

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 **MOTION FOR EXPEDITED CONSIDERATION**

22 Plaintiff/Counter Claim Defendant, State of Alaska ("the State"), through  
23 counsel, and pursuant to Rule 77(g) of the Alaska Rules of Civil Procedure, moves for  
24 expedited consideration of its Motion for Injunction Against OSK, filed herewith.

25 Pursuant to Rule 77(g), the State provides the following information:

26 1. As set forth in the State's accompanying principal motion papers,  
the State is moving for a preliminary, temporary injunction against OSK pursuant to  
AS 09.40.230, AS 22.10.020(c) and Alaska R. Civ. P. 65(a). The State moves for an  
injunction directing OSK to:

a. Open and leave open its gate across Nikishka Beach Road  
which now blocks public access to Nikishka Beach; and

1  
2 b. Cease and desist from preventing public and State access to  
3 Nikishka Beach via both the west ("south") and east ("north") access routes.

4 The State asks that the Court injunctive order specify that the injunction shall be in  
5 effect until the final resolution of this case. The State's Motion For Injunction should  
6 come as no surprise to opposing counsel since the State's undersigned counsel  
7 suggested the injunction at the Oral Argument held on April 17, 2009.

8  
9 2. Expedited consideration of the State's Motion for Injunction  
10 Against OSK is necessary because of the very nature of the injunctive relief requested.  
11 As is indicated in the State's underlying motion papers filed herewith, an immediate  
12 injunction is needed to stop OSK from barring beach access down Nikishka Beach  
13 Road, before another summer passes. OSK illegally blocked beach access in 2008.  
14 With the summer of 2009 rapidly approaching and with the trial in this matter having  
15 been continued from May until the end of July 2009, an immediate injunction is  
16 warranted. It would be unfair to the State, and to public beach users, to have to wait for  
17 injunctive relief.  
18

19 3. The State does not request oral argument with respect to the  
20 underlying motion accompanying this motion for expedited consideration.

21  
22 4. Undersigned counsel certifies that a good faith effort was made to  
23 resolve the issues raised in the State's underlying motion with opposing counsel, but  
24 that this effort was not successful. Undersigned counsel has on this date spoken with  
25 OSK's counsel, Ron Baird. Mr. Baird has stated OSK's opposition to the State's  
26 underlying principal motion. Of course it should be self-evident that OSK will not

1  
2 agree to a temporary injunction – otherwise OSK would already have its gate open  
3 pending the outcome of this lawsuit.

4           5.     This motion for expedited consideration is accompanied by a  
5 proposed order. As stated in the order, the State proposes that OSK be given until the  
6 close of business on Monday May 11 to respond to the underlying motion. The State  
7 believes this is sufficient time to respond because OSK has known since at least  
8 April 17 that the underlying motion would be forthcoming. Because the underlying  
9 motion for injunctive relief was foreseeable to OSK, and because it relates to issues  
10 which have already been briefed and argued before the Court (on April 17) the State  
11 asks that the underlying motion be fully briefed and ruled on by no later than the close  
12 of business on May 15, 2009.  
13

14           6.     The undersigned certifies that this motion for Expedited  
15 Consideration and the accompanying, underlying motion were served on counsel for  
16 OSK and interpleader/plaintiff Kenai Peninsula Borough by facsimile and mail on this  
17 date, May 5, 2009. Pursuant to Rule 77(g)(3), the undersigned certifies that all  
18 information provided in this motion is true and correct, that the undersigned has made a  
19 good faith effort to resolve this dispute without Court intervention; and that there is a  
20

21 //

22 //

23 //

24  
25  
26

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

1  
2 good faith basis for expedited consideration as described herein. Counsel's certification  
3 is provided in lieu of an affidavit but is intended to have the full effect and force of an  
4 Affidavit of Counsel.

5 DATED this 5<sup>th</sup> day of May, 2009 at Anchorage, Alaska.

6 RICHARD A. SVOBODNY  
7 ACTING ATTORNEY GENERAL

8  
9 By:



Dana S. Burke  
Assistant Attorney General  
ABA No. 9011085

11 **Certificate Of Service**

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

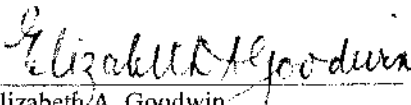
- 14  mailed  
 faxed

15 to the following:

16 Ronald L. Baird  
17 Law Offices of Ronald L. Baird  
18 Box 100440  
19 Anchorage, AK 99510  
20 Fax No.: 565-8819

21 Clay A. Young  
22 Delaney Wiles, Inc.  
23 1007 W. 3<sup>rd</sup> Avenue  
24 Anchorage, AK 99501  
25 Fax No.: 277-1331

26 Scott Bloom  
Assistant Borough Attorney  
Kenai Peninsula Borough  
Office of the Borough Attorney  
144 N. Binkley Street  
Soldotna, AK 99669-7520  
Fax No.: 907-262-8686

  
Elizabeth A. Goodwin  
May 5, 2009

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  
22  
23  
24  
25  
26  
**ORDER GRANTING MOTION FOR EXPEDITED CONSIDERATION**

The Court, having reviewed the State's May 5, 2009 Motion for Expedited Consideration and any opposition and reply memoranda hereby rules that the Motion for Expedited Consideration is granted. Accordingly, OSK shall file its opposition to the State's underlying principal motion (for injunctive relief) by no later than the close of business on Monday, May 11, 2009. Service of such opposition shall

////

////

////

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 be by fax as well as mail or hand delivery. The Court will rule on the State's underlying  
3 principal motion by no later than the close of business on May 15, 2009.

4 It is so ordered this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

5  
6  
7 Anna M. Moran  
8 Superior Court Judge

9 **Certificate Of Service**

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

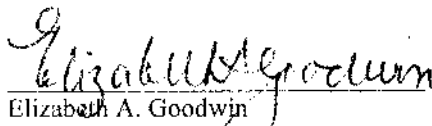
- 11  mailed  
12  faxed

13 to the following:

14 Ronald L. Baird  
15 Law Offices of Ronald L. Baird  
16 Box 100440  
17 Anchorage, AK 99510  
18 Fax No.: 565-8819

19 Clay A. Young  
20 Delaney Wiles, Inc.  
21 1007 W. 3<sup>rd</sup> Avenue  
22 Anchorage, AK 99501  
23 Fax No.: 277-1331

24 Scott Bloom  
25 Assistant Borough Attorney  
26 Kenai Peninsula Borough  
Office of the Borough Attorney  
144 N. Binkley Street  
Soldotna, AK 99669-7520  
Fax No.: 907-262-8686

27  
28   
29 Elizabeth A. Goodwin  
30 May 5, 2009

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 OFFSHORE SYSTEMS-KENAI, an Alaskan )  
10 Partnership, )  
11 )  
12 Defendant, )  
13 )  
14 and )  
15 )  
16 KENAI PENINSULA BOROUGH, )  
17 a Municipal Corporation, )  
18 )  
19 Intervenor. )

Case No. 3KN-08-453 CI

20 MOTION FOR INJUNCTION AGAINST OSK

21 The State, through undersigned counsel and pursuant to AS 09.40.230,  
22 AS 22.10.020(c), and Alaska R. Civ. P. 65(a), moves for a preliminary, temporary  
23 injunction directing OSK to: (a) open (and leave open) its gate across Nikishka Beach  
24 Road which now blocks public access to Nikishka Beach; and (b) cease and desist from  
25 preventing public and State access to Nikishka beach via both the west ("south") and  
26 east ("north") access routes. The injunctive order should specify that the injunction  
shall be in effect until the final resolution of this case, *i.e.*, until all appellate remedies  
are exhausted. The State also requests that the order specify that the injunction is  
contingent upon the acquiescence of the U.S. Coast Guard or, if acquiescence is

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

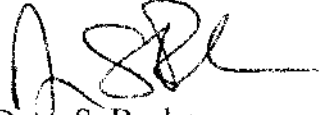
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

withheld, subject to the outcome of any proceeding the State may participate in to seek  
Coast Guard capitulation.

The grounds for this motion are set forth in the accompanying  
memorandum of law. A proposed order is provided.

DATED this 5<sup>th</sup> day of May, 2009 at Anchorage, Alaska.

RICHARD A. SVOBODNY  
ACTING 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

- mailed
- faxed

to the following:

Ronald L. Baird  
Law Offices of Ronald L. Baird  
Box 100440  
Anchorage, AK 99510  
Fax No.: 565-8819

Clay A. Young  
Delaney Wiles, Inc.  
1007 W. 3<sup>rd</sup> Avenue  
Anchorage, AK 99501  
Fax No.: 277-1331

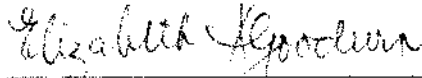
///  
///  
///

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

Scott Bloom  
Assistant Borough Attorney  
Kenai Peninsula Borough  
Office of the Borough Attorney  
144 N. Binkley Street  
Soldotna, AK 99669-7520  
Fax No.: 907-262-8686



Elizabeth A. Goodwin  
May 5, 2009

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 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  
22 **MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTION**  
23 **AGAINST OSK**

24 **I. INTRODUCTION**

25 Consistent with comments made by undersigned counsel near the  
26 conclusion of the April 17, 2009 oral argument, the State moves for a preliminary  
injunction prohibiting OSK from blocking public and State access down Nikishka  
Beach Road to Nikishka Beach, with such injunction to remain in effect until this case is  
finally resolved. This Court has the authority to issue such an injunction pursuant to  
AS 09.40.230, AS 22.10.020(c), and Alaska R. Civ. P. 65(a).

An order now enjoining OSK from blocking Nikishka Beach Road and  
preventing public access is warranted in view of the fact that the trial in this case has

1  
2 been continued until late July 2009, and in view of the fact that the case appears to be  
3 sufficiently contentious that appeal will probably be taken after trial. In the meantime,  
4 another summer is upon us with public access to the beach being illegally denied by  
5 OSK. Exhibit A hereto, *Peninsula Clarion* article. The law also favors an injunction,  
6 now that the State has (by its summary judgment work) demonstrated that it is likely to  
7 prevail at trial. *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).  
8

9 **II. LAW, FACTS, AND PROCEDURAL HISTORY RELEVANT TO**  
10 **STATE'S MOTION FOR INJUNCTION**

11 **A. Law**

12 Whether a preliminary injunction is warranted depends on the nature of  
13 the threatened injury. *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska  
14 2005). If the movant faces "irreparable harm", and if the non-movant is "adequately  
15 protected" notwithstanding the injunction, then the movant need only demonstrate that  
16 the issues raised in the case are "serious and substantial" rather than "frivolous or  
17 obviously without merit." *Id.* If, however, the movant's threatened harm is less than  
18 "irreparable", or if the non-movant cannot be "adequately protected", the injunctive  
19 relief movant must make a "clear showing of probable success on the merits." *Id.*  
20

21 In the instant case, the State can easily demonstrate "irreparable harm",  
22 "adequate protection" for OSK, and the existence of "serious and substantial issues that  
23 are not "frivolous or obviously without merit." And, even assuming that the harm to the  
24 State absent a preliminary injunction will be less than irreparable, or that OSK cannot  
25 be adequately protected if an injunction is issued, the State is still entitled to an  
26

1  
2 injunction under the “clear showing of probable success on the merits” standard. Thus  
3 under any standard this Court should issue a temporary injunction.

4 **B. Facts and Procedural History**

5 This Court is already familiar with the facts and procedural history that  
6 demonstrate the State’s entitlement to temporary injunctive relief. The Court has before  
7 it complete summary judgment papers explaining Nikishka Beach Road’s status as a  
8 public access right of way to the beach. The Court held oral argument on the summary  
9 judgment motions on April 17, 2009. At oral argument the public access nature of  
10 Nikishka Beach Road was further demonstrated by reference to deed history, public use  
11 history, State ownership history, and OSK’s own history of recognizing the public  
12 access nature of the Road.  
13

14 In addition the Court has before it complete briefing on the State’s motion  
15 to compel production of OSK’s secret security plan developed under the auspices of the  
16 U. S. Coast Guard. The motion papers explain that if OSK is ordered to open its gate  
17 and allow access the State, OSK and the Coast Guard can formulate a security plan that  
18 protects OSK’s security interests. In addition, the motion to compel illustrates why  
19 temporary injunctive relief ordered by this Court will have to be subject to Coast  
20 Guard’s acquiescence, given the Coast Guard’s role in OSK’s security measures.  
21

22 In addition the State asks the Court to pay particular attention to the  
23 following in weighing the merits of the State’s request for an injunction.  
24

25 ///

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

**1. Facts**

The following undisputed facts prove that the State is likely to succeed on the merits, and that irreparable harm will result unless an injunction is issued.

1. The incontrovertible fact that at all relevant times prior to and since statehood, Nikishka Beach Road has run all the way to the beach. Exhibit C to State's summary judgment motion, cited pages of Dale McGahan deposition.

2. The fact that in 1959 the Federal government quitclaimed Nikishka Beach Road, to the beach, to the State. Exhibit S to the State's summary judgment motion.

3. The fact that when the State, in 1980, patented land in Section 36 adjacent to Nikishka Beach Road to the Borough, the State reserved Nikishka Beach Road to the beach to include a 50-foot wide beach access right of way. Exhibits M and N to the State's summary judgment motion.

4. The fact that in so doing, the State preserved public access rights of way in accordance with AS 38.05.127. Exhibit AA to the State's reply to OSK's Opposition to Motion for Summary Judgment. Exhibit FF to the State's reply to OSK's Opposition to Motion for Summary Judgment.

5. The fact that when the Borough, in 1990, conveyed Section 36 land adjacent to Nikishka Beach Road to the Borough, the Borough likewise reserved the Nikishka Beach public access right of way, to include the east and west access routes. Exhibit O to the State's summary judgment motion. Exhibit P to the State's summary judgment motion.

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 263-5100

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

6. The fact that these rights of way were known to and ascertainable by OSK at the time of OSK's initial ownership. Exhibit P to State's summary judgment motion.

7. The fact that until after 2001, OSK never prevented fishermen, commercial fishermen, subsistence people, or members of the public from using Nikishka Beach Road to access the beach because the public had an access right. Exhibit T to the State's summary judgment motion, Gubuat deposition testimony.

8. The fact that since OSK erected its gate and guard shack in 2007, public access has been denied. Exhibit C to the State's summary judgment motion, Dale McGahan deposition testimony.

9. The fact that OSK's denial of access has irreparably harmed Nikishka beach goers, as evidenced by the two dozen or so that appeared at the April 17, 2009 oral argument.

10. The fact that local residents are highly distressed about OSK's blockage of their public access for a second straight summer. *See Peninsula Clarion* article discussing this case, with e-mail responsive comments. Exhibit A hereto.

## 2. Procedural History

The procedural history of this case is important to the State's Motion for Injunction. The history demonstrates that the Court's recent continuance of the trial until late July 2009, which has triggered the need for an injunction so Nikishka Beach can be opened pending the delayed trial and its aftermath, was the result of a delay caused by OSK. The pertinent history is as follows:

1  
2 1. The Court's pretrial scheduling order, dated October 1, 2008,  
3 specifies an original trial commencement date of May 18, 2009, with discovery to close  
4 on March 19, 2009. *See* Pretrial Scheduling Order.

5 2. On March 3, 2009 OSK, which had yet to take a single deposition,  
6 asked for a substantial discovery extension and a continuance of the trial until a time "in  
7 advance of the Summer 2010." Exhibit B hereto.

8  
9 3. In response, the State agreed only to a short extension of time for  
10 depositions to accommodate OSK's counsel's schedule. The State refused a  
11 continuance. Exhibit C hereto.

12 4. The courtesy extended by the State (and the Borough) resulted in a  
13 Stipulation, approved by the Court, extending discovery for depositions and final  
14 summary judgment briefing to April 10, 2009. *See* Stipulation. This in turn led the  
15 Court to comment, at the April 17 oral argument, that a continuance was necessary.

16  
17 As this procedural history demonstrates this case likely would be on its  
18 way to an early trial, with no pre-trial injunction necessary, but for OSK's actions.

19 **III. ARGUMENT**

20 Based on the foregoing, this Court has every reason to issue a preliminary  
21 injunction enjoining OSK from blocking public access to Nikishka Beach Road until  
22 this case is finally resolved. Of primary importance is the fact that for the second  
23 summer in a row, one of a very few, very scattered accesses to a historically popular and  
24 important public beach has been denied by the illegal actions of an intransient business  
25  
26

1  
2 owner. This has caused irreparable harm to Kenai and North Kenai residents, who,  
3 absent injunctive relief, are about to lose another season of public beach access.

4 Of equal importance is that the irreparable harm caused by OSK can be  
5 easily avoided pending the resolution of this case without compromising OSK's  
6 security. As the State explained in its previously filed Motion to Compel, the State's  
7 very own director of Homeland Security, John Madden, who is responsible for State  
8 interface with the Federal government on homeland security matters, stands ready to  
9 work with the Coast Guard on an alternative security plan that will allow public access.  
10 See the State's March 26, 2009 Reply to Opposition to Motion to Compel at p. 3-4. Mr.  
11 Madden has stated that in his view OSK's security measures could be revised so that in  
12 low threat circumstances public access to the beach could be maintained without  
13 compromising OSK's security. *Id.* at p. 4, n.1. This signifies that if this Court issues an  
14 injunctive order OSK will be "adequately protected." *Metcalf, supra*, 110 P.3d at 978.  
15 Because OSK can and will be adequately protected, this Court should not be inhibited  
16 from granting injunctive relief to the State.  
17

18 Of course, as the State has already made clear, the State recognizes that an  
19 injunctive order directing OSK to open its gate and cease blocking Nikishka Beach  
20 Road will have to be subject to Coast Guard acquiescence. If the Court enters an  
21 injunction order against OSK, OSK will have to show the order to the Coast Guard as  
22 contemplated under 49 C.F.R. § 1520.9(a)(3). The Coast Guard will then have to  
23 decide whether it wants to cooperate with the Court and the State, or whether it wants to  
24 invoke Federal law to prevent enforcement of the injunction. If the Coast Guard  
25  
26



1 chooses not to acquiesce, and chooses not to work with State Homeland Security  
2 Director Madden to formulate an alternative security plan, it will then be up to the State  
3 to pursue a Federal remedy. Either way, there is nothing to prevent this Court from  
4 exercising its injunctive authority under AS 09.40.230, AS 22.10.020(c) and Alaska R.  
5 Civ. P. 65(a).  
6

7  
8 As to the question of whether the State's underlying claim that it owns  
9 Nikishka Beach Road as a public access right of way to the beach is sufficiently  
10 meritorious to warrant an injunction against OSK, suffice it to say that whether this  
11 Court applies the "not frivolous" or the "probable success on the merits" standard, the  
12 outcome is the same. As has been demonstrated above in this memorandum, and as was  
13 demonstrated in the State's summary judgment briefing (followed by the April 17, 2009  
14 summary judgment oral argument), the State's claim is very, very sound. On the other  
15 hand, OSK's position is precarious in that it is based on obfuscation, distorted facts, and  
16 false pleas for equity rather than sound legal argument. Under the circumstances this  
17 Court should enter a preliminary injunction. A proposed injunctive order is provided  
18 herewith.  
19

#### 20 IV. CONCLUSION

21 For the forgoing reasons, the State respectfully requests that the Court  
22 exercise its authority under AS 09.40.230, AS 22.10.020(c) and Alaska R. Civ. P. 65(a)  
23 and enter a preliminary, temporary injunction directing OSK to:  
24

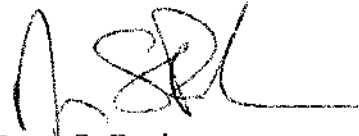
25 a. Open (and leave open) its gate across Nikishka Beach Road which  
26 now blocks public access to Nikishka Beach; and

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

b. Cease and desist from preventing public and State access to Nikishka Beach Road via both the west ("south") and east ("north") access routes. The injunctive order should specify that the injunction shall be in effect until the final resolution of this case, i.e., until all appellate remedies are exhausted. The State also requests that the injunctive order specify that the injunction is contingent upon the acquiescence of the Coast Guard or, if acquiescence is withheld, subject to the outcome of any proceeding the State may participate in to seek Coast Guard capitulation. A proposed order is provided.

DATED this 5<sup>th</sup> day of May, 2009 at Anchorage, Alaska.

RICHARD A. SVOBODNY  
ACTING ATTORNEY GENERAL

By: 

Dana S. Burke  
Assistant Attorney General  
ABA No. 9011085

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1001 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

**Certificate Of Service**

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

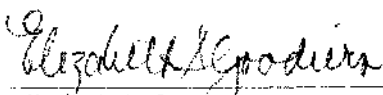
- mailed
- faxed

to the following:

Ronald L. Baird  
 Law Offices of Ronald L. Baird  
 Box 100440  
 Anchorage, AK 99510  
 Fax No.: 565-8819

Clay A. Young  
 Delaney Wiles, Inc.  
 1007 W. 3<sup>rd</sup> Avenue  
 Anchorage, AK 99501  
 Fax No.: 277-1331

Scott Bloom  
 Assistant Borough Attorney  
 Kenai Peninsula Borough  
 Office of the Borough Attorney  
 144 N. Binkley Street  
 Soldotna, AK 99669-7520  
 Fax No.: 907-262-8686

  
 \_\_\_\_\_  
 Elizabeth A. Goodwin  
 May 5, 2009

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

Sunday, April 19, 2009  
Story last updated at 4/19/2009 - 2:19 pm

## Beach access case goes to court

By Mike Nesper | Peninsula Clarion

For the second consecutive summer, it seems Nikiski residents' public beach access via Nikishka Beach Road will remain blocked.

At the end of 2007, Offshore Systems Kenai erected a security checkpoint past the platted road, restricting public access to the beach. A lawsuit has since been filed. The two parties involved, OSK and the state of Alaska, presented oral arguments to Kenai Superior Court Judge Anna M. Moran on Friday at the Kenai Superior Courthouse.

"The state statutes have nothing to do with whether there was a right-of-way under federal law," said Ron Baird, representing OSK. "The patent simply does not call out the easement for (Nikishka) Beach Road.

"As a matter of law, those easements needed to be called out," Baird said.

OSK's land was once owned by the federal government. It was later selected by the borough, prior to being acquired by OSK. However, according to the title search, previous rights of way and easements still attach to the property.

Baird argued that when the borough transferred the land to OSK, it didn't preserve the easements.

"There's no reservation of public right-of-way in the lease," he said.

"It's always gone to the beach and it's always been a beach access road," said Assistant Attorney General Dana Burke, representing the state of Alaska. He said multiple people have testified to the road extending to the beach and the road was marked down to the beach in the past.

In a report to the Borough Assembly in January of last year, Land Management Officer Marcus Mueller said a state-owned 100-foot-wide right-of-way to the beach borders Nikishka Beach Road and extends beyond the platted portion to the shore of Cook Inlet. It is under the jurisdiction of the Alaska Department of Transportation and Public Facilities. Meanwhile, a 50-foot-wide easement along the mean high water line provides contiguous access along the shore pursuant to state code.

The borough, however, has no jurisdiction in the matter. According to the borough, any resolution that might lead to resuming full access will have to be worked out by OSK, DOT, the Department of Homeland Security and the U.S. Coast Guard.

The assembly appropriated \$60,000 of general funds at the March 24 meeting to hire outside

**EXHIBIT A**  
**Page 1 of 3**

legal counsel to assist the borough in the case.

The assembly got involved in the case in August 2008 when it authorized the administration to intervene because the issue involved borough residents.

"If the Nikishka Beach Road didn't go to the beach, then it's a road to nowhere," said Clay Young, representing the borough. "(OSK) knew the fact there was a public right-of-way down to the beach. Failure to plat ... has no impact on the existing Nikishka Beach Road."

Young said until OSK restricted the public, there had always been open, acknowledged access to the beach. "OSK unreasonably stopped that in 2007," he said.

"If the state thought they had a right-of-way they would have required a permit," Baird said, referring to a large construction project OSK conducted on the land during the 1980s.

"We're not trying to take away the improvements OSK made, we're trying to get back to the status quo before they put their gate up," Burke said.

Burke said the history of public use is important in this case.

"It's real people, real lives," he said.

Prior to late 2007, public access was never a problem. In fact, OSK provided a pathway so people on the beach could easily get from one side of the dock to the other. Since then, OSK said even people on the beach could present a problem.

OSK blocked access in order to comply with provisions of the Marine Transportation Security Act of 2002.

Judge Moran pushed the May 18 trial date back to the week of July 27, saying it was unrealistic to be ready for trial in three weeks due to the complexity of the issue. Trial call will be July 17 at 8:30 a.m.

*Mike Nesper can be reached at [mike.nesper@peninsulaclarion.com](mailto:mike.nesper@peninsulaclarion.com).*

## READER COMMENTS

Posted by [jessnjeff](#) at Apr. 19, 2009 at 11:10:22 am

Is this a separate issue from the access at Rig Tenders Dock, or is this the same one covered in this article?

Posted by [blackmorej](#) at Apr. 19, 2009 at 2:05:44 pm

maybe the money spent to fight this ought to be spent on finding/making a new beach access?

Posted by [JusticeNOTJustUs](#) at Apr. 19, 2009 at 3:09:05 pm

If the Borough put a gate on the road and blocked OSK's access, perhaps OSK's move to block the public access wouldn't be quite so objectionable.

If the Borough built the road, then it should be used by ALL Borough residents. All this "homeland security" control and rules should be repealed.

Perhaps Alaska would be better off telling the federal government to mind their own business (they do not own the beach or the land). Our federal

government is way out of control and we need to elect politicians who will stand up for our state's rights and the rights of American citizens.

We no longer live in a nation that respects the rights of its citizens.

Posted by kenairiverbandit at Apr. 20, 2009 at 6:24:09 am

The man upstairs owns the beach and I havent seen a sign telling anybody not to use it....has anyone else????

Posted by nancyk at Apr. 20, 2009 at 9:12:29 am

Amen JusticeNotJustUs...I don't like the fact that I have an easement in front of my house either, but I can't legally block my neighbors dog from taking full advantage of the improvements I made there. If I put up a fence, the authorities would most certainly make me take it down...Those people in Nikiski have the right to have access to their beach without the taxpayers putting out more taxpayers money to build another road...Get over it OSK...

Posted by SonnyD at Apr. 21, 2009 at 8:06:40 am

I miss the access too but has anyone thought about the alternative? From what I understand it is not OSK who wants to block access to the beach. Our government under Homeland Security including the Coast Guard demand that the road be blocked. I'm not sure but I would think if OSK did not do what is required then OSK might be shut down. Then a lot of local people would lose their job. Which is worse? We might have to drive a couple miles to get that beach access but at least we have a job and the money to play and fish on the beach. I think OSK has their hands tied with this and I respect that. I feel what we need to do is cut some slack with OSK and start sending letters and email to the people who has the power to change this.

You can comment by logging in.

**EXHIBIT A**  
**Page 3 of 3**

OFFICE OF  
**RONALD L. BAIRD**  
ATTORNEY AT LAW

MAILING ADDRESS:  
P.O. Box 100440  
ANCHORAGE, ALASKA 99510-0440

OFFICE LOCATION:  
431 W. 7TH AVENUE, SUITE 204  
ANCHORAGE, ALASKA

PHONE NO.: 907-565-8818  
FAX NO.: 907-565-8819  
WEBSITE: www.rbaird.com

March 3, 2009  
Via Facsimile and Mail

Dana S. Burke  
Assistant Attorney General  
State of Alaska  
1031 W. 4<sup>th</sup> Avenue, Suite 200  
Anchorage, AK 99501  
Fax No. 279-5832

Clay A. Young  
Delaney Wiles, Inc.  
1007 W. 3<sup>rd</sup> Avenue  
Anchorage, AK 99501  
Fax No. 277-1331

Scott Bloom  
Assistant Borough Attorney  
Kenai Peninsula Borough  
144 N. Binkley Street  
Soldotna, AK 99669-7520  
Fax No. 907-262-8686

**RECEIVED**

MAR 05 2009

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
3<sup>rd</sup> JUDICIAL DISTRICT  
ANCHORAGE, ALASKA

Subject: State v. OSK, Alaska Superior Court Case No. 3KN-08-453 CI  
Our File: OSK-01

Gentlemen:

As Dana and Scott know, I have just returned from a lengthy absence from my office. There are a number of scheduling issues relating to the above-referenced case which require our immediate attention and probably a conference call to resolve.

1. Additional fact witness depositions need to be scheduled. I had hopes that upon review of OSK's motion for summary judgment, the State and Borough would agree that the relevant period for evidence of use by the public would be after 1990. However, it appears from the State's response to the motion that it believes use as far back as pre-statehood is relevant. This will make for a much lengthier trial than would be the case if OSK's motion is granted. I assume there is no interest in extending the close of discovery or continuing the trial date so as to allow the court to resolve this issue. Accordingly, I see close to a week of additional depositions which need to be scheduled before the close of discovery, presently set for March 19, 2009.

2. I am not able to specify the additional depositions sought by OSK because they depend in part on a) the responses to my discovery requests which are due in the next few days, b) the Borough's response to OSK's motion for summary judgment the time for which Scott has requested to be extended to March 11, 2009, and c) the

Borough's claim to attorney-client privilege to former Borough employees which prevents me from informally interviewing these witnesses. It's my position that the privilege does not extend to former employees and I would like to interview those that are listed to confirm what Scott had informally indicated was their lack of much knowledge about the events of the case.

3. The documents of McLane Consulting, Inc. have been copied, the copies marked for identification and the copies have been available for inspection by Scott in Soldotna for some time. I would like to get those copies in my office as soon as possible so Scott needs to schedule his review soon.

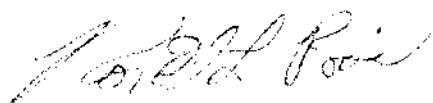
4. I would like to file one memorandum in reply to both the State's and the Borough's opposition to OSK's motion for summary judgment and in opposition to the State's motion for summary judgment and any cross-motion of the Borough. This would be with the understanding that the State and Borough would then each file one final memorandum in reply to OSK's opposition. However, it is possible that OSK will need time to complete discovery in order to frame a response on the merits.

5. I am willing to extending the expert witness deadline as requested by Dana with the understanding that the deadline for expert depositions may need to be further extended in light of the other issues described above.

Given what remains, I think at a minimum that the deadline for close of discovery should be extended. In addition, I think a continuance of the trial date would make for a more efficient trial. While the State and Borough may have originally sought a decision before this summer, it is unrealistic at this point to expect that a decision will be rendered by the judge after a trial held in late May in time to have any impact on use of the area during this summer. A more realistic goal would be to have the case tried and decided in advance of the summer of 2010.

Let's schedule a conference call to discuss these matters at your earliest convenience.

Sincerely,



Ronald L. Baird

cc: Mike Peek  
R.L.B:rlb - Document2



**DEPARTMENT OF LAW**  
*OFFICE OF THE ATTORNEY GENERAL*

1031 WEST 4<sup>TH</sup> AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 269-5169  
FAX: (907) 279-5852

March 4, 2009

**VIA FACSIMILE (565-8819) and U.S. MAIL**

Ronald L. Baird  
Law Offices of Ronald L. Baird  
431 W. 7th Avenue, Suite 204  
Anchorage, AK 99501

Re: *State of Alaska v. Offshore Systems-Kenai*  
Case No. 3KN-08-453 CI  
Our file: 221-09-0136

Dear Mr. Baird:

Here are my initial thoughts in response to your March 3, 2009 letter.

(1) I do not object to a short extension of the time for depositions, both lay and expert, but not for the reasons you have articulated. OSK's misperception of how its opponents would react to OSK's motion regarding historical evidence is not grounds for additional deposition time. Nor is the fact that OSK is awaiting discovery responses that could have been sent sooner.

(2) The fact that the Borough has an extension until March 11 to oppose OSK's summary judgment motion is not legitimate grounds for extending depositions either. The Borough timely identified its witnesses, the legal issues were identified long ago, and you already have the State's opposition which will overlap with the Borough's. And, if you wanted to challenge attorney-client privilege relationships you could have done so much sooner. Finally, the State's expert witness report will be produced with plenty of time remaining in the window for expert depositions. Thus, extensions to the deposition deadlines should be based on the legitimate need for a discreet amount of additional time in recognition of your vacation absence and scheduling considerations. Deposition extension should not be seen as an opportunity to reinvent the discovery wheel or accomplish depositions that should have been set sooner.

(3) Regarding summary judgment briefing, I do not object to any reasonable extension in order to accommodate your schedule (I expect the same courtesy), and I do

not object to your combining the briefing as suggested in your March 3 letter. However, the briefing schedule should be structured with an eye towards the May trial date. We need to get our briefing done in time for the Court to be able to rule on all motions in advance of the May trial. Bearing this in mind I believe we should plan to have all briefings done by Friday, April 3. Assuming we want oral argument, one or more of us should submit a request for oral argument specifying a date or dates in April.

(4) The State will not agree to a trial continuance. We have made two trips to Kenai for depositions, during which OSK could have deposed witnesses it now apparently seeks to depose. To the extent OSK wants to schedule depositions in Anchorage, OSK has made no effort to do so thus far, even though the witnesses were identified long ago and have been available. The State has made it clear from the start that it seeks an early trial.

(5) I would be happy to attend a telephone conference call to discuss these matters and other issues addressed in your March 3 letter. I suggest March 5 or March 6 and I will look to you to specify the time and initiate the call.

Thank you for your attention in this matter.

Regards,

RICHARD A. SVOBODNY  
ACTING ATTORNEY GENERAL

By:



Dana S. Burke  
Assistant Attorney General

DSB:eag

cc: Scott Bloom (via fax & mail)  
Clay Young (via fax & mail)

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 **ORDER**

22 The Court, having reviewed that State's May 5, 2009 Motion for  
23 Injunction against OSK and having reviewed all opposition and reply memoranda,  
24 hereby rules that the Motion is granted. In accordance with Civil Rule 65(d), the Court  
25 finds that, pursuant to *State, Division of Elections v. Metcalf*, 110 P.3d 96 (Alaska  
26 2005), the State is entitled to temporary injunctive relief in order to prevent irreparable  
harm caused by OSK's blockage of beach access on Nikishka Beach Road. Therefore,  
pursuant to AS 09.40.230, AS 22.10.020(c) and Alaska R. Civ. P. 65(a), the Court  
orders and directs as follows:

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

A. Within 10 days from the date of this order, OSK shall open (and leave open) its gate across Nikishka Beach Road, which gate now blocks public access to Nikishka Beach.

B. OSK shall thereupon cease and desist from preventing public and State access to Nikishka Beach via Nikishka Beach Road and via both the west ("south") and East ("north") access routes.

C. OSK shall leave the gate open and allow public access as described herein until the final resolution of this case, i.e., until all appellate remedies are exhausted.

D. However, it is specified that the above-described directions are contingent upon the acquiescence of the U.S. Coast Guard. Upon receipt of this order, the State, through its Homeland Security Director, and OSK shall immediately consult with the Coast Guard and advise the Coast Guard of this order. The parties shall work with the Coast Guard to formulate a security plan that allows public access, with contingencies built in in the event of increased security threat levels. If the Coast Guard acquiesces to this Court's order, OSK shall do as directed in ¶¶ A, B, and C above. If

/////  
/////  
/////

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

Coast Guard acquiescence is withheld, then the injunctive directions described in ¶¶ A, B, and C above shall be stayed pending the outcome to any proceeding the State may participate in to obtain Coast Guard capitulation.

It is so ordered this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
Anna M. Moran  
Superior Court Judge

**Certificate Of Service**

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

- mailed
- faxed

to the following:

Ronald L. Baird  
Law Offices of Ronald L. Baird  
Box 100440  
Anchorage, AK 99510  
Fax No.: 565-8819

Clay A. Young  
Delaney Wiles, Inc.  
1007 W. 3<sup>rd</sup> Avenue  
Anchorage, AK 99501  
Fax No.: 277-1331

Scott Bloom  
Assistant Borough Attorney  
Kenai Peninsula Borough  
Office of the Borough Attorney  
144 N. Binkley Street  
Soldotna, AK 99669-7520  
Fax No.: 907-262-8686

  
\_\_\_\_\_  
Elizabeth A. Goodwin  
May 5, 2009

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