, T.8N., R.12W., S.M.

November 11, 1993: Paul G. Shultz v. Department of Army, USA (RS2477 case in 9th Circuit - "*Hamerly*, 359 P.2d at 124; see also *Dillingham*, 705 P.2d at 414. Valid pre-existing claims upon the land traversed by an alleged right of way trump any RS 2477 claim. As the *Dillingham* court put it, "it is clear that the public may not, pursuant to § 932 acquire a right of way over lands that have been validly entered." *Dillingham*, 705 P.2d at 414. Homesteading rights clearly are superior to later established RS 2477 claims. Territory validly withdrawn for other purposes also falls within the *Dillingham* rule. Thus, when Congress set aside land for the support of territorial schools, the sections it named from each township no longer were available public lands. Act of March 4, 1915, ch. 181, 1-2, 38 Stat. 1214, 48 U.S.C. § 353 (repealed by Pub. L. No. 85-508, 6(k), 73 Stat. 343 (1958)) (withdrawing all township sections numbered 16 and 36 for schools unless "settlement with a view to homestead entry had been made upon any part of the sections reserved hereby before the survey thereof in the field"). Cf. *Mercer v. Yutan Constr. Co.*, 420 P.2d 323, 324, 325-26 (Alaska 1966) (grazing land "public" because grazing permit subordinate to public right of way)."

October 28, 1998: State of Alaska v. David B. Harrison - Federal District Court Case A94-0464-CV - "*The Harrison defendants contend that the reservation under Public Land Order 601 did not apply to Chickaloon River Road because the land which it traverses was land withdrawn from public domain as part of the 1917 railroad townsite withdrawal. Thus it could not also be reserved as a "local road" under Public Land Order 601. There is no inconsistency or conflict between the railroad townsite withdrawal and Public Land Order 601. The latest was expressly made subject to the former. When, in 1955, the Department of the Interior revoked the 1917 railroad townsite withdrawal, the Department of Interior did so without purporting to affect the right-of-way created by Public Land Order 601.*"

October 3, 2005: State Land Estate Status Plat for Sec 36, T.8N., R.12W., S.M. - incl. ADL 32264 easement for Nikiski Beach Road (Does not extend to water) (Note on School land litigation No. 3AN 97-3782 Civil dated May 20, 1998)

June 8, 2007: Federal MTP of T.8N., R.12W., SM incl. Sec. 36 & area of patent No. 1226102