IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

STATE OF ALASKA, Plaintiff, v. OFFSHORE SYSTEMS-KENAI, an Alaskan Partnership, Defendant, and KENAI PENINSULA BOROUGH, a Municipal Corporation, Intervenor.	Case No. 3KN-08-453 CI

STATE OF ALASKA'S TRIAL BRIEF

Plaintiff and counterclaim defendant, State of Alaska (the State), through counsel and pursuant to the Court's September 26, 2008 pretrial scheduling order, submits this trial brief in anticipation of the bench trial set to commence at 8:30 a.m. on July 28, 2009.

A. STATEMENT OF CASE.

In view of the Court's July 9, 2009 partial summary judgment order, this case comes down to the question of whether Nikishka Beach Road's status as a route of public access to the beach, which status was preserved in the recorded, 1980 Section 36 Land Patent from the State to the Borough, was somehow eliminated when the Borough failed to plat the public access routes specified in the recorded deed before conveying

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the property to OSK in 1990. The State contends that as a matter of law, the Borough's conduct could not divest the State of its public access right of way. *See Safeway, Inc. v. Department of Transportation and Public Facilities,* 34 P.3rd 336, 339-340 (Alaska 2001) holding that any municipality's action may not eliminate a State right of way. *See also Curtis v. Board of Supervisor's of Clinton County,* 270 N.W.2d 447, 449-450 (Iowa 1978) cited in *Safeway*, 34 P.3rd at 339 n.10, holding the only the Department of Transportation has the authority to vacate a highway in its system.

In the instant case, if the court concludes that this question is one of fact rather than law, and if the trier of fact concludes that the Borough's failure to plat eliminated or otherwise affected the State's public access easement, then the case comes down to additional downstream questions, which are: (1) whether the Borough's failure is immaterial because the Borough preserved the State's public access easement in the Borough's 1990 quit-claim deed to OSK; (2) whether the Borough's failure to plat is immaterial because OSK had constructive knowledge of the State's recorded public access right of way; (3) whether the Borough's failure to plat is immaterial because the right of way in question was known to and visible to OSK (actual notice); (4) whether the Borough's failure to plat is immaterial because the State has a public access easement to the beach by virtue of the Omnibus Quit-Claim Deed and PLO 601; (5) and, failing all else, whether the Borough's failure to plat is immaterial because the State and the public reacquired the public access right of way by adverse possession after the 1990 conveyance from the Borough to OSK.

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B. FACTS FOR WHICH NO PROOF IS NEEDED

The facts set forth in the Court's Summary Judgment motion are the facts for which no proof is needed. It is also uncontroverted that Nikishka Beach Road, when first built, went all the way to the beach, not just to the bluff. *See* Exhibit C to the State's February 24, 2009 Memorandum in Support of Motion for Summary Judgment, Dale McGahan deposition transcript at p. 25, line 7- p.26, line 9. The original beach access route approximated what is now known as the "North" or "East" access. *See, id.*, and *see* Exhibit A to Dale McGahan deposition, aerial photograph with original, pre-statehood beach access route depicted in pen.

C. CONTESTED FACTS

Based on the Court's Summary Judgment Order, it appears the material, contested facts explored at trial will center on the extent of public use and State maintenance before 1990 (to show the road went all the way to the beach allowing access to both sides of the dock, and provided public access which was known to OSK); the extent of State maintenance and public use after 1990 (prescriptive easement); the extent of OSK's pre and post 1990 recognition of public access (actual notice, prescriptive easement); the extent of public access after 1980 (effect of State patent to Borough which is relevant to Nikishka Beach road as a public access route within the meaning of AS 38.05.170); the length and termination of Nikishka Beach Road as described in the Omnibus Quit-Claim Deed and as affected by the PLO's.

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D. STATE'S POSITION AS TO APPLICABLE LAW

The State has set forth its position on the law in its Summary Judgment briefing, to include the State's February 24, 2009 Summary Judgment Memorandum and the State's April 10, 2009 Summary Judgment Reply. The State asks that at trial the Court focus in particular on the following legal principles:

1. Borough or Municipal government conduct cannot divest the State of a public access right of way. *Safeway, supra*. Only the State can divest itself of a right of way. AS 19.05.070(a).

2. From the time a deed is recorded, the recorded deed serves constructive notice to subsequent purchasers. AS 40.17.080(a). Where an interest in land has been recorded, a party challenging the recorded interest may not argue estoppel (reasonable reliance) based on his lack of actual knowledge of the recorded deed. *Dressel v. Weeks*, 779 P.2d 324, 330 (Alaska 1989).

3. By statute, when the State conveys an interest in land adjacent to a navigable waterway, the State must provide specific easements or rights of way necessary to insure free access to and along the body of water. AS 38.05.127.

4. The State's conveyance of land subject to right of way of less than 50 feet does not subvert the State's 50-foot (from centerline for a total of 100 feet) right of way established by D.O. 2665. *State, Department of Highways v. Green*, 586 P.2d 595, 601-602 (Alaska 1978); *Keener v. State*, 889 P.2d 1063, 1068-1069 (Alaska 1995).

5. The staking requirements of D.O. 2665 are not the only means by which a public highway subject to Federal PLOs may be established. Other methods of

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state acceptance of a public highway include positive action of the State and a history of public use. *State v. Alaska Land Title Association*, 667 P.2d 714, 722 (Alaska 1983). A State highway subject to a Federal PLO is identifiable where the road has a fixed location and the boundaries of the right of way are ascertainable by referring to the applicable PLO and measuring from the centerline. *Id.* at 724.

6. PLO 601 easements on rights of way that traverse land "withdrawn" from public domain (such as Section 36 designated school land) are in effect when the withdrawal is subsequently revoked. *State of Alaska v. Harrison*, No. A94-0464-CV(HRH) (D. Alaska October 29, 1998) (attached as Exhibit A hereto, along with 9th Circuit order affirming same).[1]

7. In litigation involving the application of PLO 601 to land adjacent to a State road, the burden of proof falls on the party challenging the PLO. AS 09.45.015.

8. Public Land Orders, which appear in the Federal Register, impart constructive notice that prevents a property owner from claiming innocent purchaser status. *State v. Alaska Land Title Association*, 667 P.2d at 725-726.

9. The owner of a parcel encumbered by an easement may make reasonable changes in the location or dimensions of the easement at the servient owner's expense to permit normal use or development of the servient state, so long as

[1] Although memorandum decisions have no precedential value, judges and lawyers may, in the absence of a relevant published decision, rely on unpublished decisions for whatever persuasive power those decisions might have. *McCoy v. State*, 80 P.3d 757, 765 (Alaska Ct. App. 2002) and Alaska R. App. P. 214(d)(1).

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the changes do not lessen the utility of the easement, increase the burdens on the owner of the easement, or frustrate the purpose of the easement. *Restatement (Third) of Property (Servitudes)* § 4.8(3)

10. The State's acquiescence in a land owner's reasonable use of property encumbered by a State right of way, where such use does not conflict with the right of way, does not result in abandonment of the right of way. *Kelly v. Matanuska Electric Association, Inc.*, 2008 W.L. 4367550 (Alaska 2008) (unpublished).[2]

11. When a change has taken place that makes it impossible to accomplish the purpose for which an easement was created, the court may modify the servitude to permit the purpose to be accomplished. *Restatement (Third) of Property (Servitudes)* § 7.10(1).

DATED this 17th day of July, 2009 at Anchorage, Alaska.

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[2] *See* note 1, *supra*.

Certificate Of Service

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

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

STATE OF ALASKA,

Plaintiff,

vs.

DAVID B. HARRISON, et al.,

Defendants.

No. A94-0464-CV (HRH)

O R D E R

Motion for Partial Summary Judgment

Plaintiff, the State of Alaska, moves for partial summary judgment establishing that the State of Alaska holds a highway right-of-way on Chickaloon River Road where it crosses the allotment held by the defendants, David B. Harrison, Penny L. Harrison, Timothy E. Harrison, Gary D. Harrison, Bruce A. Harrison, and Donald R. Harrison ("Harrison defendants").[1] The Chickaloon Native Village is also a defendant. This motion is opposed. Oral argument was not requested and is deemed unnecessary.

FACTS

Plaintiff, State of Alaska, seeks to condemn a right-of-way across Native Allotment 53702[2] which was granted to Louis R.

[1] Clerk's Docket No. 122.

[2] This allotment is comprised of the southwest one-quarter of Section 25, Township 20 North, Range 5 East, Seward Meridian.

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Harrison, now deceased. Defendants are Harrison's heirs and the Chickaloon Native Village.

The property at issue was designated as a railroad townsite by President Woodrow Wilson in 1917 by Executive Order 2538.[3] Railroad tracks were laid down to service coal fields. During the 1930's, however, the railroad was no longer needed, and the tracks were removed and the railroad bed began to be used as a roadway ("Chickaloon River Road").

In 1949, the Department of the Interior, through Public Land Order 601, reserved a portion of the land now owned by the Harrison defendants for highway purposes.[4] It reserved 100 feet of land for "local roads." Public Land Order 601 was expressly "[s]ubject to valid existing rights and to existing surveys and withdrawals for other than highway purposes,"[5] e.g., the railroad townsite withdrawal. This reservation was converted to a right-of-way in 1951 by Secretary of the Interior Department Order 2665.[6] In 1955, the Department of the Interior, by Public Land Order No. 1093, revoked the 1917 railroad townsite withdrawal.

In 1956, Louis R. Harrison applied to the Department of the Interior, Bureau of Land Management, for a homestead entry upon the lands in question. The application stated that the lands

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[3] Clerk's Docket No. 122, Excerpt of Record, page 1.

[4] Id., Excerpt of Record, page 39.

[5] Id., Excerpt of Record, page 39.

[6] Id., Excerpt of Record, page 40.

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applied for were "traversed by a roadway constructed or maintained by the Alaska Road Commission."[7] The entry was granted "[s]ubject to Local Road Right-of-way 50' each side of the centerline."[8]

In 1959, the United States Secretary of Commerce quit-claimed to the State of Alaska "all rights, title, and interest of the Department of Commerce" to Chickaloon River Road. Alaska Omnibus Act, 48 U.S.C. § 21.

In 1961, Harrison relinquished his homestead application and simultaneously applied for the same land as a Native allotment. In his Native allotment application, Harrison represented that he had occupied the land since November 11, 1956.[9] A certificate of allotment was issued to Harrison on November 6, 1962. The certificate makes no mention of the Chickaloon River Road.[10]

Louis Harrison died in 1969. His children, the Harrison defendants, succeeded to ownership of the allotment land in question.[11]

In 1981, the State of Alaska undertook substantial improvements to the Chickaloon River Road. This undertaking precipitated a series of confrontations which continue down to the

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7 Id., Excerpt of Record, page 45.

8 Clerk's Docket No. 60, Exhibit 11.

9 Clerk's Docket No. 122, Excerpt of Record, page 48.

10 Id., Excerpt of Record, page 49-a.

11 Id., Excerpt of Record, pages 50-51.

present with respect to the location and use of the Chickaloon River Road.

In 1983, the regional solicitor for the Department of the Interior rendered a formal opinion on the issue, concluding that the Alaska Road Commission and its successor, the Bureau of Public Roads, had a valid right-of-way across the allotment lands prior to Louis Harrison's occupancy, even though the right-of-way was not mentioned in the allotment. The solicitor concluded:

> [S]ince the road right-of-way was conveyed to the State prior to the issuance of the Certificate of Allotment to Harrison, the Certificate could not convey the road. Failure to note the prior conveyance can in no way defeat the State's interest.[12]

The parties disagree over who has maintained the road over the years. The State of Alaska asserts that it maintained the road, while the Harrisons assert that any maintenance of the road was done by the Harrison family and that the only maintenance done by the State was the construction of two bridges. The parties agree, however, that the centerline of the road bed was never surveyed, the road has not been staked and no plat was ever filed.

DISCUSSION

The State of Alaska moves for partial summary judgment and urges the court to find that the Harrison allotment is subject to the state's right-of-way as a matter of law even though Louis

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[12] Id., Excerpt of Record, pages 4-5.

Harrison's certificate of allotment does not expressly mention the right-of-way.

The parties agree that a roadway, Chickaloon River Road, exists across the Harrison allotment. In order for the court to grant the State's motion, the court must determine that: (1) a right-of-way for the State of Alaska's benefit was created for Chickaloon River Road; (2) such right-of-way was neither extinguished nor abandoned; and (3) the absence of mention of the right-of-way in Louis Harrison's certificate of allotment does not affect the existence of the right-of-way.

Existence of the Right-of-Way

The State of Alaska asserts that it possesses a right-of-way for Chickaloon River Road. According to the State of Alaska, this right-of-way was first created for the benefit of the United States in 1949 by Public Land Order 601 which withdrew and reserved fifty feet on each side of the centerline of all "local roads" including the Chickaloon River Road. The United States then quitclaimed the right-of-way to the State of Alaska in 1959 as part of the Alaska Omnibus Act.

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 latter 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. The Department of the Interior reaffirmed the continuing existence of the right-of-way when Department Order No. 2665 was issued in 1951 converting the reservation to a right-of-way. An easement for the road thus existed well before any entry on the land by Louis Harrison. None of these facts is disputed. Therefore, the court finds that a right-of-way for Chickaloon River Road was first created for the benefit of the United States in 1949 and was later quitclaimed to the State of Alaska in 1959. There is no dispute about the fact that the roadway had been conveyed away by the Department of the Interior before Louis R. Harrison's Native allotment entry.

Extinguishment of the Right-of-Way

The Harrison defendants posit that even if a right-of-way was created, certain actions or inactions culminated in the extinguishment or abandonment of the right-of-way. First, the Harrison defendants assert that "[u]nless the State of Alaska can show that there was a valid road surveyed, staked and constructed, then no road existed"[13] because Department Order 2665 required that roads

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[13] Clerk's Docket No. 127 at 3.

be surveyed and staked. Section 3(c) of Department Order 2665 provided:

> The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.[14]

The argument set forth by the Harrison defendants fails to recognize that the Chickaloon River Road was already in existence at the time Department Order 2665 was entered; and, since the staking requirements of Department Order 2665 applied only to new construction, they were inapplicable to Chickaloon River Road. This conclusion is further supported by the Alaska Supreme Court's interpretation of Department Order 2665 where the court stated:

> [t]he history of the promulgation of DO 2665 ... demonstrates that the staking requirement applies only to new construction, not existing roads.

State v. Alaska Land Title Ass'n, 667 P.2d at 714, 722 (Alaska 1983), cert. denied, 464 U.S. 1040 (1984). Thus, the fact that Chickaloon River Road was never staked does not effect the existence of the right-of-way for the State of Alaska's benefit.

Second, the Harrison defendants assert that they are the ones who maintained the Chickaloon River Road and that no public use of the road occurred while the allotment was occupied by Louis R.

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[14] Clerk's Docket No. 122, Excerpt of Record, page 40.

Harrison; therefore, the right-of-way was either abandoned or extinguished. The only evidence put forth by the defendants is an affidavit from one of the Harrison defendants, Gary D. Harrison, who attests that "any clearing up or maintenance of the road was done ... by my father and his family."[15] Harrison does not, however, have any personal knowledge of whether the state maintained the road prior to the Harrisons' entry onto the land and the state has put forth ample evidence--through the affidavits proffered by Peter J. Bagoy, Sr.,[16] and David C. Kepler[17]--to support its claim that it had maintained the Chickaloon River Road. More importantly, the extent of maintenance by the State of Alaska after creation of the right-of-way is irrelevant. Once the state acquired ownership of a road easement, the right-of-way could not be lost by lack of maintenance or abandonment without the state's vacation of the right-of-way by the state.[18] Even before statehood, Alaska law has precluded the extinguishment of public road rights-of-way through adverse possession. AS 38.95.010.[19] Therefore, the State of Alaska cannot be deemed to have lost the right-of-way; and the fact that the Harrisons may have participated in the maintenance of the

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[15] Clerk's Docket No. 128, ¶ 3.

[16] Clerk's Docket No. 122, Excerpt of Record, pages 9-15.

[17] Id., Excerpt of Record, pages 16-21.

[18] Id., Excerpt of Record, page 54.

[19] Formerly § 47-21 ACLA (1955).

Chickaloon River Road after the creation of the right-of-way for the state's benefit does not extinguish the right-of-way.

Lack of Mention of the Right-of-Way
in the Harrison Certificate of Allotment

The Harrison defendants contend that because Louis Harrison's certificate of allotment did not mention the Chickaloon River Road right-of-way, the state is precluded from asserting any claim because the Harrison defendants did not have recorded notice of the right-of-way. There is no room for dispute that Louis Harrison did have notice of the right-of-way when he filed his homestead application. The Chickaloon River Road right-of-way was first established in 1949 prior to Louis Harrison's initial entry onto the property. He had to have seen it. His homestead application acknowledged the existence of the road. All of this took place before Louis Harrison applied for or was granted an allotment in 1962.

Where a right-of-way is created prior to the establishment of an interest in an allotment, the allotment is subject to the right-of-way. Bird Bear v. McLean County, 513 F.2d 190 (9th Cir. 1975). Moreover, a native allotment certificate is in the nature of a quitclaim deed and can convey only the interest held by the United States. Beard v. Federy, 70 U.S. 478, 479 (1865); see also Alaska Land Title Ass'n, 667 P.2d at 727 (the absence of an express reservation for a Public Land Order right-of-way in a patent does not defeat the existence of the right-of-way). Therefore, since the United States had quitclaimed to the State of Alaska the Chickaloon

River Road right-of-way in 1959 as part of the Alaska Omnibus Act, it could in 1962, only convey its interest in the land subject to the right-of-way it had previously deeded to the state. The absence of any mention of the Chickaloon River Road in the Harrison certificate of allotment does not affect the Chickaloon River Road right-of-way for the benefit of the State of Alaska.

CONCLUSION

Based upon the foregoing, the State of Alaska's motion for partial summary judgment establishing that the Harrison defendants' allotment is traversed by a right-of-way for Chickaloon River Road is granted. This ruling does not address or resolve the question of whether the State of Alaska has or has not relocated any part of the Chickaloon River Road outside the easement which the state owns.

DATED at Anchorage, Alaska, this 28 day of October, 1998.

H. Russel Holland, Judge
District of Alaska

A94-0466--CV (RKH)

B. LANDON (ADSA)
J. BAKER (AG-STE-200)
S. JUAREZ

C
This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
Ninth Circuit.
State of **ALASKA**, Plaintiff-Appellee,
v.
Gary D. **HARRISON**, Defendant-Appellant,
and
David B. Harrison; et al., Defendants.
No. 99-35852.
D.C. No. CV-94-00464-HRH.

Submitted May 14, 2001.[FN*]

FN* Because the panel unanimously finds this case suitable for decision without oral argument, Harrison's motion for oral argument is denied. *See* Fed. R.App. P. 34(a)(2).

Decided May 25, 2001.

Appeal from the United States District Court for the District of Alaska H. Russel Holland, Chief Judge, Presiding.

Before PREGERSON, FERNANDEZ, and WARDLAW, Circuit Judges.

MEMORANDUM [FN**]

FN** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

**1 Gary D. Harrison appeals pro se from the district court's summary judgment in favor of the state of Alaska in its condemnation action under 25 U.S.C. § 357. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo grants of summary judgment, *Robi v. Reed*, 173 F.3d 736, 739 (9th Cir.1999), *cert. denied*, 528 U.S. 952, 120 S.Ct. 375, 145 L.Ed.2d 293 (1999), and affirm.

We affirm the district court's determination that the state of Alaska holds a highway right-of-way on Chickaloon River Road where it crosses the allotment held in part by Gary Harrison for the reasons stated in its order filed on October 28, 1998.

The district court properly granted summary judgment as to the valuation of the area lying outside of the previous right-of-way. *See* Alaska Stat. § 09.55.240(a)(5); *S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir.1982). The state of Alaska's evidence sufficiently supported the district court's conclusion, and Harrison did not submit any evidence in opposition.

The district court did not abuse its discretion in denying Harrison's motion for reconsideration. *See School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993).

We will not consider Harrison's contentions with respect to the federal defendants because the state of Alaska is the only appellee in this appeal.

Harrison's remaining contentions lack merit, including the contentions pertaining to his prior separate suit to quiet title against the state of Alaska.

AFFIRMED.

C.A.9 (Alaska),2001.

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10 Fed.Appx. 527
10 Fed.Appx. 527, 2001 WL 569146 (C.A.9 (Alaska))
(Not Selected for publication in the Federal Reporter)
(Cite as: 10 Fed.Appx. 527, 2001 WL 569146 (C.A.9 (Alaska)))

Alaska v. Harrison
10 Fed.Appx. 527, 2001 WL 569146 (C.A.9 (Alaska))

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