

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

STATE OF ALASKA,)
)
Plaintiff,)
)
KENAI PENINSULA BOROUGH,)
a municipal corporation)
)
Intervenor,)
)
v.)
)
OFFSHORE SYSTEMS – KENAI,)
an Alaskan Partnership)
)
Defendant.)
)
_____)

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DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
3RD JUDICIAL DISTRICT
ANCHORAGE, ALASKA

Case No. 3KN-08-453 CI

ORDER

The court previously made several factual and legal findings in its earlier summary judgment order that will not be restated here except where necessary. The court held in its summary judgment order that the highway right of way portion of the Nikishka Beach Road exists from the Kenai Spur Highway toward Cook Inlet for a distance of eight-tenths of a mile to a guard shack installed by Offshore Systems – Kenai (“OSK”).¹ The roadway continues a short distance after the guard shack towards a bluff overlooking the Cook Inlet and splits into a “Y” intersection where two roads continue down to the beach. The court will refer to the roadway that continues after the guard shack and then proceeds west at the “Y” intersection as “Dock Access Road.” This roadway accesses the southern portion of the beach and OSK’s dock. The court will refer

¹ For ease of reference, this roadway will be referred to as the “highway portion of Nikishka Beach Road.”

to the roadway that runs east at the “Y” intersection and accesses the beach north of the bluff as “Beach Access Road.”

OSK owns three lots of land that are disputed to contain reservations of easements for public access to the beach. Lot 2 is a square parcel of land that covers roughly twenty-two acres and is the first lot encountered heading toward the beach from the Kenai Spur Highway. Unlike the other lots, Lot 2 does not contain any shoreline. The highway portion of Nikishka Beach Road and a small portion of Dock Access Road traverse this parcel.

Lot 1 is a five-and-a-half acre parcel that sits exactly atop of Lot 2’s northern boundary. Lot 1’s northern boundary slants upward along the Cook Inlet shoreline from its western boundary to its eastern boundary. The “Y” intersection, Dock Access Road and all of Beach Access Road are located on this lot.

Lot 3 covers twenty-three acres and abuts Lot 1 and Lot 2’s western boundary. Similar to Lot 1, Lot 3’s northern boundary slopes upward along the shoreline from west to east. Dock Access Road and OSK’s dock are located on this parcel.

The first question before the court is whether the original Nikishka Beach Road, as described in the federal quitclaim deed, extends all the way to the beach. The court finds that it does.

FACTS

Federal law set aside sections 16 and 36 within every township of the Territory of Alaska as school trust lands reserved from sale or settlement.² Upon entry into statehood in 1959, the school trust lands were granted to the State of Alaska (“State”).³ Section 36,

² Act of March 4, 1915, ch. 181, § 1, 38 Stat. 1214 (repealed 1958).

³ Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).

Township Eight North, Range 12 West of the Seward Meridian, Alaska ("Section 36") is a partial section of land bordered on the north by the Cook Inlet and located in the Kenai Peninsula Borough ("Borough"). Lots 1, 2 and 3 are located in the northern part of Section 36 that borders the Cook Inlet.

Mazzie McGahan ("Mazzie"), a homesteader, built the original road through Section 36 in 1952 or 1953 in order to give fisherman access to the beach.⁴ James Arness ("Arness") was the first person to lease Lots 1, 2 and 3 from the State starting in 1960.

Arness entered into a five-year lease agreement with the State for Lot 3 in 1960. The lease did not contain any language about the existence of easements. In his lease agreement for Lot 3, Arness stated that he intended to construct a barge unloading facility. He obtained a special land use permit to build the barge unloading facility that has since been transformed into OSK's dock. The permit contained several stipulations, including two restrictions stating that Arness shall not "enclose roads or trails commonly in public use" or "obstruct beach in any manner that will prohibit normal beach traffic."

In 1962, Arness entered into a five-year lease agreement with the State for Lot 1. The lease for Lot 1 stated that it was subject "to the stipulation that the Lessee [Arness] shall not prevent the public from using the Nikishka Beach Road." Paragraph 6 of the lease for Lot 1 contained a reservation clause stating "[t]he 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." Two years later, Arness entered into a five-year lease for Lot 2 that contained the same reservation clause.

By 1966, Arness and the State replaced the five-year lease agreements with fifty-five year lease agreements for all three lots. The new leases all contained the paragraph 6

⁴ For ease of reference, this roadway will be referred to as the "original Nikishka Beach Road."

reservation clause but each had different language regarding specific easements. The lease for Lot 1 stated it was subject to “a 60-foot wide right of way for existing roads to the beach.” The lease for Lot 2 stated it was subject to “a 60 foot wide right-of-way for existing roads to the beach and Highway Right-of-Way Permit serialized ADL 32264.” The lease for Lot 3 did not contain any easement reservations. On August 21, 1966, the Department of Natural Resources issued permit ADL 32264 to the Department of Transportation to convert a substantial portion of Nikishka Beach Road into a public highway.

In 1972, Arness assigned the leases to Lot 1, 2 and 3 to the Foss Company. The assignments contained the same reservation language as the original fifty-five year leases. Five years later, the Foss Company assigned all three leases to Jesse Wade with the same reservation language included in the assignments.

The State enacted A.S. 38.05.127 in 1976.⁵ This statute mandates that before the State can sell, lease or otherwise dispose of state land that borders a body of navigable or public water, the State must provide an easement or right of way to ensure public access to and along that body of water.

In 1978, the State passed legislation, Chapter 182, SLA 1978,⁶ that converted the State's trust lands into general grant lands, making school lands part of the State's unrestricted general grant land, thereby eliminating any problems associated with the use of school lands for other purposes.⁷ That same year, the Municipal Land Entitlement Act

⁵ Act of September 1, 1976, ch. 117, § 2, SLA 1976 (stating “intent of this Act to implement the provisions of art. VIII, sec. 14, Alaska State Constitution”).

⁶ Act of July 1, 1978, ch. 182, § 2, SLA 1978 (stating that the redesignation “does not affect the validity of a deed, contract for sale, lease, easement, right-of-way”).

⁷ The existence of ch. 182, SLA 1978 renders OSK’s argument moot that Nikishka Beach Road was transferred in violation of Section 36’s mandate that it had to be used for school purposes.

was passed that allowed the State to convey its general grant land to some of Alaska's largest boroughs.⁸ Section 36, formerly designated as school trust land, thus became general grant land available for conveyance under the Municipal Land Entitlement Act.⁹

In 1980, the State conveyed all of Section 36 to the Borough by Patent 5124. The patent was subject to existing easements and listed, among other things, ADL roadway permit 32264 and the leases for Lots 1, 2 and 3. Wade assigned his leases to OSK after receiving approval from the Borough in 1985. In 1990, the Borough executed and delivered quitclaim deeds for Lots 1, 2 and 3 to OSK subject to "rights and reservations of record and any easements . . . of record or ascertainable by physical inspection."

In 2007, OSK closed off the end of the highway portion of Nikishka Beach Road with the installation of the guard shack. The State issued a Notice of Violation letter in 2008 stating that OSK was illegally engaged in obstruction of a public right-of-way. OSK did not remove the obstruction, leading to this dispute.

ANALYSIS

I. A Right of Way For Public Access To The Beach Exists On Lots 1 and 2

The court conducted a thorough and exhaustive review of all the evidence in this case. Several aerial photographs of the roadway were admitted into evidence at trial. Unfortunately, none of those photographs show the original roadway as installed by Mazzie. The first photo depicting the roadway was taken in 1963, almost three years after Arness applied for a permit to build the dock. Exhibit 14 shows the beginning phase

⁸ Municipal Land Entitlement Act, ch. 180, SLA 1978 (codified as amended at A.S. 29.65.010 - .140).

⁹ The State's Complaint also sought relief for a determination that the route to the beach was a right of way pursuant to 43 U.S.C. § 932 (RS 2477). This claim is without merit. The route must cross public land, not reserved or withdrawn, to qualify as an RS 2477 right of way. Section 36 was land withdrawn as school trust land. RS 2477 was repealed, and ineffective, by the time Section 36 was redesignated as general grant land by ch. 182, SLA 1978.

of the dock construction and a clear outline of the newly constructed Dock Access Road that travels west to the dock and the southern portion of the beach. The photo also shows that the dock divides the beach into two parts: to the west is what is commonly known as the “south” beach, and to the east is the “north” beach. One can also see the outline of a beach road that heads east toward the north beach that appears to be the original Nikishka Beach Road. This outline is consistent with the road shown on the vicinity map prepared before statehood in 1957 by the Department of Commerce/Bureau of Public Roads.¹⁰

The court concludes that this is also the roadway referred to in the quitclaim deed issued by the federal government to the State in 1959. That deed describes the original Nikishka Beach Road as “[f]rom a point on FAS route 490 approx 15.5 miles north of the village of Kenai, north to Nikiski Beach. Length 0.8 mile.” John Bennett, the State’s expert, testified that this description includes a metes call showing a measurement that the road was eight-tenths of a mile, and a bounds call showing the terminal point of the road is the beach. Bennett explained that where metes and bounds calls conflict, the bounds call controls, thus demonstrating that the original Nikishka Beach Road, as described in the federal quitclaim deed, extended all the way to the beach.¹¹ This determination complies with the rules for resolving disputes over the description of real property set forth in A.S. 09.25.040.¹²

¹⁰ Ex. 4.

¹¹ OSK’s expert, Scott McLane, testified he used survey monuments in determining the location of eight-tenths of a mile as described in the federal quitclaim deed. He specifically noted, however, that he was not tasked with determining the length or location of Nikishka Beach Road.

¹² A.S. 09.25.040 states: The following are the rules for construing the descriptive part of a conveyance of real property when the construction is doubtful and there are no other sufficient circumstances to determine it:

(1) where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false does not frustrate the conveyance, but it is to be construed by those particulars if they constitute a sufficient description to ascertain its application:

A finding that Nikishka Beach Road extends to the beach in a northeasterly direction is consistent with the testimony of Mazzie's nephews, Dale and Richard McGahan, and Mazzie's son, Merrill McGahan. All three lived in Nikiski and were familiar with the original road. Each recalled the original road went to the right near the bluff and extended all the way to the beach.

This testimony matches a survey made by Stanley McLane in 1963, which shows the original Nikishka Beach Road traveling over Lot 1 and ending at the "Y" intersection. Part of the road then heads west to the southern portion of the beach toward the dock. The other part passes through Lot 1 heading east toward the north beach. Moreover, the testimony and the survey are similar to the diagram of the original Nikishka Beach Road on the vicinity map prepared by the Bureau of Public Roads in 1957.

Arness' various leases and lease applications also refer to a road existing to the beach. Arness' original lease application refers to a "road installed by the bureau of public roads along the south side of lake to the beach" This same road is shown on a hand-drawn map attached to a right of way permit issued to Arness by the State in 1960. Again, these references match the vicinity map prepared by the Bureau of Public Roads.

(2) when permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount:

(3) between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both:

(4) when a road or stream of water not navigable is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or bed of the stream is held under another title:

(5) when tidewater is the boundary, the rights of the grantor to low-water mark are included in the conveyance:

(6) when the description refers to a map and that reference is inconsistent with other particulars, it controls them if it appears that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars.

The five-year lease for Lot 1, executed in 1962, simply states that the lessee shall not prevent the public from using the Nikishka Beach Road. However, the fifty-five year lease, executed on August 17, 1966, specifically provides that the lease for Lot 1 is subject to a sixty foot wide right of way for existing roads to the beach. All subsequent assignments of this lease were made subject to the same sixty foot wide right of way.

Similar language is contained in the fifty-five year lease to Lot 2. There is no mention of a roadway in the five-year lease for Lot 2 dated April 7, 1964. The subsequent fifty-five year lease executed on August 17, 1966, however, provides that the lease is subject to a sixty foot wide right of way for existing *roads* to the beach, suggesting the existence of more than one road to the beach. Because this lease makes a separate reference to highway permit ADL 32264, the only other road on Lot 2 would have been the original Nikishka Beach Road which travels to the north and then east towards the northern portion of the beach.

Moreover, an as-built drawing for the Nikishka Beach Road highway project shows a road, described as the "beach road," extending east from the end of the proposed highway down to the north beach. This road traverses the top of the bluff in the approximate location of the original road shown in Exhibit 14.¹³ Thus, it is clear that since statehood, and even before, there has been a sixty foot wide right of way that travels over Lots 1 and 2 for access to the beach.

It is also apparent that over time, use of the original roadway was discontinued in favor of easier access down the better maintained Dock Access Road constructed by Arness, with an exit off the dock to the north beach. There was ample evidence that this was done with the permission and agreement of Arness. After the dock was installed, a

¹³ Ex. 3026.

berm formed on the east side of the dock. Wood and other debris would block access to the north beach. Arness instructed his employees to maintain the north access because they were required to provide public access to the beach.

Section 4.8 of the Restatement (Third) of Property: Servitudes, provides that the dimensions of an easement are those necessary for the enjoyment of the servitude and that the owner of the servient estate may make reasonable changes in location and dimension of the easement if those changes do not lessen the utility of the easement, interfere with the owners use and enjoyment, or frustrate the purpose for which the easement was created.¹⁴ That is exactly what happened here. Arness altered the original location of the beach road so that the best approach to north beach was to travel down Dock Access Road and then exit the east side of the dock onto the beach. Arness' employees were instructed to maintain this access and keep it clear from logs and other debris.

It is obvious from the aerial photographs taken in 1968, 1971, 1981 and 1985 that the original beach road fell into disrepair and became overgrown with alders. OSK began making substantial improvements to the area in 1985. By 1990, OSK had rebuilt the dock, added a warehouse, and created Beach Access Road as a new access to the north beach.¹⁵ Beach Access Road became the primary and only means of approach to the north beach, as the warehouse prevented the public from accessing the beach from the dock. OSK maintains that the Beach Access Road was built so OSK could obtain gravel from the beach during construction. Nevertheless, the public has used this road since it

¹⁴ See Restatement (Third) of Property: Servitudes § 4.8 (2000).

¹⁵ Beach Access Road is designated as "access road" on the photo exhibits.

was constructed, without objection by OSK until this dispute, as the primary access to the north beach.

Therefore, the court finds that Beach Access Road is a continuation of the original Nikishka Beach Road, taking into consideration changes to the topography occasioned by construction of the dock and other environmental factors over the years, and provides public access to the beach.

OSK's argument that the original road to the beach was extinguished under the doctrine of merger is incorrect. The court's summary judgment order found that once OSK acquired the land in fee simple, the leases were extinguished, thereby extinguishing any *enforcement* rights under the leases. The court did not, and could not, find that extinguishment of the leases also extinguished the public's access to the beach, by merger or otherwise. This situation is similar to the situation in *Lake Colleen Enterprises, Inc. v. Estate of Mark*, where the defendant originally leased property from the state, subject to a public access easement, and later obtained title to the leased land.¹⁶ The court in *Lake Colleen* found that "access once granted under a public access easement to the state should not be lost once the state conveys full title to a private owner."¹⁷

OSK also argues that the public access easement over the original Nikishka Beach Road was abandoned or extinguished when the remaining length of the roadway was not assigned to the Department of Highways, as a public highway. The court finds the State did not abandon or relinquish the remaining length of Nikishka Beach Road when it issued permit ADL 32264 to the Department of Highways.

¹⁶ 951 P.2d 427 (Alaska 1997).

¹⁷ *Lake Colleen*, 951 P.2d at 430.

A servitude can only be extinguished by abandonment when the beneficiary relinquishes the right created by the servitude.¹⁸ The Department of Natural Resources issued permit ADL 32264 on August 2, 1966.¹⁹ On August 14, 1966, Arness and the State signed the fifty-five year leases for Lots 1 and 2. The State expressly reserved a “60 foot wide right of way for existing roads to the beach” in the lease for Lot 1.²⁰ Additionally, the lease for Lot 2 provides it is subject to “a 60 foot wide right of way for existing roads to the beach.”²¹ Thus, the State explicitly reserved these rights after permit ADL 32264 was issued to the Department of Highways. Later, in Patent 5124, the State made it clear to the public that it was not relinquishing any easements by explicitly stating the patent was “subject to valid existing trails, roads and easements.”

Therefore, the court finds the highway portion of Nikishka Beach Road, extends eight-tenths of a mile from the Kenai Spur Highway to the approximate location of the guard shack. The court further finds that Nikishka Beach Road, as a roadway easement, consists of a sixty foot wide right of way to the beach, and extends from the end of the highway portion of Nikishka Beach Road to the “Y” intersection and down Beach Access Road to the beach.²²

Yet, the court finds that Nikishka Beach Road does not include that portion of Dock Access Road that continues west from the “Y” intersection. The State claims Dock Access Road is part of the Nikishka Beach Road given the historical use of the roadway

¹⁸ Restatement (Third) Property: Servitude § 7.4 (2000).

¹⁹ The authority derived from the Alaska Land Act, ch. 169, art. III, § 7, SLA 1959 (codified as amended at A.S. 38.05.850), which stated that the director may “issue permits, right-of-ways or easements on Alaska lands for secondary roads”

²⁰ The authority derived from the Alaska Land Act, ch. 169, art. II, § 5(14), SLA 1959 (codified as amended at A.S. 38.05.035(a)(14), which stated that the director may “approve all contracts respecting the sale, lease, or other disposal of available lands . . . and in addition to the conditions and limitations imposed by law, he may impose any additional conditions or limitations in such contracts”

²¹ *Id.*

²² See Attachment A

by the public and the fact the Department of Transportation routinely maintained, bladed and sanded that portion of the road. This theory is inconsistent with the evidence introduced at trial. Aside from evidence that the public routinely traveled over Dock Access Road to get to the south beach, there was no evidence this road was intended to be a state roadway.

Dock Access Road traverses Lot 3. Unlike the leases for Lots 1 and 2, the leases for Lot 3 do not mention a roadway. The Department of Transportation occasionally bladed and sanded Dock Access Road, but OSK was primarily responsible for maintaining the road. Over the years, OSK and the Department of Transportation worked collaboratively to install culverts and erect barriers on portions of the road that extend past the guard shack. These efforts do not demonstrate an intent on the part of the State to make that portion of Dock Access Road past the "Y" intersection part of the state roadway system.

More significantly, the Department of Transportation did not crack seal or paint stripes on any part of the roadway past the current location of the guard shack, which is part of the Department's maintenance duties for a public road. The State also did not require OSK to obtain a permit before paving Dock Access Road, even though there was considerable evidence that the Department of Transportation normally requires a permit for all types of encroachments, even minor ones.

Simply put, the evidence does not support a finding that the portion of Dock Access Road that continues from the "Y" intersection was intended to be a part of the Nikishka Beach Road in any fashion, either as part of the highway, or as a public roadway providing access to the beach.

Therefore, while the court finds that Nikishka Beach Road extends over Lots 1 and 2 down Beach Access Road to the beach, Nikishka Beach Road does not include the remaining portion of Dock Access Road, including that portion that traverses Lot 3 to the dock and the south beach.

II. A Public Access Easement Was Not Extinguished When Lots 1, 2 and 3 Were Conveyed to OSK

In 1980, the State conveyed Section 36 to the Borough by Patent 5124, which included Lots 1, 2 and 3. The patent clearly identifies the existence of several easements. According to Patent 5124, the Borough's interest in Section 36 was subject to leases for Lots 1, 2 and 3, ADL 32264, other "valid existing trails, roads, and easements" and a public access easement reserved by the following language:

Subject to the reservation of a 50 foot wide lineal perpetual public easement along the line of the ordinary high water mark of Cook Inlet . . . and further subject to the reservation of a 50 foot wide perpetual public access easement to the aforementioned lineal public easement along the above bodies of water. Said public access easement shall be identified by the Grantee and shall be subject to the covenant that no development or conveyance shall occur on the land conveyed by this patent until the Grantee has platted such easements and formally notified the Grantor of the location of such public access easements.

The State's authority to properly reserve the public access easement when it issued Patent 5124 to the Borough derives from A.S. 38.05.127. This statute requires the State to reserve specific easements protecting public access to navigable waters before any interest in State land can be transferred. The corresponding state regulation, 11 AAC 53.330, requires the State, through the Department of Natural Resources, "to reserve an easement or right-of-way to provide access to coastal or inland navigable or public water

in the conveyance of land adjacent to or containing that water The easement must be at least 50 feet wide.”²³

The public access easement pursuant to this statutory mandate was the most specific easement identified in Patent 5124. Clearly, the State’s patent to the Borough was subject to the public’s right to access the beach. The statutory requirement for a continuous public access easement found in A.S. 38.05.127 and 11 AAC 53.330 serves as a clear indication of the public’s concern for the preservation of public access rights to all navigable waters. Thus, the State conveyed title to the Borough subject to the public access easement that was properly reserved under statutory authority.

In 1990, the Borough executed and delivered quitclaim deeds for Lots 1, 2 and 3 to OSK subject to “rights and reservations of record and any easements . . . of record or ascertainable by physical inspection.” While Patent 5124 contained language requiring the Borough to plat the easement, the Borough failed to comply with this provision. Nevertheless, the failure of the Borough to plat the easement does not extinguish the public access easement. Rather, the failure to plat results in a cloud on OSK’s title.

Alaska Statute 40.17.080(a) holds that “from the time a document is recorded in the records of the recording district in which land affected by it is located, the recorded document is constructive notice of the contents of the document to subsequent purchasers”²⁴ The easements were properly recorded throughout the chain of title and put OSK on notice of their existence.²⁵

²³ 11 AAC 53.330(c) (amended and renumbered at 11 AAC 51.045).

²⁴ A.S. 40.17.080(a).

²⁵ OSK was also on constructive notice that the lots were subject to various easements by virtue of Kenai Peninsula Borough Ordinance 86-19 which authorized the sale of the Borough’s patented lands to long-term leaseholders like OSK. Ordinance 86-19 states that the lands were to be sold “as is” and “the purchaser shall be responsible for ascertaining . . . the extent of any easements”

Along with the constructive notice of the recorded deeds, OSK was put on notice of the existence of the easement by its own title report to the lots. The title report stated the quitclaim deeds issued by the Borough to OSK were subject to “reservations or exceptions as contained in the State of Alaska Patent.” The title report is correct that the Borough’s quitclaim deed to OSK can only convey whatever interest the State patented to the Borough.²⁶

The court finds that OSK took title from the Borough subject to the public access easement to the beach. This is because the Borough could only convey whatever interest the State conveyed to the Borough, and the State withheld the public access easement to the beach when it issued Patent 5124 to the Borough.

This holding is consistent with the Alaska Constitution’s policy of making natural resources available for maximum public use, including access to state waters. Article VIII, section 14 of the Alaska Constitution provides that “[f]ree access to the navigable or public waters of the state as defined by the legislature, shall not be denied any citizen of the United States or resident of the state, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.”²⁷ The Alaska Supreme Court held that “the provisions in Article VIII were intended to permit the broadest possible access to and use of state waters by the general public.”²⁸

A public access easement continues to exist once the State conveys title to state land to a private owner.²⁹ Thus, the court also finds that the fifty foot wide public access

²⁶ See *Ellingstad v. State, Dept. of Natural Resources*, 979 P.2d 1000, 1005 (Alaska 1999) (stating that “a patent deed operates as a quitclaim deed in that it merely conveys whatever interest the State has in land.”).

²⁷ Alaska Const. art. VIII, § 14.

²⁸ *Wernberg v. State*, 516 P.2d 1191, 1198-99 (Alaska 1973).

²⁹ See *Lake Colleen Enters., Inc.*, 951 P.2d at 430.

easement contained in Patent 5124 to the Borough was not extinguished when the Borough failed to plat the easement before conveying the property to OSK.

Specifically, the court finds the public access easement to the beach, although not platted, survived the chain of title conveyances from the State to the Borough in 1980 and from the Borough to OSK in 1990 by explicit reservations.

Therefore, the court declares a fifty foot wide public access easement to the mean high water line of the Cook Inlet. Alaska Statute 38.04.050 directs that a public access easement shall be located to assure adequate and feasible access for the purpose for which the easement was intended. Accordingly, the court finds that a fifty foot wide easement exists and follows the court-established contours of Nikishka Beach Road down to the beach.³⁰

The court further finds an additional fifty foot wide public easement continuing from the "Y" intersection down Dock Access Road to the south entry of the beach because the dock prevents the public from accessing the south beach from Nikishka Beach Road.³¹

III. A Prescriptive Easement Exists For Public Access To The North and South Beach

In the alternative, the court finds by clear and convincing evidence that a prescriptive public easement exists over Dock Access Road to the south beach and Beach Access Road to the north beach. To prove a prescriptive easement, the moving party must prove that use was: 1) continuous and uninterrupted; 2) the user acted as if he or she were the owner not merely acting with permission; and 3) the use was reasonably visible

³⁰ See Attachment A.

³¹ *Id.*

to the record owner for the prescriptive period.³² The required period of adverse use is ten years.³³

The prescriptive period began in 1990, when OSK acquired property in fee simple and continued for seventeen years until the gate and guard shack were installed. The court finds the public's use of Dock Access Road and Beach Access Road was continuous and uninterrupted, and visible to OSK. Several witnesses testified regarding their use of Dock Access Road and Beach Access Road from 1990 until 2007, when OSK erected the guard shack. Occasionally, OSK would close the road when moving heavy equipment or other items, but this was not significant enough to interrupt the prescriptive period. In 1986, OSK installed a motorized gate. It never worked properly and was abandoned in the early nineties making it outside a ten-year prescriptive period that could begin as late as 1997.

There was abundant evidence OSK knew the public was using Dock Access Road and Beach Access Road to get to the beach, and that this use was within the prescriptive period. The only question is whether this use was permissive. There is a presumption that use of the land is with the owner's permission.³⁴ This presumption can be overcome by proof of hostility. Hostility turns on the distinction between acquiescence and permission. If the owner merely acquiesces, then the use is not permissive.³⁵

Up until 1990, OSK was obligated, under the leases, to provide public access to the beach. When OSK acquired title to the land in fee simple in 1990, it did not, by words or other conduct, indicate to the public that its former obligation to provide access

³² *Swift v. Kniffen*, 706 P.2d 296, 302 (Alaska 1985).

³³ *McGill v. Wahl*, 839 P.2d 393, 397 (Alaska 1992).

³⁴ See *Swift*, 706 P.2d at 304.

³⁵ *Tenala, Ltd. v. Fowler*, 921 P.2d 1114, 1120 (Alaska 1996).

was now being allowed by permission. Nor was this the understanding of OSK employees.

Clement Dabuat, an OSK employee since 1985, testified he saw fishermen routinely use Dock Access Road to enter the south beach. He also regularly observed the public using Beach Access Road to access the north beach for recreation. Dabuat testified that he felt he did not have the right to interfere unless the public tried to get onto the dock or OSK's equipment. This is consistent with acquiescence, not permission.

Therefore, in the alternative, the court finds by clear and convincing evidence that the State has established a public prescriptive easement. The court finds that this easement corresponds to the location of the public access easement already established by the court.

IV. The Doctrine Of Estoppel Does Not Apply

These findings defeat OSK's defense that estoppel bars the claims by the State and the Borough. The elements of quasi estoppel require a showing that: 1) the party asserting the inconsistent position has gained an advantage or produced some disadvantage through a position; 2) the inconsistency was of such significance as to make the present assertion unconscionable; and 3) the first assertion was based upon a full knowledge of the facts.³⁶

There was no evidence of an unconscionable act or representation by the State or Borough. The State was entitled to reserve a roadway easement and a public access easement for the citizens of the State of Alaska. OSK had actual and constructive notice of these easements. OSK knew there was a sixty foot wide right of way over Lots 1 and

³⁶ *Keener v. State*, 889 P.2d 1063, 1067-68 (Alaska 1995); *Safeway, Inc. v. State, Dept. of Transportation*, 34 P.3d 336, 341 (Alaska 2001).

2 when it took over the leases from Wade. OSK had notice of the public access easements by virtue of the State's patent to the Borough.

OSK could have asked the State to vacate the 60 foot wide right of way across Lots 1 and 2 before it reconstructed the Dock Access Road, but it chose not to. OSK could have asked the Borough to plat the public access easement granted by the State, but it chose not to. Instead, OSK chose to pave the Dock Access Road without asking any questions.

OSK failed to show any representation, affirmation or other conduct on the part of the State or Borough to justify its claim for estoppel. Therefore, the doctrine of estoppel does not apply.

CONCLUSION

Therefore, for the reasons stated, the court finds a sixty foot wide public right of way exists over Lots 1 and 2, but not Lot 3. The contours of this public right of way overlay the roadway that continues after the end of the highway portion of Nikishka Beach Road to the "Y" intersection and down Beach Access Road to the beach. Moreover, the court finds Nikishka Beach Road, as deeded by the federal government to the State, includes the highway portion of Nikishka Beach Road and continues down the public right of way to the beach.

The court further finds a fifty foot wide public access easement exists to the mean high water line of the Cook Inlet. The court finds that the public access easement overlays Nikishka Beach Road to access the north beach and also overlays Dock Access Road from the "Y" intersection to the south beach. The public access easement exists on

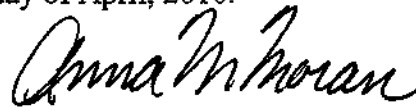
both roadways because the dock bisects the beach and it is necessary to provide public access to both portions of the beach.

In the alternative, the court finds a prescriptive public easement exists over Beach Access Road and Dock Access Road for public access to the beach.

The court also finds that the doctrine of estoppel does not apply to bar the claims by the State and the Borough.

Finally, the court further orders that OSK is hereby enjoined from interfering with the public's use of this right of way or public easement and OSK may not prevent the public's access to the beach. The gate and guard shack do not have to come down, but the gate must be opened.

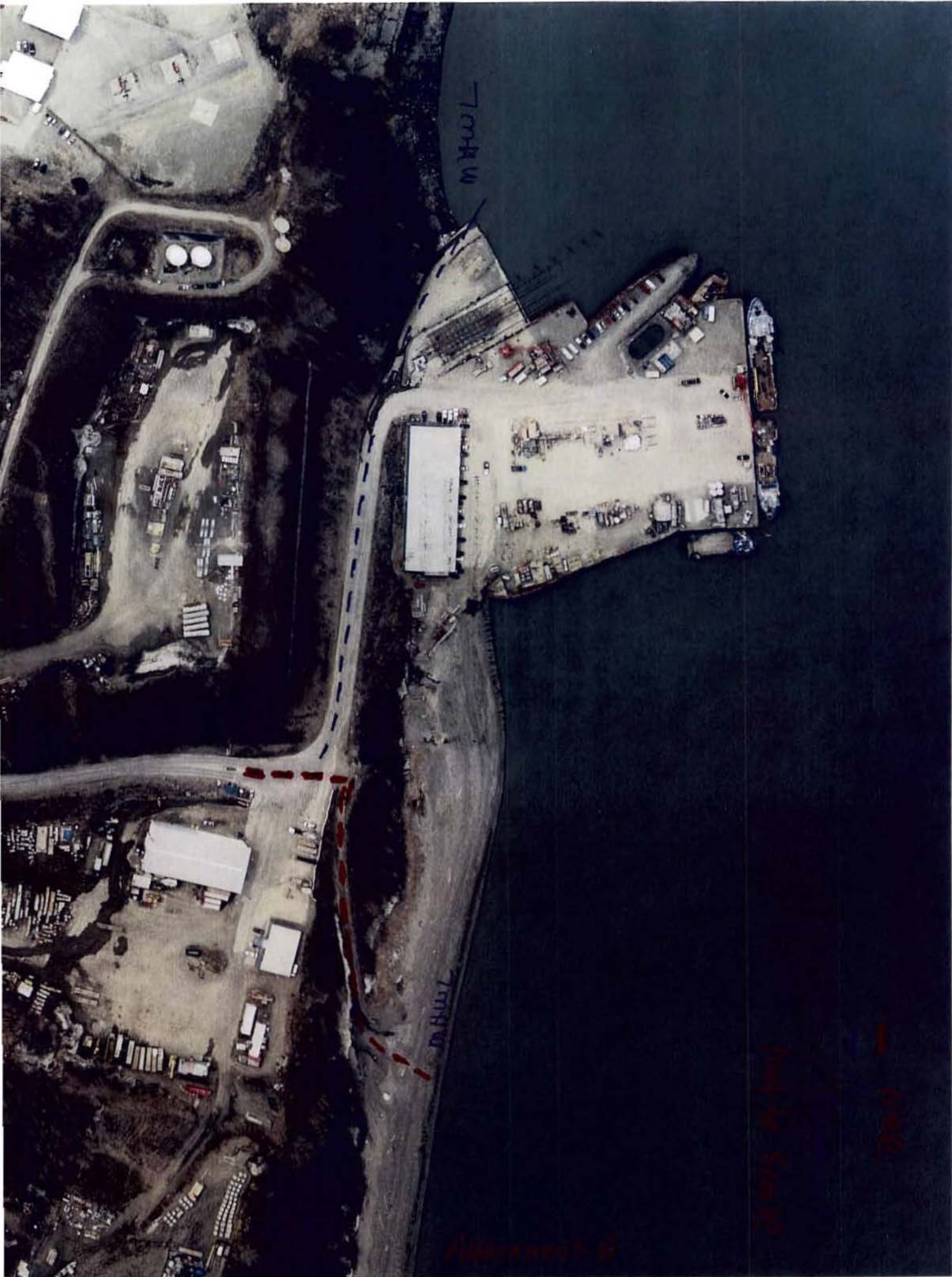
DATED in Kenai, Alaska, this 6th day of April, 2010.*



ANNA M. MORAN
Superior Court Judge

* Read into the record on March 11, 2010.

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I certify that a copy of the foregoing was mailed/faxed/court box to the following at their addresses of record:	
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