

1  
2 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
3 THIRD JUDICIAL DISTRICT AT KENAI

4 STATE OF ALASKA, )  
5 )  
6 Plaintiff, )  
7 )  
8 v. )  
9 )  
10 OFFSHORE SYSTEMS-KENAI, an Alaskan )  
11 Partnership, )  
12 )  
13 Defendant, )  
14 )  
15 and )  
16 )  
17 KENAI PENINSULA BOROUGH, )  
18 a Municipal Corporation, )  
19 )  
20 Intervenor. )

Case No. 3KN-08-453 CI

21 STATE OF ALASKA'S REPLY TO  
22 OSK'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

23 I. INTRODUCTION

24 OSK's March 27, 2009 summary judgment opposition memorandum  
25 (hereinafter "March 27 Opposition") appears designed to confuse, and will confuse, the  
26 unwary reader. The March 27 Opposition ignores recently discovered yet timely  
produced evidence proving that the State's 1980 conveyance of lands adjacent to  
Nikishka Beach Road to the Borough was intended to, and did, preserve the State's  
public access right of way to the beach. Exhibit AA at p. 5.<sup>1</sup> The March 27 Opposition

<sup>1</sup> Exhibits to this Reply are denoted by double alphabetical designations to distinguish them from previously submitted State exhibits.

1  
2 ignores recently discovered but timely produced evidence showing that Alaska  
3 Department of Transportation and Public Facilities (DOTPF) and Department of Natural  
4 Resources (DNR) personnel have, for many years, jointly treated Nikishka Beach Road  
5 as a DOTPF highway to the beach. Exhibit BB. The March 27 Opposition delves into a  
6 lengthy discussion of pre-statehood Federal Public Land Orders (PLOs) when, in  
7 reality, summary judgment in the State's favor does not in any way hinge on the PLOs.  
8 *See* the State's February 24, 2009 Memorandum at p. 24 n.8. Apparently, OSK hopes to  
9 so muddy the issues that this Court will throw up its hands in confusion and deny  
10 summary judgment. The Court should not be drawn in by this tactic.

11  
12 In this reply, the State will refocus the Court's attention to the dispositive  
13 issue: the public access right of way nature of Nikishka Beach Road. AS 38.04.055;  
14 AS 38.05.127(a)(2). The State will address OSK's PLO analysis, but only to show that  
15 PLO legal principles are not germane. Then, analyzing evidence recently obtained but  
16 improperly ignored by OSK, the State will further confirm: (a) that when the State took  
17 ownership of Nikishka Beach Road by conveyance from the Federal government in  
18 1959, the road already served as a public access beach right of way; (b) that the State  
19 openly (putting OSK on notice) and unambiguously preserved the road's public access  
20 status when it conveyed the land surrounding the road to the Borough in 1980; (c) that  
21 the State, has since statehood, consistently treated Nikishka Beach Road as a public  
22 access beach route; and (d) that nothing the Borough has done can divest the State of its  
23 ownership of the road. The State is optimistic that upon review of the true, relevant  
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

1  
2 facts and law the Court will enter summary judgment in favor of the State, OSK's  
3 obfuscations notwithstanding.

4 **II. ARGUMENT**

5 **A. OSK's PLO Discussion is a Needless Distraction.**

6 The State's summary judgment motion, which asks this Court to declare  
7 Nikishka Beach Road's status as a public access right of way extending to the beach, is  
8 neither based on nor requires analysis of the PLOs. That is because PLOs do not define  
9 the start and end points of public access beach rights of way. Rather, PLOs define the  
10 width (measured outward from the road centerline) of Federal easements for roads in  
11 existence, and for roads not yet constructed. *See State of Alaska v. Alaska Land Title*  
12 *Ass'n*, 667 P.2d 714, 722 (Alaska 1983), explaining the purpose of Interior Department  
13 Order 2665, 1951. And *see id.* at 718, explaining that PLO 601 creates a 50-foot  
14 easement measured from either side of the centerline of "local roads" for a total of 100  
15 feet. Moreover, PLO width easements do not eliminate State road rights conveyed by  
16 patent - they compliment and co-exist with such rights. *See* 667 P.2d at 720, explaining  
17 that a PLO width easement may co-exist with road ownership created by patent.

18  
19  
20 Thus, in OSK's case the PLOs are relevant to the width of the easement  
21 through which Nikishka Beach Road runs. The PLOs may also have some import  
22 because their existence places the burden proof on OSK. *See* AS 09.45.015. But, in  
23 this summary judgment proceeding the State is not asking the Court to declare the width  
24 of the PLO easement rights that run in the State's favor on Nikishka Beach Road.  
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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

The State has only asked for an order declaring that Nikishka Beach Road is a State road providing public access to the beach, and that the access includes the “north” and “south” routes extending from the “Y” to the beach. See the State’s proposed order submitted in support of its memorandum in support of Motion for Summary Judgment. The proposed order asks for a declaration of a 50-foot wide public access right of access on the “north” and “south” access routes to the beach in accord with AS 38.05.127(a)(2). This does not mean the State cannot successfully assert a 100-foot wide PLO easement beyond the “Y”.<sup>2</sup> What it does mean is that for purposes of the State’s motion it is unnecessary to resolve the footprint of the State’s PLO width easement. OSK knows this, but attempts to distract the Court.

The fact that OSK’s discussion of PLO law is designed to confuse the issues rather than provide clarity is further illustrated by a review of OSK’s change in its position on the import of the PLOs. In its original, February 5, 2009 summary judgment papers, OSK cited the viability of PLO 601. OSK argued (incorrectly) that the easement created by PLO 601 existed, but then disappeared under the common law

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

---

<sup>2</sup> The State can indeed prove its 100-foot wide easement based on PLO analysis. The State’s PLO expert, DOTPF’s Northern Region Right of Way Chief John Bennett, has published a report explaining the import of the Federal PLOs. Exhibit CC. Mr. Bennett has been deposed, and has confirmed his opinion that the PLOs apply to the entirety of Nikishka Beach Road, to the beach, notwithstanding Section 36’s previous “school lands” designation. Based on Mr. Bennett’s report and testimony no waiver or estoppel may be inferred. See also Exhibit DD, Attorney General Opinion A66-021-78, August 9, 1980, which debunks OSK’s theory that Federal reservations affecting school lands passing to the State are not subject to PLO easements. And see Exhibit EE, 1955 Solicitor General Opinion at p. 4, ¶ III, reaching the same result.

1  
2 of "merger" after the State received title to the Section 36 land surrounding the PLO  
3 width easement. *See* OSK's February 5 Memorandum at 8. OSK will now have this  
4 Court believe that PLO 601 never applied at all. *See* OSK's March 27 Opposition at 15.

5 The bottom line is that Nikishka Beach Road exists as a public access  
6 right of way to the beach not by virtue of PLO width easements but by virtue of: the  
7 State's ownership of the road to the beach under a valid conveyance from the Federal  
8 government; the State's maintenance of the road as a public beach access; the public's  
9 use of the road as a public beach access; the State's conveyance of the road to the  
10 Borough under terms that protected public beach access in accordance with Alaska law;  
11 and the State's continuous treatment of Nikishka Beach Road as a public access right of  
12 way from the time of conveyance to the Borough to the present. Pre-statehood PLOs  
13 have no impact on this analysis. The Court should reject OSK's PLO obfuscation.  
14

15 **B. Nikishka Beach Road is a State Road Providing Public, Beach Access**  
16 **by Virtue of the 1959 Patent from the Federal Government.**

17 Nikishka Beach Road served as a public access route to the beach before  
18 Statehood. *See* State's February 24 Memorandum at 6-11. PLO width issues aside, the  
19 fact that the road was staked for ditches and slopes by the Federal government in 1954  
20 to Station 45 (500-feet beyond what OSK claims to be the end of the public access right  
21 of way) proves that this road was built for public beach access. Exhibit D to State's  
22 February 24 Memorandum. *See also* p. 2 to Exhibit CC, 1957 Bureau of Public Lands  
23 drawing that shows the beach road going to the beach. Thus, when in 1959 the State  
24 received ownership of Nikishka Beach Road by virtue of the Federal Omnibus  
25  
26

1  
2 Quitclaim Deed, Exhibit S to the State's February 24 Memorandum, the State inherited  
3 the obligation to maintain the road as a public right of way. *See, specifically, Exhibit S*  
4 at p. 2 of 11, highlighted paragraph.

5           Despite this evidence, OSK would have this Court believe that the 1959  
6 Patent did not convey beach access. (As if the Federal government intended to convey  
7 the entire road save the very end, which presumably the Federal government would  
8 continue to maintain!) In support of its obfuscation, OSK points to: (a) alleged friction  
9 within the language of the Omnibus Deed ("to the beach" as opposed to ".8 miles"); and  
10 (b) so-called extrinsic evidence. *See* March 27 Opposition at 21-22. OSK's arguments  
11 in this regard are absurd.

12           Concerning the alleged friction between the terms "north to Nikishka  
13 Beach" and "length .8 miles" (*see Exhibit S*, p. 11 of 11, highlighted portion) that  
14 "friction" can be easily rectified by applying common contract interpretation principles.  
15 The goal of contract interpretation is to give effect to the reasonable expectations of the  
16 parties. *Sowinski v. Walker*, 198 P.3d 1134, 1143 (Alaska 2008). The Court should  
17 give effect to all terms if possible, but should not create unwarranted conflict between  
18 terms. *Stordahl v. GEICO*, 564 P.2d 63 (Alaska 1977), citing *Wessells v. State, Dep't of*  
19 *Highways*, 562 P.2d 1042 (Alaska 1977) (additional citations omitted). The Court may  
20 not impose a strained interpretation or infer ambiguity where none exists. *Jarvis v.*  
21 *Aetna Casualty & Surety Co.*, 633 P.2d 1359, 1363 (Alaska 1981). *See also Rydwell v.*  
22 *Anch. Sch. Dist.*, 864 P.2d 526, 528-529 (Alaska 1993), discussing comparable rules of  
23 statutory construction.  
24  
25  
26

1  
2 Applying these principles, this Court may easily reconcile the terms  
3 “north to Nikishka Beach” and “length .8 miles”. “North” refers to the direction;  
4 “Nikishka Beach” refers to the terminus; and the .8 mile length, while helpful in that it  
5 gives the State an idea of the approximate distance of one of many roads it is receiving  
6 under the conveyance, is not dispositive since it would frustrate the reasonable  
7 expectations of the State the Federal government -- the transfer of the entire road to the  
8 State. Given these considerations this Court should reject OSK’s claim that the 1959  
9 Patent did not convey a road going to the beach.  
10

11 With respect to extrinsic evidence, the extrinsic evidence overwhelmingly  
12 supports the conclusion that the 1959 Patent vested the State with ownership of  
13 Nikishka Beach Road as a public road to the beach. The evidence consists of the State’s  
14 maintenance history of the road subsequent to Statehood; the public’s use of the road  
15 subsequent to Statehood; the State’s and the Borough’s leases of the property  
16 surrounding the road to OSK and its predecessors subject to beach access rights of way,  
17 and the State’s conveyance of the road to the Borough subject to beach access. All of  
18 this extrinsic evidence, and more, was carefully explained in the State’s February 24  
19 Memorandum.  
20

21 Additional extrinsic evidence includes the lack of Federal government  
22 ownership claims with respect to the tip of Nikishka Beach Road. If, as OSK asserts,  
23 the Federal government did not intend to convey Nikishka Beach Road to the beach to  
24 the State, why has the Federal government not continued to maintain the tip of the road  
25 since 1959? Why has the Federal government not complained that it owns the tip of the  
26

1  
2 Road? *Compare Sowinski, supra*, 198 F.3d at 1145 (lack of complaining by contracting  
3 party is extrinsic evidence of contractual expectations).  
4

5 **C. The State's Conveyance of Section 36 Land Surrounding Nikishka**  
6 **Beach Road to the Borough Subject to Public Access Rights of Way**  
7 **Preserved the Road's Public Status in Accordance with Alaska Law.**

8 OSK's central argument is that the State, by preparing (in 1965) a road  
9 construction project drawing that depicted the Nikishka Beach Road phase of the project  
10 as ending short of the beach (State's February 24 summary judgment memorandum,  
11 Exhibit L at p. 7 of 8), somehow divested itself and the public of Nikishka Beach  
12 Road's public access, "to the beach" status. *See* March 27 Opposition at 19-20. This is  
13 another obfuscation. Even if the State could somehow "abandon" a public use right of  
14 way through its own property (recall that as of 1965 all of the property in question was  
15 owned by the State), the State resurrected the so-called "abandoned" right of way when  
16 it conveyed the property in question to the Borough in 1980. As the State has amply  
17 explained, that 1980 conveyance, a recorded deed document, put OSK on notice of  
18 Nikishka Beach road's public access, "to the beach" status. *See* the State's February 24  
19 Memorandum at 17-18.  
20

21 Recently discovered records which OSK had in hand before it wrote its  
22 March 27 Opposition reinforce the State's position (*see* State's February 24  
23 Memorandum at 12) that the State's 1980, recorded quitclaim deed conveyance of the  
24 lands surrounding Nikishka Beach Road to the Borough was intended to and did protect  
25 Nikishka Beach Road as a public access beach right of way. Exhibit AA hereto is the  
26



1  
2 State's March 13, 2009 discovery supplementation, consisting of the State's "1980 Final  
3 Decision" regarding land approved for conveyance to the Kenai Peninsula Borough.  
4 The Final Decision describes Section 36, the land at issue in this case. Exhibit AA at  
5 p. 2. The land description for Section 36 excludes Nikishka Beach Road from the  
6 conveyance. *Id.* The land description further reserves:

7  
8 a 50-foot wide perpetual public easement, as required by  
9 AS 38.05.127 and regulations implementing that statute, to and  
10 along its navigable and public body of water ... which is  
11 determined to be reasonably necessary to ensure free public access  
12 to and along each body of water.... Public access to each water  
13 body ... shall be provided from the nearest practicable existing  
14 public easement or right of way, and to and from such public  
15 easements or rights of way which may be created in the future....  
16 No such easement may be vacated, abandoned, or otherwise  
17 extinguish or rendered incapable of reasonable of by the public for  
18 which it was reserved without the approval of the grantor....

19 Exhibit AA at p. 5 (emphasis added).

20  
21 The significance of this "Final Decision" should not be undervalued. The  
22 Final Decision, when viewed in conjunction with the State's conveyance of the property  
23 to the Borough (Exhibits M and N to State's February 24 Memorandum) confirms that  
24 the purpose for the beach access easements described in the conveyance was to ensure  
25 enforcement of the public access requirements of AS 38.05.127 on Nikishka Beach  
26 Road. This is further confirmed in Exhibit FF, a copy of the State's 1979 public notice  
of its intended conveyance of lands to include Section 36 to the Borough. The  
newspaper notice states that the conveyance will be subject to "reservation of public  
access easements as required by AS 38.05.127 ... to and along navigable and public  
waters.... Exhibit FF highlighted portion.

1  
2 As all of this evidence demonstrates, even if the State had “abandoned”  
3 the beach end of Nikishka Beach Road in 1965 (it did not), the State’s conveyance of  
4 Section 36 land surrounding the road to the Borough in 1980 reinstated the supposedly  
5 “abandoned” right of access. In so doing, the State not only preserved the pre-existing  
6 public road access, but ensured that the road access conformed to Alaska law,  
7 AS 38.05.127. This puts to bed OSK’s argument that the State’s right of way on  
8 Nikishka Beach Road stops short of the beach.  
9

10 **D. The Borough’s 1990 Conveyance of Section 36 Land to OSK Could**  
11 **Not Diminish Nikishka Beach Road’s Beach Access Status.**

12 OSK argues that the State’s public access right of way ceased to exist as  
13 a result of the Borough’s 1990 conveyance of land adjacent to Nikishka Beach Road to  
14 OSK. Ignoring the fact that the State had in 1980 reserved the end of Nikishka Beach  
15 Road as a statutory public access route, OSK insists that the Borough’s allegedly  
16 inarticulate quitclaim deed to OSK and inaction with respect to platting somehow  
17 eliminated a State, statutory public access right. See March 27 Opposition at 27-29.  
18 OSK then argues that the State’s actions after 1990 resulted in “abandonment” of the  
19 public access right of way. March 27 Opposition at 30-32. OSK’s arguments belie the  
20 undisputed facts and the law.  
21

22 The fact is that after the 1990 conveyance the State continued to treat the  
23 north and south beach access routes as State roads subject to State operations and  
24 maintenance. See the State’s February 24 Memorandum at 9-11, citing Exhibits G and  
25 H, deposition testimony of DOTPF maintenance foremen Coup and Miller. The fact is  
26

1 that since 1990 the State has utilized its own equipment, materials, and manpower in  
2 this endeavor. *Id.* The facts are that since 1990, public access to Nikishka Beach down  
3 the north and south beach accesses was not interrupted until OSK closed the road off in  
4 2007. *Id.* at 10-11, citing Exhibit C, Dale McGahan deposition.

5  
6 An additional significant fact, ignored by OSK, is that shortly after OSK  
7 took title to the land adjacent to Nikishka Beach Road the two State agencies with  
8 jurisdiction here, DOTPF and DNR, where in agreement that Nikishka Beach Road  
9 served as a public access route to the beach to be administered by DOTPF. Exhibit BB  
10 hereto consists of two 1992 letters between then DOTPF Central Region Right of Way  
11 Chief Daniel Beardsley and then DNR Natural Resources Officer Katie Farley. The  
12 letters demonstrate that in 1992 DOTPF contended that Nikishka Beach Road provided  
13 a right of way extending “all the way to the beach.” Exhibit BB p. 1. DNR concurred.  
14 *Id.* at p. 3. This seriously discredits OSK’s theory (March 27 Opposition at 5) that after  
15 1990 DOTPF ceded its rights and public access responsibilities with respect to Nikishka  
16 Beach Road.  
17

18  
19 As for the legal question of whether the State divested itself of a statutory  
20 public access right of way after the Borough’s conveyance, the law dictates that no such  
21 divestiture could occur. Pursuant to AS 38.95.010, the State may not be divested of an  
22 interest in its land by prescription, adverse position, or statute of limitation defenses,  
23 and “no title or interest to land under the jurisdiction of the State may be acquired ... in  
24 any other manner except by conveyance from the State.” The State, through the  
25 Department of Natural Resources, “shall reserve easements in rights of way ...  
26

1  
2 necessary to reach or use public water and public ... land. AS 38.04.055. These are  
3 legislative mandates that the State carefully followed with respect to Nikishka Beach  
4 Road. These mandates could not, as a matter of law, have been undone by the  
5 Borough. *See Safeway, Inc. v. State Dep't of Transp. & Pub. Facilities*, 34 P.3d 336,  
6 339-341 (Alaska 2001) (adverse action of a Municipality cannot divest the State of a  
7 highway right of way). Applying these principles this Court should rule that Nikishka  
8 Beach Road's public beach access status was not disrupted by the Borough's 1990  
9 Quitclaim Deed and subsequent conduct.  
10

11 **D. OSK's Equity Arguments are of No Avail.**

12 Throughout its March 27 Opposition OSK continues to plead for equity  
13 relief in defiance of statutory and case law. OSK pleads laches, adverse possession  
14 against the State (disguised as "abandonment"), and merger. The State carefully  
15 addressed all of these pleas in its February 24 Memorandum at pp. 24-28. The State  
16 can now only add that if the equity principles that OSK cites were to apply, they would  
17 backfire on OSK.  
18

19 OSK, after all, accepted a quitclaim deed from the Borough knowing full  
20 well (based on its lease history) that the land it was accepting was subject to public  
21 access rights of way. *See Exhibit R* to the State's February 24 Memorandum, lease  
22 assignment documents. OSK's owner, Jesse Wade, knew of the public access history  
23 of Nikishka Beach Road, as did OSK's agent Clem Gubuat. *Exhibit Q. Exhibit T.*  
24 OSK knew of the Nikishka Beach Road public access routes because the routes were  
25 easily ascertainable. *Exhibit P. Exhibit Q.* Yet it appears OSK blindly accepted a  
26

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

quitclaim deed that expressly reserved rights of way then turned a blind eye to visible, established rights of way. A simple title search would have cured this. Exhibit GG. But OSK sat on its hands.

When equity principles are applied the facts militate against OSK. Nothing OSK has done suggests reasonable reliance to trigger estoppel or other equity principles against the State. To the contrary, the evidence shows that the State and the Borough reasonably relied on OSK's recognition of the rights of way, acceptance of State maintenance services, and acceptance of public beach access. Thus if equity theories such as laches, estoppel, and abandonment apply, they do so against OSK.<sup>3</sup>

///  
///  
///

---

<sup>3</sup> The same reasoning applies to OSK's adverse position discussion. OSK attempts to draw the State into a State adverse possession analysis. However, the State need not prove adverse possession over its own recorded property rights. The State would only need to prove adverse possession at trial if this Court were to first declare the State's statutory public access rights of way void (an unlikely outcome). If that happens the State will easily prove adverse possession based on its and the public's continuous, uninterrupted actions undertaken in front of OSK's very eyes and without OSK's protest.


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

CONCLUSION

For the foregoing reasons the State respectfully requests that the Court enter summary judgment in favor of the State and against OSK as specified in the proposed order submitted by the State in support of its February 24 Memorandum.

DATED this 10<sup>th</sup> day of April, 2009 at Anchorage, Alaska.

WAYNE ANTHONY ROSS  
ATTORNEY GENERAL

By:   
Dana S. Burke  
Assistant Attorney General  
ABA No. 9011085

**Certificate Of Service**

I certify that a true and correct copy of the foregoing document was

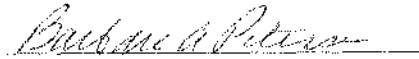
- hand delivered
- faxed
- mailed

to the following:

Ronald L. Baird  
Law Offices of Ronald L. Baird  
Box 100440  
Anchorage, AK 99510

Scott Bloom  
Assistant Borough Attorney  
Kenai Peninsula Borough  
Office of the Borough Attorney  
144 N. Binkley Street  
Soldotna, AK 99669-7520

Clay A. Young  
Delaney Wiles, Inc.  
1007 W. 3<sup>rd</sup> Avenue  
Anchorage, AK 99501

  
Barbara A. Peterson  
April 10, 2009

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

STATE OF ALASKA  
DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF LANDS

⋮

FINAL DECISION  
Kenai Peninsula Borough  
P.O. Box 850  
Soldotna, Alaska 99569

*Jss 2/26/80*

Selection Approved

The Municipal Land Entitlement Act of 1978 (AS 29.18.201 - 213) which became effective on July 1, 1978, provides for the conveyance of land to those municipalities granted a state land entitlement. The purpose of this decision is to approve the conveyance of certain state land to the above-named municipality.

\*\*\*\*\*

Municipal land selections were filed with the Division of Lands on May 11, 1979, under ADL numbers 55707, 55735, 55737 - 55740, 55742, 55743, 201285 & 201378. Lands contained in this decision were considered to be primarily of local concern and to be suitable for municipal ownership. State interest areas were identified, public access needs were considered and public easements are reserved in this decision for such purposes.

In compliance with statutory requirements, the following described lands are approved for conveyance to the above-named municipality, subject to:

- \* all valid existing rights, if any, including, but not limited to, those herein listed;
- \* reservation to the United States of America such valid rights of way and easements for ditches, canals, railroads, highways, communication lines and other uses defined in 38 Stat .305, 48 U.S.C. Sec. 305, 26 Stat .391, 43 U.S.C. Sec. 943, 41 Stat .1075 as amended (16 U.S.C. 818) and such other reservations as may appear in the patents by which the State acquired the selected lands.

LAND DESCRIPTION

T8N, R12W, S.M.

Gross Acres

ADL 201285	Sec. 36: Gov't. Lots 1, 2, 3, 4, SE $\frac{1}{4}$ , S $\frac{1}{2}$ S $\frac{1}{4}$ , excluding Nikiski Beach Rd. R/W [Project No. S-0490-(2)]. Subject to: ADL's 01391, 02844, 21879, & 36812, Land Leases, Jesse S. Wade ADL 61479, Letter Permit, McGahan Enterprises ADL 36859, Right-of-Way Permit, Anchorage, Natural Gas Corporation 50' R/W on east side of GLO Lots 1 & 3	365.90
------------	--	--------

T5N, R11W, S.M.

ADL 55707	Sec. 28: SW $\frac{1}{4}$ Subject to: AO 51647, Pipeline	160
-----------	--	-----

T1S, R14W, S.M.

ADL 55735	Sec. 26: Gov't. Lot 1, NE $\frac{1}{4}$ SE $\frac{1}{4}$ Subject to: ADL 34494, Right-of-Way Permit, Homer Electric Association.	66.87
-----------	---	-------

T2S, R14W, S.M.

ADL 55737	Sec. 8: Gov't. Lots 1 & 2, excluding Sterling Highway R/W	30.22
	Sec. 9: Gov't. Lot 2, excluding Sterling Highway R/W	39.32
	Sec. 20: Gov't. Lots 5, 7, 12, 13, 18, 19, 22, 23, 24, 25, 26 excluding Sterling Highway R/W Subject to: ADL 49441, Free Use Permit, Corps of Engineers ADL 67091, Special Land Use Permit, Warren Enzler	58.79

00417  
SOA DOT&PF

ADL 201378	Sec. 28: W $\frac{1}{2}$	320
ADL 55737	Sec. 29: Gov't. Lots 6, 10, 11, 12, 13, 14, E $\frac{1}{2}$ NE $\frac{1}{4}$ excluding Sterling Highway R/W	110.46

**EXHIBIT AA**  
**Page 2 of 6**



	<u>T3S, R14W, S.M.</u>	<u>Gross Acres</u>
ADL 55738	Sec. 8: SE $\frac{1}{2}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ SW $\frac{1}{4}$ , NW $\frac{1}{4}$ SE $\frac{1}{2}$ Subject to: ADL's 64485 and 34494, Right-of-Way Permits, Homer Electric Association	200

	<u>T3S, R15W, S.M.</u>	
ADL 55739	Sec. 24: Gov't. Lots 5, 6, 7, 8, 9, 11, 12	32.70
	Sec. 25: Gov't. Lots 4, 5, 6, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23 excluding Sterling Highway R/W	73.88
	Sec. 26: Gov't. Lots 2, 3, 4	11.13
	Sec. 35: Gov't. Lots 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17	63.80

	<u>T4S, R14W, S.M.</u>	
ADL 55740	Sec. 20: S $\frac{1}{2}$	320
	Sec. 26: N $\frac{1}{2}$ SE $\frac{1}{4}$ excluding North Fork Rd. R/W and Russian Village Rd. R/W Subject to: ADL 20854, Letter Permit, Homer Electric Association	80
	Sec. 27: N $\frac{1}{2}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ excluding North Fork Rd. R/W	110
	Sec. 30: Gov't. Lot 3, E $\frac{1}{2}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$	159.26
	Sec. 35: NW $\frac{1}{4}$ NE $\frac{1}{4}$	40

	<u>T5S, R11W, S.M.</u>	
ADL 55742	Sec. 5: Gov't. Lots 3, 4, S $\frac{1}{2}$ NW $\frac{1}{4}$	161.11
	Sec. 6: Gov't. Lots 1, 2, 3, 4, 5, SE $\frac{1}{4}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ NE $\frac{1}{4}$	302.34

		<u>T5S, R12W, S.M.</u>	<u>Gross Acres</u>
ADL 55743	Sec. 22: <sup>NE 1/4 SW 1/4, NW 1/4 SW 1/4, SE 1/4 NW 1/4 SW 1/4, E 1/2 SW 1/4 NW 1/4 SW 1/4</sup> excluding 100 foot Right-of-Way for Greer Rd.		75
	Sec. 28: NW 1/4 NW 1/4 Subject to: ADL 52920, Grazing Lease, Mary A. and Joseph Jones		40
	Sec. 29: NE 1/4 NE 1/4, SW 1/4 NE 1/4 Subject to: ADL 52920, Grazing Lease, Mary A. and Joseph Jones		200
Total			3020.78

\*\*\*\*\*

MINERAL RESERVATION

The State hereby expressly saves, excepts and reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, all oil, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils of every name, kind or description, except sand and gravel resources, and which may be in or upon said lands above described, or any part thereof, and the right to explore the same for such oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils. The State also hereby expressly saves and reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, the right to enter by itself, its or their agents, attorneys, and servants upon said lands, or any part of parts thereof, at any and all times for the purpose of opening, developing, drilling and working mines or wells on these or other lands and taking out and removing therefrom all such oils, gases, coals, ores, minerals, fissionable materials, geothermal resources, and fossils, and to that end it further expressly reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, the right by its or their agents, servants and attorneys at any and all times to erect, construct, maintain, and use all such buildings, machinery, roads, pipelines, powerlines, and railroads, sink such shafts, drill such wells, remove such soil, and to remain on said lands or any part thereof for the foregoing purposes and to occupy as much of said lands as may be necessary or convenient for such purposes, hereby expressly reserving to itself, its lessees, successors, and assigns, as aforesaid, generally all rights and power in, to and over said land, whether herein expressed or not, reasonably necessary or convenient to render beneficial and efficient the complete enjoyment of the property and rights hereby expressly reserved.

The rights reserved herein to the Grantor and its lessees, successors, and assigns are subject to exercise in accordance with AS 38.05.130 and any amendment thereto.

\*\*\*\*\*

RESERVATION OF LAND UNDERLYING PUBLIC OR NAVIGABLE WATERS

The State of Alaska reserves unto itself all tide, submerged, and shorelands and land underlying public or navigable waters, as defined in AS 38.05.365, to which it has received tentative approval, patent, or title by operation of law, and the effects of said reservation will be reflected in the acreage conveyed by patent, and will be depicted on maps attached to and incorporated in that patent.

\*\*\*\*\*

ACCESS TO AND ALONG NAVIGABLE OR PUBLIC WATERS

The lands approved for conveyance by this decision are subject to the reservation of a 50-foot wide perpetual public easement, as required by AS 38.05.127 and regulations implementing that statute, to and along each navigable and public body of water, as those terms are defined in AS 38.05.365(22) and (23), which is determined to be reasonably necessary to insure free public access to and along each body of water depicted on the map(s) which will be attached to and incorporated in the patent. Public access to each water body identified on such map(s) shall be provided from the nearest practicable existing public easement or right-of-way, and from such public easements or rights-of-way which may be created in the future. Management authority over such access easements is transferred to the municipal grantee unless otherwise specified in this conveyance document, but no such easement may be vacated, abandoned or otherwise extinguished or rendered incapable of reasonable use by the public for the purposes for which it was reserved without the approval of the grantor, and unless an alternative means for reasonable public access is provided.

\*\*\*\*\*

OTHER PUBLIC EASEMENTS AND RIGHTS-OF-WAY

The lands approved for conveyance by this decision are conveyed subject to all section line rights-of-way granted or reserved to the Territory or State of Alaska pursuant to 43 USC Section 932 (R.S. 2477).

\*\*\*\*

*L. A. Dutton*  
L. A. Dutton, District Manager, Southcentral District  
Alaska Division of Forest, Land and Water Management

2/26/80  
Date

This is to certify that on the 26th day of February, 1980, before the undersigned, a notary public in and for the State of Alaska personally appeared L. A. Dutton and acknowledged to me that he executed the foregoing instrument.

In testimony whereof, I have thereunto set my hand and affixed my official seal, the day and year of this certificate first above written.

*Rose E. Tree*  
Notary Public in and for the State of Alaska  
My Commission Expires 4/11/82

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CENTRAL REGION — DIVISION OF DESIGN AND CONSTRUCTION  
RIGHT OF WAY BRANCH

4111 AVIATION AVENUE  
P.O. BOX 196900  
ANCHORAGE, ALASKA 99519-6900  
(FAX 248-9456) (907) 266-1621

July 9, 1992

Re: ADL 225842  
Cook Inlet Processing  
Right-of-Way Permit

Ms. Katie Farley  
Natural Resource Officer  
State of Alaska  
Department of Natural Resources  
Division of Land  
Box 107005  
Anchorage, AK 99510-7005

Dear Ms. Farley:

The Department of Transportation and Public Facilities has reviewed the above referenced right of way permit and has the following comments.

The state status plat included for review indicates that the right of way for Nikishka Beach Road ends some distance from the Nikishka Beach. In reality, this road, including the right of way, extends all the way to the beach. The right of way for this road was first established by Public Land Order (PLO) 601. Under PLO 601, Nikishka Beach Road is categorized as a local road. As such, the right of way reserved for Nikishka Beach Road is 100 feet in width, 50 feet each side of the centerline.

In 1959, the federal government transferred their interest in the Alaska public highway system to the State Department of Highways by virtue of a quitclaim deed referred to as the Omnibus Act. According to the Omnibus Act, the length of the right of way reserved for this road extends from its intersection with North Kenai Road, northerly to Nikishka Beach. We have enclosed copies of the applicable pages from this document for your information.

In 1963, the Department of Highways acquired additional right of way for Nikishka Beach Road in conjunction with the North Kenai Road project. The acquisition ended close to the location shown for the outfall on the state status plat included for review. However, the original 100 feet reserved for this road still exists.

EXHIBIT BB  
Page 1 of 3

00578  
SOA DOT&PF

RECEIVED

JUL 14 1992

DIVISION OF LAND

Katie Farley

-2-

July 9, 1992

for the remaining length of the road. It appears from this same status plat, that the proposed outfall will lie within this right of way. If this is the case, our department will need to review the plans for the outfall in order to determine if it will impact the road.

Thank you for the opportunity to review this right of way permit. If you have any questions, please contact James H. Sharp, Right of Way Engineering Supervisor at 266-1647.

Sincerely,



Daniel W. Beardsley, SR/WA  
Chief Right of Way Agent  
Central Region

JS/BM

Enclosures

# STATE OF ALASKA

## DEPARTMENT OF NATURAL RESOURCES

### DIVISION OF LAND SOUTHCENTRAL REGION

WALTER J. HICKEL, GOVERNOR

3601 C STREET  
BOX 107005  
ANCHORAGE, ALASKA 99510-7005

July 28, 1992

Daniel W. Beardsley, SR/WA  
Central Region-Div. of Design and Construction  
Department of Transportation and Public Facilities  
4111 Aviation Avenue  
PO Box 196900  
Anchorage, Alaska 99519-6900

Re: ADL 225842/Right-of-Way Permit  
Cook Inlet Processing

Dear Mr. Beardsley:

Thank you for your comments regarding the Cook Inlet Processing outfall project in Nikiski. It's helpful to get some background information on a project. The status plat that I sent with the public notice depicted the right-of-way that was applied for and not what may be authorized. The Department of Natural Resources does not manage the uplands in that area, only the tidelands. Cook Inlet Processing will only be granted that portion of the right-of-way from the Mean High Water (MHW) line and seaward. If you would like to direct your concerns regarding the outfall within the highway right-of-way, please contact Pat Hardina, Controller; Cook Inlet Processing; Box 8163; Nikiski, Alaska 99635; Phone Number (907)776-8174; FAX# 776-5302.

If you have any questions, please give me a call at 762-2270.

Sincerely,

*Katie Farley*  
Katie Farley  
Natural Resource Officer

# STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

NORTHERN REGION PRECONSTRUCTION, Right-of-way Section

SARAH PALIN, GOVERNOR

2301 PEGER ROAD  
FAIRBANKS, ALASKA 99709-5399  
TELEPHONE: (907) 451-5423  
TDD: (907) 451-2363  
FAX: (907) 451-5411  
1-800-475-2464

March 10, 2009

Dana S. Burke  
Assistant Attorney General  
Office of the Attorney General  
1031 West 4<sup>th</sup> Avenue, Suite 200  
Anchorage, Alaska 99501-5100

Re: State v. Offshore Systems – Kenai (OSK)  
Case No. 3KN-08-453 CI  
AGO file no. 221-09-0136  
Nikishka Beach Road – Right-of-way

Dear Mr. Burke:

As requested, I have reviewed the historical and title information relating to the status of the Nikishka Beach Road and offer the following analysis of the existing right-of-way:

## I. Identification and Location

Nikishka Beach Road is located between the Kenai Spur Highway and Cook Inlet within Section 1 of Township 7 North, Range 12 West, Seward Meridian and Section 36 of Township 8 North, Range 12 West, Seward Meridian. The USGS Quadrangle map references the road as Nikishka No. 2<sup>1</sup>. The portion of the road right-of-way in question is located within Section 36.

Nikishka Beach Road is identified as being a part of the State Highway System<sup>2</sup> and is listed as Route 116315 “Nikishka Beach Road” with a length of 0.823 miles<sup>3</sup>.

Generally, Nikishka Beach Road is located at approximate milepost 26.7 of the Kenai Spur Highway or approximately 16 miles northerly of Kenai<sup>4</sup>.

<sup>1</sup> USGS Quadrangle Map - Kenai (C-4) 1951 Minor Revisions 1972 – 1:63,360

<sup>2</sup> The Department of Transportation and Public Facilities is responsible for the designation, construction and maintenance of the State Highway System. (See A.S. 19.10.020 - A.S. 19.10.030) The State Highway System Inventory is published as required by 17 AAC 05.010 (b)(1-4)

<sup>3</sup> State Highway System CDS Route Numbers as of 27 October 2008.

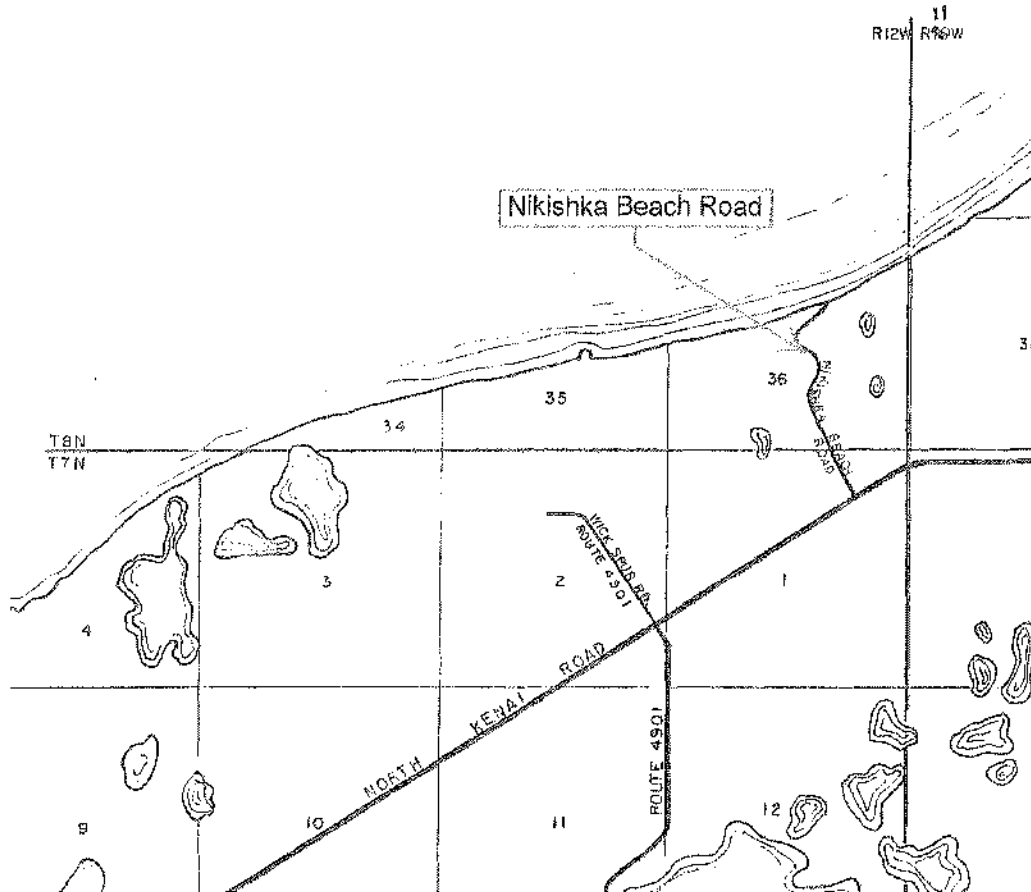
[http://www.dot.state.ak.us/siwdp/plng/highwaydata/pub/routelists/shs\\_stwdRtlist\\_2008\\_10.pdf](http://www.dot.state.ak.us/siwdp/plng/highwaydata/pub/routelists/shs_stwdRtlist_2008_10.pdf)

<sup>4</sup> Reference Page 621 of The Milepost 2006 Edition

**EXHIBIT CC**  
**Page 1 of 12**

*“Providing for the safe movement of people and goods and the delivery of state services.”*





DEPARTMENT OF COMMERCE  
BUREAU OF PUBLIC ROADS  
DIVISION TEN  
ANCHORAGE

# NORTH KENAI

VICINITY MAP  
NO. 168

SCALE 2" = 1 MILE

JANUARY 1951

00405  
SOA DOT&PF

EXHIBIT CC  
Page 2 of 12

## 2. Highway Rights-of-Way Established by Public Land Orders

Prior to Statehood, the highway system in Alaska was primarily managed and owned by the federal government. As provided under Section 21(a) of Public Law 86-70, the June 25, 1959 "Alaska Omnibus Act", lands and interests in lands pertaining to roads in Alaska were to be transferred to the State of Alaska. Subsequently, the State of Alaska received title to approximately 5,400 miles of highways as a part of the June 30, 1959 "Omnibus Act" Quitclaim Deed (QCD)<sup>5</sup>.

The QCD does not reference the width, interest or exact location of the conveyed highway rights-of-way. As a quitclaim deed, it could only convey the interest held by the United States, Department of Commerce, if any. To determine what interest was conveyed, it is necessary to review the authorities and actions that initially established the highway rights-of-way.

The majority of the rights-of-way conveyed to the State of Alaska were created under the authority of several Public Land Orders (PLO's) issued while the highway system was managed by the United States, Department of the Interior, Alaska Road Commission.

Commencing in the war years between 1942 and 1945, the Secretary of the Interior issued several PLO's relating to the reservation of right-of-way corridors for certain primary roads including the Alaska, Richardson and Glenn highways.

On August 10, 1949, the Department of the Interior issued PLO 601<sup>6</sup>, the first large scale reservation of public lands for highway purposes. The corridors reserved by PLO 601 were withdrawn from all forms of appropriation under the public land laws. Public lands subject to PLO 601 were no longer available for a variety of competing entries including homesteads, mining claims and Trade & Manufacturing sites. PLO 601 also reserved specific corridor widths based on the classification of the highway. The highways were classified as "Through" with a reserved width of 300 feet, "Feeder" with a reserved width of 200 feet or "Local" roads with a reserved width of 100 feet. The highways reserved as "Through" or "Feeder" roads were specifically named. "Through" roads included primary highways such as the Richardson and Glenn. "Feeder" roads included the Steese and Elliott highways. "Local" roads consisted of *"All roads not classified above as Through or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior."* A critical element of PLO 601 was that it was *"subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes."* A highway right-of-way created by PLO 601 would be subordinate to prior existing rights where the date of a valid homestead entry or mining claim location preceded the effective date of the PLO. However, if the homestead entry or mining claim location were relinquished prior to

<sup>5</sup> Recorded in Kenai Recording District in Book 58, Page 12 Deeds, also referenced as Serial No. 70—242, (Date obscured) Reference State of Alaska's Complaint dated 5/22/08 - Attachment 5, Pages 5-11.

<sup>6</sup> Published in the Federal Register 8/16/49, No.: 157, Volume: 14, Page: 5048 & 5049

patent, the lands would be returned to the public domain, and the PLO would take full effect.

The Department of the Interior eventually recognized that they had created significant complexity in the establishment of highway withdrawals with respect to the survey and patenting of adjoining public lands. A withdrawal would require that the federal government complete a survey and official platting of all of the highway corridors before they could be conveyed to a future state. Road realignments or partial releases of the highway withdrawals would add to the burden. By converting the withdrawals to easement interests, all of this could be avoided. Subsequent homestead entries and mining locations would be subject to these highway easements.

On October 16, 1951, The Department of the Interior simultaneously issued PLO 757<sup>7</sup> and Secretarial Order (SO) 2665<sup>8</sup>. The effect of these two actions was to fix the width of public highways in Alaska, to convert the highway right-of-way withdrawals established under PLO 601 for "Feeder" and "Local" roads to highway easements and to establish a procedure to attach rights-of-way to new construction. There were two subsequent amendments to SO 2665 on July 17, 1952 and September 15, 1956. These amendments reclassified a several roads in the "Through" and "Feeder" categories and modified the width of Otis Lake road.

On April 7, 1958, the Department of the Interior issued PLO 1613<sup>9</sup>. The effect of PLO 1613 was to convert the "Through" category of highway withdrawals into highway easements. With this change, owners of patented homesteads bounding on existing "Through" highway corridors could apply for a preference right to purchase "highway lots" adjoining their claim up to the centerline of the highway. Homestead entries that had not yet reached the patent stage could be amended to include the highway corridor.

With the enactment of PLO 1613, all of the highway rights-of-way established under the prior Department of Interior PLO's now had become easement interests.

### 3. Nikishka Beach Road Chronology

The QCD lists the Nikishka Beach Road as one of the North Kenai Branches which are collectively referred to as Federal-Aid Secondary Highway System Class "B" Route No. 4901. The deed describes Nikishka Beach Road as being "*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.*"

To determine whether a full width right-of-way attached to a road by PLO, it is necessary to review the chronology of title and physical activity for the lands crossed by the road. The chronology should consider the effective dates of the relevant PLOs, dates of public

<sup>7</sup> Published in the Federal Register 10/20/51, No.: 205, Volume 16, Pages 10749 & 10750

<sup>8</sup> Published in the Federal Register 10/20/51, No.: 205, Volume 16, Page 10752

<sup>9</sup> Published in the Federal Register 4/11/58, No.: 72, Volume 23, Pages 2376 & 2378

construction and maintenance work and dates for changes in land status such as entries, reservations, easements and conveyances that may bear on the PLO analysis. The purpose of this review is to evaluate whether the PLO authority applied to the road in question and whether its application might be subject to a valid existing right. The following is a chronology for the Nikishka Beach Road within Section 36:

**March 4, 1915:** The Act of March 4, 1915, (38 Stat. 1214) provided that when public lands in the Territory of Alaska are surveyed, sections 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, 6(K), title to these reserved school lands passed to the State of Alaska as of the date of the State's admission into the Union on January 3, 1959, by Presidential Proclamation (73 Stat. 16).

**June 12, 1923:** Rectangular Survey for T.8N., R.12.W. S.M. including Sec 36 approved.

**August 10, 1949:** Effective date for Public Land Order 601

**July 4, 1951:** Aero-Metric photo pre-Nikishka road construction.<sup>10</sup>

**October 16, 1951:** Effective date for PLO 757 & SO 2665

**1952-1953:** Nikishka Beach road constructed through Mazzie McGahan's homestead to the beach by Mazzie McGahan.<sup>11</sup>

**August 25, 1954:** Alaska Road Commission Anchorage 4-Week Report – Page 3 “*Kenai Area – 5. Set ditch and slope stakes Nikishka No. 2 beach Road, Sta. 20+00 to Sta. 45+00*”<sup>12</sup>

**January 1957:** BPR Vicinity Map No. 168 - Nikishka Beach Road in Section 36<sup>13</sup>

**April 7, 1958:** Effective date for PLO 1613

**July 1, 1959:** Omnibus Act QCD – Conveyance of highways to the State of Alaska.<sup>14</sup>

**July 5, 1961:** Appraisal Report ADL #02844, James Arness, 5 Acres at Nikishka – “*General Description: Approximately 700 feet of inlet frontage where the bluff is very low, traversed by the Nikishka #2 State road, which leads through subject and offers a road approach to the beach.*”<sup>15</sup>

---

<sup>10</sup> State of Alaska's First Supplemental Disclosures dated 12/15/08 - page 317 - 318

<sup>11</sup> Dale McGahan deposition, December 19, 2008, pages 10-13

<sup>12</sup> State of Alaska's Third Supplemental Disclosures pages 347-351 dated 1/22/09

<sup>13</sup> State of Alaska's Complaint dated 5/22/08 – Attachment 1, page 1 of 1

<sup>14</sup> State of Alaska's Complaint dated 5/22/08 – Attachment 5, page 5-11 of 41

<sup>15</sup> State of Alaska's Complaint dated 5/22/08 – Attachment 3, page 1 of 1

**February 15, 1962:** State of Alaska DNR Lease No. ADL 02844; Lessor: James V. Arness; Description: West ½ of Lot 1, Section 36, T.8N., R.12W. S.M.; Note: "*Subject to the stipulation that the Lessee shall not prevent the public from using the Nikishka Beach Road.*"; Lease was extended to 55 years on August 17, 1966 and subsequently re-assigned to others.<sup>16</sup>

**April 2, 1962:** Federal Patent No. 1226102 to State of Alaska - including Section 36, T.8N., R.12W., S.M.<sup>17</sup>

**May 2, 1963:** Aero-Metric photo post-Nikishka road construction.<sup>18</sup>

**April 7, 1964:** State of Alaska DNR Lease No. ADL 21879; Lessor: James V. Arness; Description: NW ¼ NW ¼ SE ¼ of Section 36, T.8N., R.12W. S.M.; Lease was extended to 55 years on August 17, 1966 and subsequently re-assigned to others.<sup>19</sup>

**May 15, 1964:** State of Alaska DNR Lease No. ADL 01391; Lessor: James V. Arness; Description: North ½ of Lot Three (3) in Section 36, T.8N., R.12W. S.M.<sup>20</sup>

**January 2, 1966:** Project S-0490(2) Wildwood North ROW Plan approval (Incl. Nikishka Beach Road - Sheets 34 & 35) Existing ROW shown as 100 feet in width from intersection with the North Kenai Road to a point near the southerly boundary of Government Lot 1 – The existing ROW is not shown as extending to the water or beach.<sup>21</sup>

**August 8, 1966:** ADL No. 32264, Right-of-way Permit for a public highway within Section 36, T.8N., R.12W., S.M. for Project S-0490(2), Parcel 72-C.<sup>22</sup>

**July 1, 1978:** Ch. 182 SLA 1978 - In 1978, State legislation is passed making mental health lands and school lands part of the state's unrestricted grant public domain.<sup>23</sup>

**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 and "*Subject to valid existing trails, roads and easements.*")<sup>24</sup>

**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. (Book 372 Page 946 KRD) and QCD Kenai Borough to Offshore Systems – Kenai for a portion of the West ½ of Lot 1, Section 36, Township 8

---

<sup>16</sup> Defendant's Motion for Summary Judgment dated 2/5/09 – Exhibit 5, pages 1 – 4 of 4

<sup>17</sup> Exhibit 2, Pages 1-3 of 3, Defendant's Motion for Summary Judgment dated 2/5/09

<sup>18</sup> State of Alaska's First Supplemental Disclosures dated 12/15/08 - page 319 - 320

<sup>19</sup> Defendant's Motion for Summary Judgment dated 2/5/09 – Exhibit 6, pages 1 – 3 of 3

<sup>20</sup> Defendant's Motion for Summary Judgment dated 2/5/09 – Exhibit 3, pages 1 – 6 of 6

<sup>21</sup> State of Alaska's Complaint dated 5/22/08 – Attachment 5, page 12-15 of 41

<sup>22</sup> Defendant's Motion for Summary Judgment dated 2/5/09, Exhibit 4, pages 1-6 of 6

<sup>23</sup> State of Alaska's Third Supplemental Disclosures pages 352-363 dated 1/22/09

<sup>24</sup> State of Alaska's Complaint dated 5/22/08 – Attachment 4, page 1-2 of 2

North, Range 12 West, S.M. (Book 372 Page 940 KRD) and the North ½ of Lot 3, Section 36, Township 8 North, Range 12 West, S.M. (Book 372 Page 943 KRD). Each deed is subject to “*Rights and reservations of record and any easements, taxes, assessments, encroachments, alterations, or infringements of record or ascertainable by physical inspection.*”<sup>25</sup>

**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.*”<sup>26</sup>

#### 4. Right-of-way Analysis: Public Land Order

According to the deposition of Dale McGahan, Nikishka Beach Road was constructed by local homesteader “Mazzie” (Mazie) McGahan in late 1952 or 1953, through the homestead to the beach. The McGahan homestead was located in the Northeast ¼ of Section 1 of Township 7 North, Range 12 West, Seward Meridian. An Alaska Road Commission Report dated August 25, 1954 indicates the placement of construction survey stakes along Nikishka No. 2 Beach Road. The January 1957 Bureau of Public Roads Vicinity Map No. 168 (See page 2 of this report) indicates that approximately 0.2 miles of the road passed from the North Kenai road through the McGahan homestead before continuing to the North through Section 36 to the beach.

As of October 16, 1951, Public Land Order No. 757 and Secretarial Order No. 2665 were in effect. SO 2665 provided that a right-of-way or easement “*will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground...*” As Nikishka road was not named in SO 2665 as either a “Through” or “Feeder” route, it would be considered a “Local” road with a right-of-way extending 50 feet on each side of centerline. On July 1, 1959, the “Omnibus Act” Quitclaim Deed conveying highways to the State of Alaska specifically named Nikishka Beach Road as one of the “North Kenai Branches” listed under Federal Aid Secondary Class “B” Route 4901.

*Prior Existing Rights:* All of the PLOs that established highway rights-of-way across public lands including Secretarial Order 2665 were subject to prior valid existing rights. Section 36 of Township 8 North, Range 12 West, S.M., which contains the subject right-of-way, was reserved for school purposes under the Act of March 4, 1915. This reservation was

<sup>25</sup> State of Alaska’s Complaint dated 5/22/08 – Attachment 5 pages 23-25 of 41

<sup>26</sup> State of Alaska’s Third Supplemental Disclosures pages 337-346 dated 1/22/09

still in effect when Secretarial Order 2665 became effective in 1951 and when the Alaska Road Commission staked the Nikishka Beach road in 1954. Although the PLO right-of-way attached to Nikishka Beach Road under SO 2665, it was subject to the prior school land reservation. Subsequently, Section 36 was patented to the State of Alaska on April 2, 1962. On July 1, 1978, State legislation released the school land reservation and incorporated lands reserved for school purposes including the subject section 36 into the State's unrestricted public domain. The right-of-way easement established under SO 2665 was no longer subject to a prior right and came into full effect. The October 28, 1998 Alaska District case State of Alaska v. David B. Harrison supports the position that a PLO right-of-way which is subject to a prior existing right can rise to full effect when the prior existing right is released.

*Merger of Title:* With the Nikishka Beach Road easement having been conveyed to the State of Alaska in 1959 and Section 36 patented to the State of Alaska in 1962, it has been suggested that the lesser easement interest would merge with the fee title and effectively terminate the Public Land Order right-of-way. Under the Statehood Act, Alaska has or is eligible to receive title to approximately 28% of its total land area. Alaska also received 5,400 miles of highway rights-of-way under the "Omnibus Act" Quitclaim Deed. Although both the QCD and subsequent patents name the State of Alaska as the grantee, application of the merger doctrine that would result in the termination of a significant number of highway easements crossing State lands would be chaotic. It has been held that merger does not occur when the common owner holds one interest as a trustee or in another representative capacity.<sup>27</sup> Under A.S. 19.05.010, the Department of Transportation (DOT&PF) is delegated responsibility "*for the planning, construction, maintenance, protection, and control of the state highway system.*" A.S. 19.05.040 provides DOT&PF with the authority to acquire and dispose of property. A.S. 38.05, Alaska Land Act provides the Department of Natural Resources, Division of Lands with the authority to manage state lands. A.S. 38.05.030 specifies exceptions to the Alaska Land Act including the following exception for DOT&PF: "*(b) The provisions of this chapter do not apply to any power, duty or authority now or in the future granted to the Department of Transportation and Public Facilities in the name of the state, to acquire, use, lease, dispose of, or exchange real property, or any interest in real property.*" These provisions clearly distinguish the authorities for DNR and DOT&PF to acquire, manage and dispose of lands such that the land interests in their respective inventories would be protected from merger due to their separate representative capacities. The administration of the highway inventory conveyed to the State under the "Omnibus Act" QCD was never transferred from DNR to DOT&PF. Responsibility for the highway inventory was assumed by DOT&PF as a part of its authority granted by the legislature. As a matter of practice and contrary to an application of the merger doctrine, DNR recognizes and reserves "Omnibus Act" highways when issuing patents. The highway right-of-way easements managed by DOT&PF are dedicated for a specific public transportation purpose and are effectively held in trust for the public until affirmatively vacated. The merger of title doctrine would not serve to terminate highway easements established by Public Land Orders and conveyed to the State of Alaska.

---

<sup>27</sup> The Law Of Easements And Licences In Land, Bruce & Ely 2001, § 10:27

*DNR Leases & Permits:* While Section 36 was still subject to the school lands reservation, the Alaska Department of Natural Resources issued a variety of leases and right-of-way permits. The leases included three issued to James V. Arness, a predecessor in interest to the current OSK interest. The leases to Arness were ADL No. 02844 within Government Lot 1 of Section 36, ADL No. 01391 within Government Lot 3 of Section 36 and ADL No. 21879 within the SE ¼ of Section 36. Although each of the leases preceded the 1978 legislative release of the school lands reservation, the PLO right-of-way would constitute a prior existing right even though they were not stated in the lease. The leases were not immune from the effect of road rights-of-way whether created in the past or potentially in the future. A standard paragraph in each of the leases states that “*The Lessor expressly reserves the right to grant easements or rights-of-way across the land herein leased if it is determined to be in the best interests of the State to do so; ...*” In addition, the Department of Highways right-of-way plans for Project S-0490(2) Wildwood North, dated January 2, 1966 indicates a re-alignment and widening of the Nikishka Beach Road right-of-way. On August 8, 1966, the Department of Natural Resources issued right-of-way permit ADL No. 32264 for Parcel 72-C crossing the State owned lands within Section 36. Although the right-of-way plan sheet clearly shows the existing road extending to the beach, the DNR permit terminates south of the southerly boundary of Government Lot 1 of Section 36. The Department of Highway maps show an existing 100-foot wide right-of-way for the old alignment of Nikishka Beach road up to the end of the DNR right-of-way permit, however, no existing right-of-way is shown beyond that point. Based on the documents available, I believe that to be an erroneous depiction of the PLO right-of-way for Nikishki Beach Road as the PLO right-of-way should be shown extending to the beach.

On May 16, 1980, Section 36 was patented to the Kenai Borough excluding the area within the DNR right-of-way permit ADL 32264 for Nikishka Beach Road and subject to the above mentioned DNR land leases. The patent was subject to valid existing roads and easements which would have included the PLO right-of-way for Nikishki Beach Road whether or not specified in the patent.

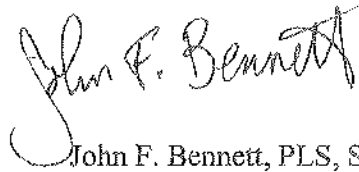
On October 1, 1980, the Kenai Borough issued three quitclaim deeds to Offshore Systems – Kenai for properties in the vicinity of Nikishki Beach Road. Each deed is subject to “*Rights and reservations of record and any easements, taxes, assessments, encroachments, alterations, or infringements of record or ascertainable by physical inspection.*”

*Conclusion:* A 100-foot wide highway easement within Section 36 of Township 8 North, Range 12 West, Seward Meridian was established by Public Land Order as early as 1954 for the Nikishka Beach Road. The easement was conveyed to the State of Alaska and survives subsequent conveyances of the underlying fee estate to the Kenai Borough and the current owner, Offshore Systems – Kenai (OSK).



Nikishka Beach Road Right-of-way  
March 10, 2009  
Page 10 of 10

Sincerely,

A handwritten signature in black ink that reads "John F. Bennett". The signature is written in a cursive style with a large initial "J".

John F. Bennett, PLS, SR/WA  
Chief, Right-of-way

Attachments: Resume – John F. Bennett, PLS, SR/WA

## John F. Bennett, PLS, SR/WA

3123 Penguin Lane  
Fairbanks, Alaska 99712  
907.488.3814 (home)  
907.451.5423 (office)  
Email: [johnf.bennett@alaska.gov](mailto:johnf.bennett@alaska.gov)

### Professional Achievements

Professional Land Surveyor - State of Alaska - PLS 6278 - March 1984  
United States Mineral Surveyor - September 1986  
SR/WA - Senior Member/International Right of Way Association - October 1989  
Alaska Society of Professional Land Surveyors – Member since 1976  
*1987 Fairbanks Chapter President, 1992-1993 Statewide Secretary, 1995 Statewide President, 1994-1997 Alaska Land Surveying Exam Workshop, 1993-2005 Standards of Practice Chairman & Website Manager, 1999 ASPLS Surveyor of the Year*  
International Right of Way Association – Member since 1986  
*1990 Fairbanks Chapter President, 1990 – Fairbanks Chapter Professional of the Year, Certified Instructor: IRWA Engineering and Property Description Courses – since April 1990*

### Formal & Continuing Education

1971-1974 (2 years) - Civil Engineering - University of Alaska, Fairbanks  
May 1978 (Graduated) - A.S. Survey Technology – Anchorage Community College  
1980-2008: Over 1300 continuing education hours relating to right of way and surveying issues.

### Papers & Seminar Presentations

*Access Law & Issues Affecting Public & Private Lands in Alaska* - 8 hr seminar presented by John F. Bennett PLS, SR/WA, Daniel W. Beardsley, SR/WA and P.J. Sullivan, SR/WA. Multiple presentations between 1992 and 2007.

*Highway Rights of Way In Alaska* – authored and presented by John F. Bennett as a part of the above noted *Access Law* seminar. 3/9/93, revised 1/20/07

*Highway Right of Way Surveys* – authored and presented by John F. Bennett, PLS, SR/WA – 31<sup>st</sup> Alaska Surveying & Mapping Conference, Anchorage, 2/8/96.

*Records of Survey: Interpreting the Intent* – authored and presented by John F. Bennett, PLS, SR/WA – 32<sup>nd</sup> Alaska Surveying & Mapping Conference, Anchorage, 2/13/97.

*Property Descriptions for Rural Alaska* – authored and presented by John F. Bennett, PLS, SR/WA – 8 hour seminar sponsored by IRWA, DOT&PF & U. of Alaska: Presented twice in 1998.

RS 2477 Trails and Section Line Easements – authored and presented by John F. Bennett, PLS, SR/WA – ACCESS 2003 Seminar, Fairbanks, 3/13/02

IRWA 101 Principals of Real Estate Acquisition – Engineering  
24-hour course instructed multiple times in Alaska since 1992.

IRWA 901 Engineering Plan Development & Application  
8-hour course instructed multiple times in Alaska since 1992.

IRWA 902 Property Descriptions  
8-hour course instructed multiple times in Alaska since 1992.

IRWA 900 Principles of Real Estate Engineering  
16-hour course instructed multiple times in Alaska since 2001.

RS2477, PLO's & Section Line Easements – an in-house seminar presented by John F. Bennett and Daniel W. Beardsley to the Attorney General's Transportation staff, Anchorage - 12/9/98

Alaska Society of Professional Land Surveyors – Standards of Practice Manual – 1994 Edition – Editor and Distribution manager.

## **Employment History**

- 7/1999 – PRESENT            Chief, Right of Way, Alaska Department of Transportation, Northern Region. Supervised Titles & Plans, Utilities, Appraisal, Negotiations, Relocation, Property Management, Pre-Audit and Surveying activities for the aviation, highway and public facility projects.
- 10/1986 – 7/1999            Right of Way Engineering Supervisor, Alaska DOT&PF, Northern Region. Responsible for survey specifications and development of title reports, mapping, property descriptions and platting for land acquisition projects.
- 9/1985 – 10/1986            Land Surveyor/Staff Engineer with R&M Engineering Consultants, Inc, in Fairbanks. Responsible for the development of right of way acquisition plans for large urban transportation projects.
- 6/1972 – 5/1985            Party Chief/Office Engineer. I worked on a seasonal or contract basis for over a dozen Alaskan engineering/surveying companies during this period performing land and construction surveys in the field and office.

**EXHIBIT CC**  
**Page 12 of 12**

00415  
SOA DOT&PF

Westlaw

1980 WL 27809 (Alaska A.G.)

Page 1

1980 WL 27809 (Alaska A.G.)

Office of the Attorney General  
State of Alaska

File No. A66-021-78

August 4, 1980

CTRI Selection Pool Nomination of Nike Site Jig.

Mr. William Beaty  
Planning Supervisor

By your memorandum of July 16, 1980 you have requested that I analyze the opposite positions taken by the University of Alaska and the United States Department of the Interior regarding the selectability by Cook Inlet Region, Incorporated of 60 improved acres comprising Nike Site Jig, located in a portion of Section 33, T. 4 S., R. 4 E., Fairbanks Meridian.

The basic question presented is whether the University of Alaska, by itself or through the State, presently has title to the subject property by virtue of the Educational Land Grant Act of March 4, 1915 (38 Stat. 1214-1215, 48 U.S.C. § 353). My conclusion, based upon the language of that Act and the sequence of events which have transpired subsequent to its passage in 1915, is that neither the State nor the University now 'owns' Nike Site Jig, but that the State has a claim to an equal amount of in-lieu acreage to replace that acreage lost by the reservation of Nike Site Jig by PLO 1345 on October 16, 1956 or PLO 1523 on October 8, 1957.

The Act of March 4, 1915 reserved Sections 16 and 36 in each township of the Territory of Alaska, and Section 33 in each township in the Tanana Valley between certain specified longitude and latitude, for the support of public education. However, the reservation of these lands was, until statehood, merely a reservation, and not a grant, of the lands; further, it attached only when the public lands were surveyed. The subject lands were apparently surveyed on October 27, 1933, and the reservation for the benefit of the University was effective on that date.

However, it must be noted that the reservation contained in 48 U.S.C. § 353 was a reservation only '... from sale or settlement'; such a reservation did not prevent the United States from subsequently appropriating the reserved lands by public land order for other governmental purposes (here for national defense purposes). Section 353 deals specifically with such a situation:

... Provided, that where settlement with a view to homestead entry has been made upon any part of the sections reserved hereby before the survey thereof in the field, or where the same have been sold or otherwise appropriated by or under the authority of any Act of Congress, or are wanting or fractional in quantity, other lands may be designated and reserved in lieu thereof in the manner provided by Sections 851 and 852 of Title 43: . . .

[Emphasis supplied]

It is clear from this quotation that a homestead entry on the lands prior to survey would have precluded attach-

ment of the reservation for the University, but that no homestead entry subsequent to survey would have been permitted. Further, it is apparent that a sale or other appropriation . . . by or under the authority of any Act of Congress', whether occurring before or after the date of survey, would remove the specific lands involved from the educational reservation. (With regard to sales subsequent to survey, this language appears to conflict with the prior provision reserving the designated sections ' . . . from sale or settlement', but is of only academic interest here, since appropriations by the United States for other federal purposes, either before or after survey, as in the situation involved here, were not forbidden by the statute). Thus the University, through the State, would appear to have a claim for 60 acres of in-lieu lands to replace the lands at Nike Site Jig which were reserved by survey in 1933, but were subsequently appropriated for other federal purposes by the United States in 1956 or 1957.

Pursuant to Section 6(k) of the Alaska Statehood Act, all lands reserved under the 1915 school legislation were granted to the State on January 4, 1959. Of course, subsequent to that date, the authority of the United States to appropriate school sections for other federal purposes ceased to exist.

I would appreciate it if you would communicate the conclusions reached in this letter to the U.S. Bureau of Land Management, the University of Alaska, and the Fairbanks North Star Borough, together with your recommendations regarding the placement of Nike Site Jig in the CIRI selection pool.

Wilson L. Condon  
Attorney General

Thomas E. Meacham  
Assistant Attorney General  
AGO-Anchorage

1980 WL 27809 (Alaska A.G.)  
END OF DOCUMENT

FEB 8 - 1955

M-36243

SCHOOL SECTIONS RESERVED BY THE ACT OF MARCH 4, 1915  
(38 STAT. 1214; 48 U.S.C. 353) FOR THE TERRITORY OF ALASKA

Alaska: School Land

Subject to the Territory's consent, the Bureau of Land Management may issue permits under the Act of July 31, 1947 (43 U.S.C. 1135) to the Alaska Road Commission authorizing it to remove roadbuilding material from school sections reserved for the Territory by the Act of March 4, 1915 (48 U.S.C. 353). The consent may be conditioned upon reasonable payment to the Territory. The Territory has no authority under the Act of 1915 to lease the reserved school sections to the Federal Government. Land reserved by the Act of 1915 may be withdrawn by public land order for the use of the Department of the Army. Applicability of the Act of June 14, 1926 (44 Stat. 741) as amended (43 U.S.C. 859) to school sections reserved by the Act of 1915 considered.

Materials Act

The Bureau of Land Management may issue permits to the Alaska Road Commission under the Materials Act authorizing the Commission to remove roadbuilding material from sections reserved for the Territory of Alaska by the Act of March 4, 1915 (48 U.S.C. 353), providing consent of the Territory is first obtained.

Accounts: Payments

Proceeds from leases for school sections reserved by the Act of March 4, 1915 (48 U.S.C. 353) issued under the Act of June 14, 1926, as amended (43 U.S.C. 869) should be deposited in the United States Treasury for payment annually to the Territory of Alaska.



UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON 25, D. C.

FEB 8 - 1955

M-36243

Memorandum

To: Director, Office of Territories

From: Acting Solicitor

Subject: School sections reserved by the Act of March 4, 1915 (38 Stat. 1214; 43 U.S.C. 353), for the Territory of Alaska

Reference is made to your memorandum of September 23 and attached correspondence raising the following questions:

1. May the Territory charge the Alaska Road Commission, a Federal agency under the jurisdiction of this Department, for road-building material removed by that Commission from school sections reserved for the Territory by the Act of March 4, 1915 (38 Stat. 1214; 43 U.S.C. 353), the material to be used for the construction and maintenance of roads outside of those sections? The record shows that such material is being removed by that Commission under permits issued by the Bureau of Land Management, authorized by the Act of July 31, 1947 (61 Stat. 681; 43 U.S.C. 1185).

2. May the Territory, under authority of section 1 of the act of March 4, 1915, supra, lease lands in reserved school sections to the Federal Government for buildings and structures used for defense purposes and collect rental for such use? It appears that the Territory has leased such lands to an agency of the Department of the Army for those purposes.

I

With respect to question 1:

With certain exceptions not pertinent here, section 1 of the Act of March 4, 1915, supra, provides that when public lands in the Territory are surveyed, sections 16 and 36 of every township shall be reserved from sale or settlement, for the support of common schools of

the Territory and sections 33 in every township within a certain area shall be reserved for the support of the Territorial agricultural college and school of mines. The reservation made by the act does not attach to a school section until it has been surveyed and the plat of survey approved or accepted by the Bureau of Land Management. 1/ The reservations made by the act are not grants and title to the reserved sections remains in the United States, subject to the full control and disposition of Congress until the contemplated grant is effected. 2/ Hence the Territory cannot charge for the material by virtue of any ownership of such a section or of the material therein. However, section 1 of the act of July 31, 1947, supra, after authorizing the Secretary of the Interior to permit any Federal, State or Territorial agency, unit or subdivision, including municipalities, without charge, to remove material from public lands, provides in part:

"When the lands have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may make disposals under said sections only with the consent of such Federal department or agency or of such State, Territory, or local governmental unit."

The act clearly applies to Alaska, as section 3 thereof provides for the disposal of proceeds from the reserved school sections in Alaska.

One of the functions of the Territorial government is the establishment and maintenance of public schools in the Territory 3/

1/ Section 1 of the act of March 4, 1915 (38 Stat. 1214; 48 U.S.C. 353). See John J. Doray, A-25892 (August 11, 1950); departmental decision of April 14, 1920 (D-38804)(796175); Cf. United States v. Morrison, 240 U.S. 192 (1916); State of New Mexico, 52 L.D. 679 (1929); State of Colorado, 49 L.D. 341 (1922); State of Montana, 38 L.D. 247, 259 (1909); F. A. Hyde & Co., 37 L.D. 164, 165 (1898); and Solicitor's Opinion M-36243 (July 22, 1952).

2/ See departmental ruling of July 16, 1946 (59 L.D. 280, 283) and footnotes 5 and 6; New Mexico v. Altman, 54 L.D. 8 (July 18, 1932); Byers v. State of Arizona, 52 L.D. 488 (September 10, 1928).

3/ Act of January 27, 1905 (33 Stat. 616), as amended (48 U.S.C. 41, 161169).



and as the proceeds from the reserved school sections obviously would aid in the performance of that function, it is clear that the Territory comes within the scope of the above-quoted provision of section 1 of the act of 1947. Consequently, roadbuilding or other materials in the reserved school sections may not be removed and disposed of under the Act of 1947 without first obtaining the consent of the proper agency of the Territory. As the Territory may refuse or give consent, it follows that it may attach reasonable conditions to the consent, if given. <sup>4/</sup> In view of the purpose for which the surveyed school sections have been reserved, its consent may be conditioned upon the Federal agency entering into a separate agreement with the Territory which requires a reasonable payment to the Territory. However, in our opinion after the Territory has once given its consent to the issuance of a permit and the permit has been issued, the Territory may not attach other conditions so long as the permit remains in effect.

## II

With respect to question 2:

A provision of the act of March 4, 1915, supra, reads as follows:

"Provided further, that the Territory may, by general law, provide for leasing said land in area not to exceed one section to any one person, association, or corporation, for not longer than ten years at any one time."

We find nothing in the act or in its legislative history to justify the conclusion that by the words "person, association, or corporation" Congress intended to include the Federal Government. It is hardly conceivable that by those words Congress intended that lands to which the United States still holds legal title may be leased by the Territory to the United States and that the Federal Government be restricted to leasing not to exceed one section. Therefore, we conclude

---

<sup>4/</sup> See Solicitor's Opinion M-36071 of May 16, 1951 (60 I.D. 477); Cf. Solicitor's Opinion of July 8, 1939 (57 I.D. 31, 33), wherein he held that power to grant or refuse a right of way permit, implied the authority to condition the permit upon payment of rental.

that the Territory has no authority under the provision quoted to lease to the Federal Government. It may be that under the language the Territory could issue a lease to a governmental corporation. That specific question will be considered when and if it arises.

### III

We have also been asked whether the Secretary by the issuance of a public land order may withdraw such legal subdivisions of a section reserved to the Territory by the Act of March 4, 1915, supra, as might be needed by the Department of the Army. In our opinion, he may do so. As above stated, the reservation made by the Act of 1915 is not a grant but is merely a reservation in contemplation of a future grant and the legal title to the reserved school section remains in the United States. Hence the reservation is no legal obstacle to such a withdrawal <sup>5/</sup> particularly as the reservation is only "from sale or settlement". <sup>6/</sup>

### IV

In closing, attention is called to the Act of June 14, 1926 (44 Stat. 741), as amended by the Act of June 4, 1954 (43 U.S.C. 869) which authorizes the Secretary of the Interior to sell or lease public lands for public purposes to Federal instrumentalities. The judicial interpretation of the term "public lands" as used in other acts has varied with the context and purpose of the statute in which it occurs and although those words ordinarily are used to designate such lands as are subject to sale or disposal under the general land laws, they are sometimes used in a larger and different sense. <sup>7/</sup> We think that might be true here, since the section 1(c) of the Act specifically excepts from the applicability of the Act, lands covered by certain enumerated kinds of withdrawals and provides for the disposal of other lands withdrawn in aid of a function of a Federal or Territorial agency with the consent of that agency.

---

<sup>5/</sup> See Byers v. State of Arizona, 53 L.D. 488 (September 10, 1928); departmental ruling of July 16, 1946 (59 L.D. 280, 283); Assistant Attorney General's Opinion of October 19, 1905 (34 L.D. 136), which concerned lands withdrawn March 9, 1903, under the reclamation laws. The Federal Government still retains control and dominion over the reserved sections - see United States v. Elliott, 41 P. 720 (1895); Barkley v. United States, 19 P. 36 (1888; Washington); United States v. Bissel, 19 P. 251 (1888; Montana).

<sup>6/</sup> Section 1 of Act of March 4, 1915 (48 U.S.C. 353).

<sup>7/</sup> See Kindred v. Union Pac. Ry. Co., 225 U.S. 582 (1912); Newhall v. Sanger, 92 U.S. 761 (1875); Union Pac. Ry. Co. v. Karges, 169 F. 459 (1909); United States v. Blendauer, 128 F. 910 (1904); State of Utah, 53 L.D. 365, 368 (1921).

The pertinent portion of the section 1(c) provides that:

"Where the lands have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior, or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may make disposals under this Act only with the consent of such Federal department or agency, or of such State, Territory, or local governmental unit."

In view of the consent requirement, before a lease may be issued for a reserved school section, it would be necessary that the consent of the proper agency of the Territory to the issuance be obtained. As the Territory may refuse or grant its consent, the consent, if given, may be conditioned upon the Territory being assured of receiving the amount of the rental. <sup>B/</sup> The section 2(b) of the Act authorizes the Secretary to charge a "reasonable annual rental" and the regulations (43 CFR 254.6d) provides for such rental. The rental received by the Secretary under such a lease would be deposited in the United States Treasury for payment annually to the Territory pursuant to section 1 of the Act of March 4, 1915 (48 U.S.C. 353). When any specific questions arise over the applicability and effect of the Act of June 4, 1954, we shall be glad to consider them.

Of course, a permit, lease or withdrawal order cannot be issued for a reserved school section to the detriment of a lease issued by the Territory under the second provision of section 1 of the Act of March 4, 1915, supra.

Acting Solicitor

ECDuckworth:dvw  
1/25/55

---

<sup>B/</sup> See footnote No. 4.

COPY x 10

National Archives and Records Administration  
Pacific Alaska Region  
654 West 3rd Avenue

Anchorage, Alaska 99501-2145

Record Group No. 30- AK ROAD COMMISSION

Box No. / Location 3- 10/05/08(1)

Additional Information DIRECTIVE FILES

JUNEAU, AK 1931-1956

12. REAL ESTATE [M]



**SCHEDULE B**

**EXCEPTIONS:**

1. Reservations or exceptions in patents or in acts authorizing the issuance thereof.
2. Reservations and exceptions as contained in the State of Alaska Patent.  
  
Said patent, among other things, reserves all oil, gas and other minerals together with the privileges, mining and drilling rights and immunities.
3. Rights of the public and of governmental bodies in and to that portion of the premises herein described lying below the high water mark of Cook Inlet.  
Affects:                               Parcels 2, 3, 4 & 5
4. Any adverse claim based upon the assertion that some portion of said land is tide or submerged lands, or has been created by artificial means or has accreted to such portion so created.  
Affects:                               Parcels 2 & 3
5. Any preference rights which may exist under the Alaska Land Act, terms, provisions and reservations under the Submerged Lands Act (43 USCA 1301, 67 Stat. 29) and the enabling act (Public Law 85-508, 72 Stat. 339).  
Affects:                               Parcels 2 & 3
6. Terms, provisions and reservations under the Submerged Land Act (43 U.S.C.A. Sections 1301 through 1311) and the rights of the United States of America to regulate commerce, navigation, flood control, fishing and production of power.  
Affects:                               Parcels 2 & 3
7. Any prohibition or limitation on the use, occupancy or improvements of the land resulting from the right of the public or riparian owners to use any waters which may cover the land or to use any portion of the land which is now or may formerly have been covered by water.  
Affects:                               Parcels 2, 3, 4 & 5
8. Taxes and/or Assessments, if any, due The Kenai Peninsula Borough.
9. Easement for roadway and/or public utilities as reserved in Patent  
Recorded:                               June 20, 1980  
Recording Information:               Book 157 Page 818  
Affects:                                 Portions as delineated in instrument
10. Covenants, conditions, restrictions and/or easements; but deleting any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, family status, or national origin to the extent such covenants, conditions or restrictions violate Title 42, Section 3604(c), of the United States Codes:  
Recording Information:               June 20, 1980 in Book 157 at Page 818

11. Lease, Amendments and Assignments thereto upon the terms, covenants and conditions therein provided, and any failure to comply,  
Dated: April 13, 1964  
Lessor: State of Alaska  
Lessee: James V. Arness  
Term: 55 years  
Recorded: December 24, 1965  
Recording Information: Book 20 Page 184

Said lease has been assigned by mesne assignments and is now held of record by Offshore Systems-Kenai, as disclosed by instrument recorded March 20, 1986 in Book 283 at Page 227.

Affects: Parcel 3

12. Agreement and the terms and conditions thereof:  
Between: James Arness  
And: Standard Oil Company of California  
Recording Information: November 21, 1967 in Book 29 at Page 206

13. Lease, Amendments and Assignments thereto upon the terms, covenants and conditions therein provided, and any failure to comply,  
Dated: December 7, 1967  
Lessor: State of Alaska  
Lessee: James B. Arness  
Term: 55 years  
Recorded: Unknown  
Recording Information: Unknown

Said lease has been assigned by mesne assignments and is now held of record by Offshore Systems-Kenai, as disclosed by instrument recorded March 20, 1986 in Book 283 at Page 227.

Affects: Parcel 2

**EXHIBIT GG**  
**Page 2 of 9**

14. Deed of Trust and the terms and conditions thereof.  
Grantor/Trustor: Offshore Systems-Kenai  
Grantee/Beneficiary: Kenai Peninsula Borough  
Trustee: TransAlaska Title  
Amount: \$42,840.00  
Recorded: October 15, 1990  
Recording Information: Book 372 Page 941  
Affects: Parcel 5
15. Deed of Trust and the terms and conditions thereof.  
Grantor/Trustor: Offshore Systems-Kenai  
Grantee/Beneficiary: Kenai Peninsula Borough  
Trustee: TransAlaska Title  
Amount: \$133,920.00  
Recorded: October 15, 1990  
Recording Information: Book 372 Page 944  
Affects: Parcel 4
16. Deed of Trust and the terms and conditions thereof.  
Grantor/Trustor: Offshore Systems-Kenai  
Grantee/Beneficiary: Kenai Peninsula Borough  
Trustee: TransAlaska Title  
Amount: \$70,560.00  
Recorded: October 15, 1990  
Recording Information: Book 372 Page 947  
Affects: Parcel 1
17. Deed of Trust and the terms and conditions thereof.  
Grantor/Trustor: Offshore Systems-Kenai  
Grantee/Beneficiary: Kenai Peninsula Borough  
Trustee: TransAlaska Title  
Amount: \$66,420.00  
Recorded: August 14, 1992  
Recording Information: Book 404 Page 58  
Affects: Parcel 7
18. Easements as dedicated and shown on the plats 86-235 & 92-32 of said subdivisions. (Copies attached)  
Affects: Parcels 6 & 7
19. The effect of the notes which appear on the plats 86-235 & 92-32 of said subdivisions. (Copies attached)  
Affects: Parcels 6 & 7

**EXHIBIT GG**  
**Page 3 of 9**



20. Public Right of Way Permit including the terms and provisions thereof:  
Dated: August 17, 1992  
Recorded: September 15, 1992 in Book 405 at Page 654  
Executed by: State of Alaska Department of Natural Resources Division of  
Land, Southcentral Regional Office and Offshore Systems, Inc.  
Affects: Parcels 2 & 3
21. Oil and Gas Lease, Amendments and Assignments thereto upon the terms, covenants and conditions therein provided, and any failure to comply,  
Dated: December 17, 2001  
Lessor: State of Alaska, Department of Natural Resources  
Lessee: Escopeta Production-Alaska, Inc.  
Term: 7 years with provisions for extension  
Recorded: January 10, 2002  
Recording Information: Book 631 Page 741

Note: Title to the mineral estate, as it pertains to said Oil and Gas Lease, has not been further searched and assurance thereto is not covered under this Policy.

22. Tideland Easement including the terms and provisions thereof:  
Dated: April 27, 2005  
Recorded: 2005-004169-0  
Executed by: State of Alaska Department of Natural Resources, Division of  
Mining, Land and Water, Southcentral Region and Ocean Beauty  
Seafoods, Inc.  
Affects: Parcel 2

NOTE: THIS GUARANTEE IS RESTRICTED TO THE USE OF THE ASSURED HEREIN AND IS NOT TO BE USED AS A BASIS FOR CLOSING ANY TRANSACTION AFFECTING TITLE TO SAID PROPERTY.

**SCHEDULE C**

The necessary parties (other than those having a claim or interest by reason of matters shown in Exception number(s) , inclusive) to be made defendants in an action to Judicially foreclose the Deed of Trust shown as exception number herein, said action to be brought by are as follows:

**EXHIBIT GG**  
**Page 5 of 9**

**EXHIBIT A  
LEGAL DESCRIPTION**

Parcel No. 1:

The Northwest one-quarter of the Northwest one-quarter of the Southeast one-quarter (NW1/4 NW1/4 SE1/4) of Section 36, Township 8 North, Range 12 West, Seward Meridian, Third Judicial District, State of Alaska,

EXCEPTING THEREFROM that portion lying within the right of way known as Nikiski Beach Road.

Parcel No. 2:

A tract of tidelands shown on Alaska Tidelands Survey No. 647 and more particularly described as follows:

Beginning at the brass cap monument which is the WCMC between fractional section 35 & 36 in T8N, R12W, SM, Alaska;

THENCE N 0°02'W 446.16 feet to the true and meander corner between fractional corners 35 & 36 which is located at the line of mean high water on the southeast shore of Cook Inlet;

THENCE N 76°E 1358.94 feet along the line of mean high water to Corner No. 1 of ATS 384;

THENCE N 13° 45' W 200.00 feet to Corner No. 2 of ATS 384 which is common to Corner No. 1 of ATS 647 and is the true point of beginning;

THENCE N 13° 45' W 900.00 feet to Corner No. 2 of ATS 647;

THENCE N 76° 15' E 1158.94 feet to Corner No. 3;

THENCE S 13° 45' E 900.00 feet to Corner No. 4 which is on the Northerly Boundary line of ATS 384;

THENCE S 76° 15' W 1158.94 feet along the Northerly Boundary line of ATS 384 to Corner No. 1 of ATS 647 and is common to Corner No. 2 of ATS 384 and is the true point of beginning,

All in the Kenai Recording District, Third Judicial District, State of Alaska.

Parcel No. 3:

A Tract of land known as ATS 384;

Commencing at the point of the M.C. between fractional sections 35 & 36, T8N, R12W, Seward Meridian, Kenai Recording District, Third Judicial District, State of Alaska, from which W.C.M.C. bears S 00° 02'E 446.16 feet;

THENCE N 76° 15' E 1358.94 feet to Corner No. 1 of ATS 384, the true point of beginning;

THENCE by metes and bounds:

N 13° 45' W 200.00 feet to Corner No. 2;

N 76° 15' E 1178.94 feet to Corner No. 3;

S 13° 45' W 200.00 feet to Corner No. 4;

S 76° 15' W 1178.94 feet to Corner No. 1.

Parcel No. 4:

The North one-half (N1/2) of Government Lot 3, in Section 36, Township 8 North, Range 12 West, Seward Meridian, according to the official plat of surveys filed in the office of the Bureau of Land Management, records of the Kenai Recording District, Third Judicial District, State of Alaska.

**EXHIBIT GG  
Page 6 of 9**

Parcel No. 5:

All of that portion of Government Lot 1, lying Westerly of a North-South line, said line being the west-

East 1/64 subdivisional section line, Section 36, Township 8 North, Range 12 West, Seward Meridian, subject to a 60 foot right of way for existing roads to the beach, located in section 36, Township 8 North, range 12 West, Seward Meridian, Third Judicial District, State of Alaska;  
EXCEPTING THEREFROM a parcel of land 208' x 208' being further described in that certain lease recorded May 29, 1967 in Book 26 at Page 308;  
EXCEPTING THEREFROM that portion described in the partial assignment of lease to Offshore Fabricators, Inc., recorded October 24, 1967 in Book 29 at Page 36.

Parcel No. 6:

Tract A, Arness Dock Subdivision, according to the official plat thereof, filed under Plat No. 86-235, records of the Kenai Recording District, Third Judicial District, State of Alaska.

Parcel No. 7:

Tract B, Arness Dock Subdivision, Addition Number One, according to the official plat thereof, filed under Plat No. 92-32, records of the Kenai Recording District, Third Judicial District, State of Alaska.

**EXHIBIT GG**  
**Page 7 of 9**

**SCHEDULE OF EXCLUSIONS FROM COVERAGE OF THIS GUARANTEE**

1. Except to the extent that specific assurance are provided in Schedule A of this Guarantee, the Company assumes no liability for loss or damage by reason of the following:
  - (a) Defects, liens, encumbrances, adverse claims or other matters against the title, whether or not shown by the public records.
  - (b) (1) Taxes or assessments of any taxing authority that levies taxes or assessments on real property; or, (2) Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not the matters excluded under (1) or (2) are shown by the records of the taxing authority or by the public records.
  - (c) (1) Unpatented mining claims; (2) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (3) water rights, claims or title to water, whether or not the matters excluded under (1), (2) or (3) are shown by the public records.
2. Notwithstanding any specific assurances which are provided in Schedule A of this Guarantee, the Company assumes no liability for loss or damage by reason of the following:
  - (a) Defects, liens, encumbrances, adverse claims or other matters affecting the title to any property beyond the lines of the land expressly described in the description set forth in Schedule (A), (C) or in Part 2 of this Guarantee, or title to streets, roads, avenues, lanes, ways or waterways to which such land abuts, or the right to maintain therein vaults, tunnels, ramps, or any structure or improvements; or any rights or easements therein, unless such property, rights or easements are expressly and specifically set forth in said description.
  - (b) Defects, liens, encumbrances, adverse claims or other matters, whether or not shown by the public records; (1) which are created, suffered, assumed or agreed to by one or more of the Assureds; (2) which result in no loss to the Assured; or (3) which do not result in the invalidity or potential invalidity of any judicial or non-judicial proceeding which is within the scope and purpose of the assurances provided.
  - (c) The identity of any party shown or referred to in Schedule A.
  - (d) The validity, legal effect or priority of any matter shown or referred to in this Guarantee.

**GUARANTEE CONDITIONS AND STIPULATIONS**

**1. Definition of Terms.**

The following terms when used in the Guarantee mean:

- (a) the "Assured": the party or parties named as the Assured in this Guarantee, or on a supplemental writing executed by the Company.
- (b) "land": the land described or referred to in Schedule (A) (C) or in Part 2, and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule (A) (C) or in Part 2, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways.
- (c) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.
- (d) "public records": records established under state statutes at Date of Guarantee for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge.
- (e) "date": the effective date.

**2. Notice of Claim to be Given by Assured Claimant.**

An Assured shall notify the Company promptly in writing in case knowledge shall come to an Assured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as stated herein, and which might cause loss or damage for which the Company may be liable by virtue of this Guarantee. If prompt notice shall not be given to the Company, then all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any Assured under this Guarantee unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

**3. No Duty to Defend or Prosecute.**

The Company shall have no duty to defend or prosecute any action or proceeding to which the Assured is a party, notwithstanding the nature of any allegation in such action or proceeding.

**4. Company's Option to Defend or Prosecute Actions; Duty of Assured Claimant to Cooperate.**

Even though the Company has no duty to defend or prosecute as set forth in Paragraph 3 above:

(a) The Company shall have the right, at its sole option and cost, to institute and prosecute any action or proceeding, interpose a defense, as limited in (b), or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest as stated herein, or to establish the lien rights of the Assured, or to prevent or reduce loss or damage to the Assured. The Company may take any appropriate action under the terms of this Guarantee, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this Guarantee. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(b) If the Company elects to exercise its options as stated in Paragraph 4(a) the Company shall have the right to select counsel of its choice (subject to the right of such Assured to object for reasonable cause) to represent the Assured and shall not be liable for and will not pay the fees of any other counsel, nor will the Company pay

any fees, costs or expenses incurred by an Assured in the defense of those causes of action which allege matters not covered by this Guarantee.

(c) Whenever the Company shall have brought an action or interposed a defense as permitted by the provisions of this Guarantee, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from an adverse judgment or order.

(d) In all cases where this Guarantee permits the Company to prosecute or provide for the defense of any action or proceeding, an Assured shall secure to the Company the right to so prosecute or provide for the defense of any action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of such Assured for this purpose. Whenever requested by the Company, an Assured, at the Company's expense, shall give the Company all reasonable aid in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as stated herein, or to establish the lien rights of the Assured. If the Company is prejudiced by the failure of the Assured to furnish the required cooperation, the Company's obligations to the Assured under the Guarantee shall terminate.

**5. Proof of Loss or Damage.**

In addition to and after the notices required under Section 2 of these Conditions and Stipulations have been provided to the Company, a proof of loss or damage signed and sworn to by the Assured shall be furnished to the Company within ninety (90) days after the Assured shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the matters covered by this Guarantee which constitute the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the Assured to provide the required proof of loss or damage, the Company's obligation to such Assured under the Guarantee shall terminate. In addition, the Assured may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Guarantee, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Assured shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the Loss or Damage. All information designated as confidential by the Assured provided to the Company, pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Assured to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in the above paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this Guarantee to the Assured for that claim.

Form No. 1282 (Rev. 12/15/95)

**6. Options to Pay or Otherwise Settle Claims: Termination of Liability.**

In case of a claim under this Guarantee, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Liability or to Purchase the Indebtedness.

The Company shall have the option to pay or settle or compromise for or in the name of the Assured any claim which could result in loss to the Assured within the coverage of this Guarantee, or to pay the full amount of this Guarantee or, if this Guarantee is issued for the benefit of a holder of a mortgage or a lienholder, the Company shall have the option to purchase the indebtedness secured by said mortgage or said lien for the amount owing thereon, together with any costs, reasonable attorneys' fees and expenses incurred by the Assured claimant which were authorized by the Company up to the time of purchase.

Such purchase, payment or tender of payment of the full amount of the Guarantee shall terminate all liability of the Company hereunder. In the event after notice of claim has been given to the Company by the Assured the Company offers to purchase said indebtedness, the owner of such indebtedness shall transfer and assign said indebtedness, together with any collateral security, to the Company upon payment of the purchase price.

Upon the exercise by the Company of the option provided for in Paragraph (a) the Company's obligation to the Assured under this Guarantee for the claimed loss or damage, other than to make the payment required in that paragraph, shall terminate, including any obligation to continue the defense or prosecution of any litigation for which the Company has exercised its options under Paragraph 4, and the Guarantee shall be surrendered to the Company for cancellation.

(b) To Pay or Otherwise Settle With Parties Other Than the Assured or With the Assured Claimant.

To pay or otherwise settle with other parties for or in the name of an Assured claimant any claim Assured against under this Guarantee, together with any costs, attorneys' fees and expenses incurred by the Assured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of the option provided for in Paragraph (b) the Company's obligation to the Assured under this Guarantee for the claimed loss or damage, other than to make the payment required in that paragraph, shall terminate, including any obligation to continue the defense or prosecution of any litigation for which the Company has exercised its options under Paragraph 4.

**7. Determination and Extent of Liability.**

This Guarantee is a contract of Indemnity against actual monetary loss or damage sustained or incurred by the Assured claimant who has suffered loss or damage by reason of reliance upon the assurances set forth in this Guarantee and only to the extent herein described, and subject to the Exclusions From Coverage of This Guarantee.

The Liability of the Company under this Guarantee to the Assured shall not exceed the least of:

(a) the amount of liability stated in Schedule A or in Part 2;

(b) the amount of the unpaid principal indebtedness secured by the mortgage of an Assured mortgagee, as limited or provided under Section 6 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage Assured against by this Guarantee occurs, together with interest thereon; or

(c) the difference between the value of the estate or interest covered hereby as stated herein and the value of the estate or interest subject to any defect, lien or encumbrance Assured against by this Guarantee.

**8. Limitation of Liability.**

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures any other matter Assured against by this Guarantee in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title, as stated herein.

(c) The Company shall not be liable for loss or damage to any Assured for liability voluntarily assumed by the Assured in settling any claim or suit without the prior written consent of the Company.

**9. Reduction of Liability or Termination of Liability.**

All payments under this Guarantee, except payments made for costs, attorneys' fees and expenses pursuant to Paragraph 4 shall reduce the amount of liability pro tanto.

**10. Payment of Loss.**

(a) No payment shall be made without producing this Guarantee for endorsement of the payment unless the Guarantee has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within thirty (30) days thereafter.

**11. Subrogation Upon Payment or Settlement.**

Whenever the Company shall have settled and paid a claim under this Guarantee, all right of subrogation shall vest in the Company unaffected by any act of the Assured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the Assured would have had against any person or property in respect to the claim had this Guarantee not been issued. If requested by the Company, the Assured shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The Assured shall permit the Company to sue, compromise or settle in the name of the Assured and to use the name of the Assured in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the Assured the Company shall be subrogated to all rights and remedies of the Assured after the Assured shall have recovered its principal, interest, and costs of collection.

**12. Arbitration.**

Unless prohibited by applicable law, either the Company or the Assured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Assured arising out of or relating to this Guarantee, any service of the Company in connection with its issuance or the breach of a Guarantee provision or other obligation. All arbitrable matters when the Amount of Liability is \$1,000,000 or less shall be arbitrated at the option of either the Company or the Assured. All arbitrable matters when the amount of liability is in excess of \$1,000,000 shall be arbitrated only when agreed to by both the Company and the Assured. The Rules in effect at Date of Guarantee shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permits a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

**13. Liability Limited to This Guarantee; Guarantee Entire Contract.**

(a) This Guarantee together with all endorsements, if any, attached hereto by the Company is the entire Guarantee and contract between the Assured and the Company. In interpreting any provision of this Guarantee, this Guarantee shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, or any action asserting such claim, shall be restricted to this Guarantee.

(c) No amendment of or endorsement to this Guarantee can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

**14. Notices, Where Sent.**

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this Guarantee and shall be addressed to the Company at 2 First American Way, Bldg. 2, Santa Ana, CA. 92707.

Form No. 1282 (Rev. 12/15/95)