

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

Case No. 3KN-08-453 Civ.

TRIAL BRIEF OF DEFENDANT, OFFSHORE SYSTEMS - KENAI

Defendant, Offshore Systems-Kenai (“OSK”), by and through its attorney, Ronald L. Baird, submits this trial brief in compliance with the pretrial order dated September 26, 2008. The facts and legal principles involved in this case have been extensively briefed by OSK, the State of Alaska (“State”), and the Kenai Peninsula Borough (“Borough”) in their motions for summary judgment. OSK incorporates herein by reference its Motion for Summary Judgment and Rule of Law Determinations dated February 5, 2009 (“OSK Motion”) and its Reply to Oppositions and Opposition to Motions for Summary Judgment dated March 27, 2009 (“OSK Reply and Opposition”). The court has issued a 22 page order concerning those motions. This brief will be limited to discussing what remains to be decided in the case in light of the court’s ruling. OSK does not argue here

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the errors which it contends exist in the court's order. As noted below, however, the court's order did not resolve all of the legal issues presented in the prior briefing. This brief will identify those for resolution at or after trial.

Statement of the Case

The motions and the court's order make it unnecessary to again state the basic facts of this case.

Facts For Which No Proof Is Needed

No requests for admission were exchanged during the course of discovery. The court has noted in its Order on Summary Judgment some facts which are not disputed. The parties have not consulted further concerning any additional facts to which they will stipulate. It does appear, however, that neither the State nor the Borough contest that the roads which exist in the N1/2 of Lot 3, the parcel immediately upland and adjacent to the dock were constructed by either James Arness, an early leaseholder, or OSK. Nevertheless, OSK will present evidence of this fact since no stipulation has been formally made.

Contested Issues of Fact

1. Did the Bureau of Public Roads of the United States Department of Commerce construct a road to Nikiski Beach through the West ½ of Lot 1, Section 36 prior to the issuance of the Department's quitclaim deed on June 30, 1959?

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2. If the answer to question 1 is yes, where was the road located in the West ½ of Lot 1, Section 36?

3. If the answer to question 1 is yes and a location of the road can be determined within the West ½ of Lot 1, did the State of Alaska abandon any right-of-way created by the Quitclaim Deed of the Department of Commerce which was not included in Right-of-Way Permit, ADL 32264, issued by the Department of Natural Resources on August 8, 1966?

4. Did any road to the shoreline of Cook Inlet exist within the W1/2 of Lot 1, Section 36 immediately prior to the issuance of State Patent No. 5124 to the Borough on May 16, 1980?

5. If OSK had an obligation under State Patent No. 5124 to "plat" an easement within its lands to the easement along the shoreline of Cook Inlet, is enforcement of that obligation by either the State or the Borough barred by the doctrine of laches?

6. If OSK had an obligation under State Patent No. 5124 to "plat" an easement within its lands to the easement along the shoreline of Cook Inlet, is enforcement of that obligation by either the State or the Borough barred by the doctrine of estoppel?

7. Is the State barred from asserting any right-of-way within the W1/2 of Lot 1, Section 36 by the doctrine of estoppel because it requested no permits or made no objection to OSK's construction of improvements in any alleged right-of-way in 1986 and thereafter?

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8. Was any road (other than roads constructed by OSK) within the W ½ of Lot 1, Section 36 to the shoreline of Cook Inlet “ascertainable by physical inspection” at the time of the Borough’s quitclaim deed of the parcel to OSK on October 1, 1990?

9. Has the State acquired an easement by prescription for a public road over any lands of OSK?

10. What is the location relative to existing improvements of OSK of the easement along the ordinary high water mark of Cook Inlet which was reserved in the State Patent?

Issues of Law and Briefing Thereon

1. Did the Department of Commerce create any easements for roads within Section 36 pursuant to any public land orders when the land was reserved for school purposes pursuant to the Act of March 4, 1915, 38 Stat. 1214?

OSK raised this issue in its Opposition and Reply¹ but the court did not resolve it in its order. Essentially as the Attorney General’s office itself concluded as to this road in 1964, Congress reserved for school purposes section 36 at the time of its survey in 1922. Subsequent land actions are presumed to not apply to such reserved lands.² The State presumably will rely on a solicitor’s opinion that the Secretary of the Interior could withdraw school lands for war purposes. This is not sufficient. In the absence of express intent of a subsequent order to embrace lands previously reserved, the subsequent order

¹ OSK Reply and Opposition, pages 5-6, 15-16, Exhibits 19, 27.

² Exhibit 27 citing *United States v. Minnesota*, 270 U.S. 181, 206 (1925).

does not apply to them.³ No such expression of intent is present in any of the relevant land orders or the quitclaim deed.

In addition, a subsequent federal statute relating to school lands provided that when patents to school lands are issued, they were to show "the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any."⁴ The patent to Section 36 here specifically references that it is issued pursuant to this act. There is no indication in that patent that Section 36 is subject to an easement for Nikishki Beach Road.

2. **Did the State as a matter of law abandon any rights to road easements within the W1/2 of Lot 1, Section 36 other than those described in the simultaneously issued the leases to Arness and the right-of-way permit to the Department of Highways in 1966?**

This issue was briefed by OSK⁵ but not resolved by the court in its order.

3. **Does the 1959 Quitclaim Deed, properly construed, support a claim of an easement for a public road within the W1/2, Lot 1, Section 36?**

This issue was briefed by OSK⁶ but not resolved by the court in its order.

4. **Does the 1980 State Patent, properly construed, support a claim of an easement for a public road within the W1/2, Lot 1, Section 36?**

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³ *Minnesota, supra.*

⁴ Act of June 21, 1934, 48 Stat. 1185 (emphasis added).

⁵ OSK Reply and Opposition, Part IV, pages 19-20.

⁶ OSK Reply and Opposition, Part V-A, pages 21-22.

This issue was briefed by OSK⁷ but not resolved by the court in its order.

- 5. Does the 1990 Borough quitclaim deed, properly construed, support a claim of an easement for a public road within the W1/2, Lot 1, Section 36?**

This issue was briefed by OSK⁸ but not resolved by the court in its order.

- 6. Can the State acquire an easement by prescription over roads constructed, maintained and used by OSK for its own purposes?**

To establish a public easement by prescription, the claimant must show that the use was continuous and uninterrupted for the prescriptive period, here ten years, was made adversely and not with the permission of the record owner, and was reasonably visible to the record owner.⁹ All elements must be established by clear and convincing evidence.¹⁰ There is a presumption that the use is made with the permission of the record owner.¹¹ The presumption is overcome only by the distinct and positive assertion of a right hostile to the owner.¹² Use alone even with the knowledge of the owner does not establish prescription.¹³

⁷ OSK Reply and Opposition, Part V-B, pages 23-25.

⁸ OSK Reply and Opposition, Part V-C, pages 27-29.

⁹ *Weidner v. State, Department of Transportation and Public Facilities*, 860 P.2d 1205, 1209 (Alaska 1993) citing, *McGill v. Wahl*, 839 P.2d 393, 397 (Alaska 1992).

¹⁰ *McDonald v. Harris*, 978 P. 2d 81, 83 (Alaska 1999).

¹¹ *Id.* See, also, *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 416 (Alaska 1993).

¹² *Dillingham, supra*, quoting *Hamerly v. Denton*, 359 P.2d 121, 126 (Alaska 1961).

¹³ *Id.*

The evidence will show that the only roads from the end of Nikiski Beach Road as described in the 1966 right-of-way permit to the shore of Cook Inlet which existed in 1990 and thereafter were constructed and used by OSK for its own purposes. The evidence will also show that the only way for patrons of OSK's dock and yard to enter the business property is via the road which extends from the end of the right-of-way permit through the W1/2 of Lot 1. OSK regularly used the area between the end of the permitted road and the road to the dock to move equipment and material between the dock and its yard.

Other states follow different rules as to the presumption of adversity but even those states which presume adversity recognize that use of a road constructed and used by the record owner cannot be adverse.¹⁴ In *Stone v. Henry Enterprises, Inc.*¹⁵, for example, Henry constructed a road to his ranch house and continuously used it thereafter. His neighbor began using the road thereafter to access his ranchhouse. The parties never discussed the use. The Idaho Supreme Court held that the presumption of adversity which otherwise would have controlled was rebutted. In *Gerberding v. Schnakenberg*,¹⁶ the predecessor of the record owner built a path so the he could place more of his land under cultivation. The court rejected a neighbor's claim to a prescriptive easement over

¹⁴ See cases collected in *Restatement 3d of Property, Servitudes* §2.16, page 249-50 (2000).

¹⁵ 768 P.2d 945 (Idaho 1989).

¹⁶ 343 N.W.2d 62 (Nebraska 1984).

this route concluding that such use was presumed permissive absent some other act or notice to the record owner of adverseness.

The fact that the roads over which a prescriptive claim is asserted here were constructed and used by OSK for its own purposes distinguishes this case from several Alaska cases where the pathway was constructed by the prescriptive user and was not used by the record owner.¹⁷

7. Does the shoreline easement called out in the State Patent extend across the dock which lawfully existed at the time of the conveyance?

OSK has filed counterclaims against the State seeking to quiet OSK's title and declare OSK's rights with respect to easement claims of the State. One of these, the 50 foot easement along the ordinary high water mark of Cook Inlet, has been the subject of conflicting statements by DNR. The question is whether the easement goes around the dock or across it. The most recent indication from DNR is that the easement goes around the dock. Additionally, both the Borough and the State in this recent controversy have seemed to claim that the easement can extend onto OSK's uplands beyond 50 feet from the ordinary high water mark.

"Mean high tide" is the average height of all the high waters at a given place over a period of 18.6 years, the full lunar cycle affecting the tides.¹⁸ "Mean high tide line" is

¹⁷ See, *McDonald v. Harris*, 978 P.2d 81, 85 (Alaska 1999); *McGill v. Wahl*, 839 P.2d 393, 397-8 (Alaska 1992); *Weidner, supra*, 860 P.2d at 1210.

¹⁸ *United States v. Alaska*, 521 U.S. 1, 23 (1997); *Borax Consol., Ltd. v. City of Los Angeles*, 296 U.S. 10, 26-27 (1935); T. Harris, "The Location of High Water Marks," *Land Surveys - A Guide for Lawyers and Other Professionals*, Section of Real Property,

the line formed by the intersection of the plane of the mean high tide with a landmass. The intersection of the plane of the mean high tide and the land mass may change over time.¹⁹ Not all changes in the observed line of intersection result in a change in the boundary between tidelands and uplands.²⁰ The selection of the historical date for locating the intersection line and thereby establishing the boundary between tidelands and uplands is a complex question of fact and law.

"Meander line" is a straight line between fixed points, or a series of connecting straight lines, run along the shore of a body of water for the purpose of marking the general contour of the shore at high water.²¹ A meander line is generally not the boundary line of the property along the shore--the boundary being marked by the actual line of mean high water.²²

In 1980, when the State Patent was issued, the dock constructed by Arness still existed and interrupted the natural shoreline of Cook Inlet. No attempt to locate the actual high water mark was made at that time. The only other effort to locate the high water mark was by the original government survey in 1922. The meander line shown on that survey would bisect a warehouse structure which OSK constructed on its combined lease lands in 1986.

Probate and Trust Law of the American Bar Association, 227-8 (2d ed. 2000)(herein "*Harris*")(Copy in the Anchorage Law Library).

¹⁹ *Harris, supra*, 228.

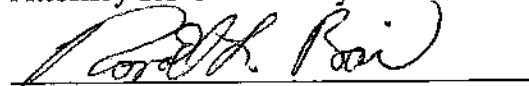
²⁰ *See, e.g., Schafer v. Schnabel*, 494 P.2d 802, 806-7 (Alaska 1972)(determined whether accretion occurred which changed boundary).

²¹ *Hawkins v. Alaska Freight Lines Inc.*, 410 P.2d 992, 994 (Alaska 1966), *citing, Niles v. Clear Point Club*, 175 U.S. 300,308 (1899); *Harris, supra*, at 228.

²² *Id.*

The dock was lawfully constructed by Arness pursuant to a lease from the State. It facilitated maritime commerce and commercial access to the water. Filling of tidelands pursuant to a state authorization can suffice to remove legal restrictions which would otherwise apply.²³ The shoreline easement therefore follows the high tide line which is along the dock face of OSK's dock, not across it.

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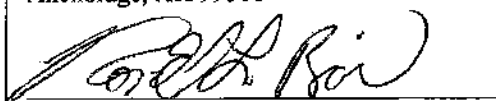
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²³ See, *City of Berkeley v. Superior Court*, 606 P.2d 362 (California 1982).