



## FACTS

The facts in this case, as presented by the State of Alaska (“State”), Off Shore Systems - Kenai (“OSK”), and the Kenai Peninsula Borough (“KPB”) are somewhat disputed with each party utilizing different facts in support of their argument. To the extent that a given fact is disputed, this court has endeavored to identify it in this section. This court is unable to render summary judgment on claims based on facts this court deems material, as discussed further below.

Section 36, Township Eight North, Range 12 West of the Seward Meridian, Alaska (“Section 36”) is a partial section of land bordered on the north by Cook Inlet and located in the Kenai Peninsula Borough.<sup>1</sup> Prior to Alaska’s statehood, the U.S. Congress set aside land in Section 36 in each township for schools.<sup>2</sup> Section 36 included three parcels of land—Lots 1, 2, and 3. The Federal Government patented Section 36, in its entirety, to the State of Alaska by Patent Number 1226102, dated April 2, 1962.<sup>3</sup>

The Nikishka Beach Road is located off the Kenai Spur Highway and travels through Section 36. Presently, Nikishka Beach Road extends from the Kenai Spur Highway to a bluff above Cook Inlet.<sup>4</sup> There are two public beaches lying north and south of this bluff, respectively.<sup>5</sup> The dispute in this case centers on the existence, length and contours of the Nikishka Beach Road.

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<sup>1</sup> See Def.’s Ex. 1. See also Expert Witness Report of M. Scott McLane, Ex. 1.

<sup>2</sup> See Act of March 4, 1915, 38 Stat. 1214. (“That when the public lands of the Territory of Alaska are surveyed . . . sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved from sale or settlement for the support of common schools in the territory.”); Def.’s Ex. 19.

<sup>3</sup> Def.’s Ex. 2.

<sup>4</sup> See Def.’s Ex. H1.

<sup>5</sup> These prong roads actually run west (south) and east (north), but are described by others as of being of north/south orientation. For the purposes of this Order, this Court will use the north/south distinction.

The parties agree that Nikishka Beach Road did not exist in 1951.<sup>6</sup> The State, relying on deposition testimony,<sup>7</sup> claims Mazzie McGahan, a homesteader, built the original road through his property in 1952 or 1953 in order to give fisherman access to the beach.<sup>8</sup> The public began using the road to access the beach, sometime between the road's construction and 1963.<sup>9</sup>

Before Statehood, all roadways were owned by the Federal government. Public Land Order 601 of August 10, 1949 withdrew land along certain roads for highway purposes.<sup>10</sup> Later, in 1951, the Secretary of the Interior issued Departmental Order ("DO") 2665, converting the prior withdrawals to easements.<sup>11</sup> The purpose of DO 2665 was to set the width of all public highways previously established or maintained under the Secretary's jurisdiction.<sup>12</sup> DO 2665 also contemplated easements over roads constructed in the future. Specifically, Section 3(c) of DO 2665 stated that parameters for width and the right-of-way easements "will attach as to all new construction involving public roads in Alaska when the survey stakes have been set in 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."<sup>13</sup>

In 1954, the Federal Alaska Roadway Commission issued a report showing it had staked the Nikishka Beach Road from Sta 20+00 to Sta. 45+00. The fact the Nikishka

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<sup>6</sup> Pl.'s Mem. Mot. Summ. J., 6; Pl.'s Ex. B.

<sup>7</sup> Pl.'s Mem. Mot. Summ. Judgment, Ex. C. The State submitted the deposition testimony of Dale McGahan, the nephew of Mazzie McGahan.

<sup>8</sup> Pl.'s Mem. Mot. Summ. J., 6, Ex. C (Dale McGahan Depo. 12).

<sup>9</sup> Pl.'s Mem. Mot. Summ. J., 7-8, Ex. C (Dale McGahan Depo. 25-28).

<sup>10</sup> 14 Fed. Reg. 5048 (1949). *See also* Alaska Land Title Ass'n, 667 P.3d 714, 718 n.4 (Alaska 1983) (discussing PLO 601 and its text).

<sup>11</sup> 16 Fed. Reg. 10,752 (1951). *See also* Alaska Land Title Ass'n, 667 P.3d at 719, n.5 (discussing DO 2665 and its text).

<sup>12</sup> 16 Fed. Reg. 10,752 (1951). *See also* Alaska Land Title Ass'n, 667 P.3d at 722.

<sup>13</sup> 16 Fed. Reg. 10752 (1951), §3(c).

Beach road was staked is important because under DO 2665 a new roadway became effective when survey stakes were set in the ground.<sup>14</sup> Thus, by 1954 the Nikishka Beach Road had been staked and established as a federal roadway.<sup>15</sup>

At Statehood, the Federal government conveyed all rights and interests in Alaska's highway lands to the State under the Alaska Omnibus Act of June 24, 1959.<sup>16</sup> The Secretary of Commerce executed a Quitclaim Deed to various roads in the State.<sup>17</sup> This conveyance, making the State responsible for the maintenance of roadways conveyed pursuant to the Act, specifically listed the Nikishka Beach Road.<sup>18</sup> The "Nikishka Beach Road" is described in the deed as "From a point on . . . [Kenai Spur Road] . . . north to Nikishki Beach. Length .8 miles."<sup>19</sup> OSK's surveying expert places the described road right-of-way as ending above the top of the bluff overlooking Cook Inlet and contends that it does not reach the beach from any route.<sup>20</sup> The Kenai Peninsula Borough's surveying expert, however, finds the distance of the road to be .8 miles to the beach.<sup>21</sup>

James Arness began leasing tracts in Section 36 just following statehood. Arness' first application for a lease in Section 36 in 1960 noted the existence of a "road installed by bureau of public roads along south side of lake to beach," which is owned by "Bureau of Public Roads."<sup>22</sup> The lease, designated as ADL 01391, was for ½ of a portion of Lot

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<sup>14</sup> Alaska Land Title Ass'n., 667 P.3d at 722.

<sup>15</sup> OSK argues that the roadway was not created under DO 2665 because the State cannot show that notices were posted as required by Section 3 (c). This argument is without merit. As noted by the court in *Alaska Land Title Ass'n.*, a road comes into existence upon putting stakes into the ground; posting is not even mentioned. See Alaska Land Title Ass'n., 667 P.3d at 722.

<sup>16</sup> Alaska Omnibus Act of June 24, 1959, Public Law No. 86-70, 73 stat. 141, 145.

<sup>17</sup> Pl.'s Ex. S.

<sup>18</sup> *Id.*

<sup>19</sup> See Def.'s Ex. 8; Pl.'s Ex. S, 11.

<sup>20</sup> Def.'s Expert Report of M. Scott McLane, P.L.S.

<sup>21</sup> Intervenor's Ex. B8.

<sup>22</sup> Intervenor's Ex. B9.

3 in Section 36.<sup>23</sup> According to the State, Jim Arness built the dock in 1960.<sup>24</sup> OSK states that Arness constructed both a road and a dock on this parcel.<sup>25</sup> Both parties agree Arness built the “south prong” to the dock.<sup>26</sup>

In 1962, Arness received another lease from the State, ADL 02844, for a different portion of Section 36 located on Lot 1.<sup>27</sup> Arness took this lease, “subject to the stipulation that Lessee shall not prevent the public from using the Nikishka Beach Road.”<sup>28</sup>

Two years later, in 1964, Arness entered into a 55 year lease for Lot 3, ADL 01391.<sup>29</sup> This lease doesn’t mention the existence of any roads.<sup>30</sup> In 1966, the State entered into another lease with James Arness for two more parcels within Section 36: a portion of Lot 1 (ADL 02844 described above) and a portion of Lot 2 (ADL 21879). Both these leases describe the property as “subject to a 60 foot wide right-of-way for existing roads to the beach.”<sup>31</sup>

In 1966, the Alaska State Department of Highways (DOH) undertook a highway improvement project for the Kenai Spur Highway and its feeder roads (including

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<sup>23</sup> Pl. Compl. Attachment 2, Lease ADL 01391. At the same time he received a lease for the north ½ of Lot 3, Arness received a special land permit for tidelands adjacent to Lot 3. The permit stated, in relevant part, that, “The permittee shall not obstruct beach in any manner that will prohibit normal beach traffic.” Def.’s Ex. 23.

<sup>24</sup> Pl.’s Ex. C (Dale McGahan Depo. 19-20)

<sup>25</sup> Def.’s Mem. Mot. Summ. J., 4.

<sup>26</sup> Pl.’s Ex. C (depo.); Def.’s Mem. Mot. Summ. J., 4-5.

<sup>27</sup> Def.’s Ex. 25.

<sup>28</sup> *Id.*

<sup>29</sup> Def.’s Ex. 3.

<sup>30</sup> Def.’s Mem. Mot. Summ. J., 4; Def.’s Ex. 3. OSK puts great emphasis on the fact this lease doesn’t mention any roads as support for its argument that there is no easement for a roadway to the dock. As discussed later, it is puzzling why this road is not mentioned. However, the court further notes that boiler plate language found in the leases for Lot 1 and Lot 2 at paragraph 6 expressly reserves to the lessor the right to grant easements or right-of-ways across leased premises. For some reason, page 3 where this language is found, is missing from Defendant’s Ex. 3 but is included in Intervenor’s Ex. B-15.

<sup>31</sup> Def.’s Ex. 5-6.

Nikishka Beach Road).<sup>32</sup> In that year, the State Department of Natural Resources granted to the State Department of Highways a right-of-way permit designated ADL 32264.”<sup>33</sup> The permit stated, in relevant part, “the permittee herein is hereby authorized to locate, construct, operate and maintain said right-of-way over and across the lands herein described,” and, “[t]he permittee shall not sublet or assign the right-of-way herein granted, or this permit, without the written consent of the grantor.”<sup>34</sup> The right-of-way permit included a description and plat of Nikishka Beach Road.<sup>35</sup>

As part of the highway improvement project, a right-of-way map depicting Nikishka Beach Road was prepared by the Department of Highways in 1965<sup>36</sup> and again in 1968.<sup>37</sup> Both maps show the paved portion of the roadway ending at the current location of OSK’s guard station.<sup>38</sup> However, both maps also show, by dotted line, three additional roads leading from the end of the project and labeled respectively: “Airport Road”, “Beach Road,” and “Dock.”<sup>39</sup>

In 1977, Arness assigned his interest in his leases to Jesse Wade.<sup>40</sup> In 1980, the State patented all of section 36 to the Borough by the State of Alaska Patent No. 5124.<sup>41</sup> The State patent was subject to the ADL 32264 easement, other specified additional

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<sup>32</sup> See Def.’s Ex. 31.

<sup>33</sup> See Def.’s Ex. 4.

<sup>34</sup> Pl.’s Ex. L, 3. The permit also reads, “Any lands included in this permit which are sold under a contract to purchase shall be subject to this permit. . . . Upon issuance of title to the purchaser, this permit shall remain in effect to till the date of expiration.” Pl.’s Ex. L.

<sup>35</sup> Def.’s Ex. 4, 29. The right-of-way contemplates an easement running 2,828.89 ft and containing 4.783 acres.

<sup>36</sup> Def.’s Ex. 29.

<sup>37</sup> Def.’s Ex. 30.

<sup>38</sup> See Def.’s Ex. 29, 30.

<sup>39</sup> See *Id.*

<sup>40</sup> Intervenor’s Ex. B19. This assignment only includes the leases ADL 02844 and ADL 21879.

<sup>41</sup> Intervenor’s Ex. B23.

easements, and “subject to valid existing trails, roads, and easements.”<sup>42</sup> The State Patent notably contains the following clause:

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.<sup>43</sup>

The State’s Patent was recorded.<sup>44</sup> While the Patent contains language requiring the Borough to plat the easements, the Kenai Peninsula Borough failed to comply with this provision.<sup>45</sup>

In 1985, Jesse Wade, after approval from the Kenai Peninsula Borough, assigned his leases to Offshore Systems-Kenai.<sup>46</sup> In 1986, OSK rebuilt the dock road and expanded the dock.<sup>47</sup> In 1990, the Borough sold its interest in the parcels to OSK.<sup>48</sup> The Borough executed and delivered quitclaim deeds to these parcels dated Oct. 1, 1990. The quit claim deed reads, in pertinent part:

NORTH ONE-HALF (N1/2) LOT 3, SECTION 36,  
TOWNSHIP 8 NORTH, RANGE 12 WEST, SEWARD  
MERIDIAN, KENAI RECORDING DISTRICT, THIRD  
JUDICIAL DISTRICT STATE OF ALASKA.

SUBJECT TO:

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<sup>42</sup> Pl.’s Ex. M, 1.

<sup>43</sup> Def.’s Ex. 7; Pl.’s Ex. M, 2.

<sup>44</sup> Pl.’s Ex. N.

<sup>45</sup> Intervenor’s Mem. Mot. Summ. J., 34.

<sup>46</sup> Intervenor’s Ex. B18.

<sup>47</sup> Def.’s Mem. Mot. Summ. J., 6.

<sup>48</sup> Def.’s Ex. 8.

Rights and reservations of record and any easements, taxes, assessments, encroachments, alterations, or infringements of record or ascertainable by physical inspection.<sup>49</sup>

In 2007, OSK closed off Nikishka Beach Road at the “Y,” consistent with the end of the right-of-way as depicted in ADL Permit No. 32264.<sup>50</sup> In March 2008, the State issued a Notice of Violation letter stating that OSK was illegally engaged in obstruction of a public right-of-way.<sup>51</sup> OSK has not removed its obstruction, leading to this dispute.

### LAW

The court may enter summary judgment if the evidence in the record presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>52</sup> All reasonable inferences of fact are drawn in favor of the party opposing the motion and against the moving party.<sup>53</sup> The proponent of a summary judgment motion has the initial burden of establishing the absence of genuine issues of material fact and his or her right to judgment as a matter of law.<sup>54</sup> Where the moving party has made a prima facie showing that he or she is entitled to judgment on the established facts as a matter of law, “the opposing party must demonstrate that a genuine issue of fact exists to be litigated by showing that it can produce admissible evidence reasonably tending to dispute the movant’s evidence.”<sup>55</sup>

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<sup>49</sup> Def.’s Ex. 8.

<sup>50</sup> Intervenor’s Ex. B24 (Michael Peek Depo., 142-143).

<sup>51</sup> Intervenor’s Ex. B25.

<sup>52</sup> *Yurioff v. American Honda Motor Co., Inc.*, 803 P.2d 386, 388 (Alaska 1990)(*citing* *Gudenau & Co. v. Sweeney Ins.*, 736 P.2d 763, 765 (Alaska 1987); Alaska R. Civ. Pro. 56(c)).

<sup>53</sup> *Id.* (*citing* *Gudenau*, 736 P.2d at 765).

<sup>54</sup> *Bauman v. State, Div. of Youth and Family Services*, 768 P.2d 1097, 1099 (Alaska 1989). *See also* Alaska R. Civ. Pro. 56.

<sup>55</sup> *French v. Jadon, Inc.*, 911 P.2d 20, 23 (Alaska 1996)(*citing* *Wassink v. Hawkins*, 763 P.2d 971, 973 (Alaska 1988)).



## ANALYSIS

Defendant, OSK, moves the court for an order entering summary judgment in its favor on four issues.<sup>56</sup> First, that the Doctrine of Merger operated to extinguish any pre-existing rights-of-way located in Section 36 on two occasions: when the State acquired ownership from the federal government, and later when OSK obtained ownership of the land in fee simple from the Borough. Second, the Doctrine of Laches bars the enforcement of a covenant in the State patent to the Kenai Peninsula Borough of May 16, 1980. Third, the State may only prove a prescriptive easement claim with evidence of adverse use after October 1, 1990, the date the property passed into private ownership. Fourth, KBP does not have a prescriptive easement claim against OSK.

Plaintiff, State of Alaska, likewise, moves the court for an order entering summary judgment in their favor. First, that Nikishka Beach Road in North Kenai is a public highway that provides an uninterrupted public access right-of-way to Nikishka Beach. Second, the boundaries of the public access right-of-way run to and include the "Y" at the top of the bluff of the beach (25 feet each side of the center) and additionally include the north (east) and south (west) access routes (both 25 feet each side of the center), all as depicted in Exhibit A to the State's summary judgment memorandum.<sup>57</sup> Third, for a court order requiring OSK to remove the gate blocking Nikishka Beach Road, and to redeploy its security guard and guard shack so that they are no longer an impediment to beach access.

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<sup>56</sup> OSK subdivides its argument into six issues. These arguments are addressed in this Order by the three issues described below.

<sup>57</sup> Pl.'s Mem. Mot. Summ. J., 30; Pl.'s Ex. A.

Intervenor, KPB, also moves for summary judgment on several issues.<sup>58</sup> First, as a matter of law, a public right-of-way exists across and along Tracts 1, 2, and 3, along Nikishka Beach Road to the beach where it intersects with a perpetual public access easement along the beach. Second, the public right-of-way is at least 50-feet wide and situated in the location of the existing roads providing said access. The court will address these issues in reverse order.

**I. THE PUBLIC POSSESSES A RIGHT-OF-WAY OVER THE NIKISHKA BEACH ROAD ORIGINATING FROM THE FEDERAL GOVERNMENT'S QUITCLAIM DEED**

The State and KPB move the court for an entry of summary judgment in their favor declaring that a right-of-way or public access easement exists over Nikishka Beach Road to the beach.<sup>59</sup> The Parties present numerous dove-tailing arguments as to why a public right-of-way exists over Nikishka Beach Road through Section 36 and down to the beach. First, Nikishka Beach Road is a right-of-way pursuant to two recorded deeds; namely the Federal Omnibus Quitclaim Deed, and the State's 1990 Patent to KPB. Second, Nikishka Beach Road is a right-of-way because OSK had actual notice of its existence as a public access to the beach. Third, Nikishka Beach Road is right-of-way by virtue of historical public use.<sup>60</sup> Fourth, KPB's failure to plat the Nikishka Beach does not divest the State of its interest in the right-of-way.

While all parties to this litigation argue that these issues may be resolved at summary judgment in their favor, this Court is unable to resolve the majority of issues at

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<sup>58</sup> OSK objects to many of the arguments in KPB's Opposition and Motion for Summary Judgment. OSK argues that KPB's asserts claims on behalf of the State, violating this court's order dated October 14, 2008, limiting the subject matter of the Borough's intervention. To the extent that KPB's arguments go beyond the subject matter of its complaint against OSK, this Court will not consider these arguments.

<sup>59</sup> The State and KPB's arguments are combined here for the sake of clarity.

<sup>60</sup> In short, this argument suggests that the State purposefully intended to enlarge the Nikishka Beach Road easement. Public use, therefore, shows both intent and expansion of the easement.

this stage. Whether OSK had notice of a public access easement to the beach, whether an easement to the beach existed through historical use, and whether KPB's failure to plat an easement to the beach eliminated that easement are genuine issues of material fact and, consequently, must be resolved at trial.<sup>61</sup> Thus, the Court will only address whether the two deeds created a right-of-way over and through the Nikishka Beach Road, the extent of that right-of-way, and whether that right-of-way has been divested by an omission of KPB.

The State argues that two recorded instruments, the Federal Omnibus Quitclaim Deed and the 1990 Patent from the State to KPB, acknowledge and establish the right-of-way existing over Nikishka Beach Road. The State asserts that the quitclaim deed from KPB to OSK conveyed the disputed property "subject to rights and reservations of record and any easements . . . of record or ascertainable by physical inspection."<sup>62</sup> Accordingly, the State argues that OSK took the property subject to easements which existed by virtue of the two aforementioned deeds.

The court finds the Nikishka Beach Road existed in some form when the Federal government conveyed all rights and interests in Alaska's highway lands to the State.<sup>63</sup> At that time, the Secretary of Commerce executed a Quitclaim Deed to various roads in the State.<sup>64</sup> The "Nikishka Beach Road" is described in the deed as "From a point on . . . [Kenai Spur Road] . . . north to Nikishki Beach. Length .8 miles."<sup>65</sup> The Federal

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<sup>61</sup> OSK's Opposition also refutes the idea that PLO 601, DO 2665, or Revised Statute 2477, created an easement over the Nikishka Beach Road. This Court is not addressing the merits of this argument or its amenability to summary judgment because it was not expressly mentioned in the State's Motion for Summary Judgment.

<sup>62</sup> Def.'s Ex. 8.

<sup>63</sup> See Alaska Omnibus Act of June 24, 1959, Public Law No. 86-70, 73 stat. 141, 145.

<sup>64</sup> Pl.'s Ex. S.

<sup>65</sup> See Def.'s Ex. 8; Pl.'s Ex. S, 11.

Government, therefore, granted to the State the Nikishka Beach Road for highway purposes.<sup>66</sup>

The State of Alaska manifested its intent to adopt Nikishka Beach Road as a state highway when, as part of an on-going highway project, the Department of Highways issued a right-of-way map for "Nikishka Beach Road" on Sept. 8, 1965.<sup>67</sup> This map shows the right-of-way stopping short of the edge of the bluff at Station 41+00.<sup>68</sup> In 1966, the State Department of Natural Resources issued right-of-way permit, ADL 32264, to the Department of Highways for a "public highway."<sup>69</sup> ADL 32264 stated, "to have and to hold until no longer used as for a public highway."<sup>70</sup> The permit attached a description for a road running through Section 36 for 2,828.89 feet and containing 4.783 acres and a plat, showing a right-of-way extending to Station 41+00.<sup>71</sup>

Thus, by 1966, Nikishka Beach Road was a highway maintained by the State for use as a public highway. Jim Arness' 1966 lease agreement recognizes the highway right-of-way permit ADL 32264.<sup>72</sup> An expressly platted right-of-way for highway purposes continues indefinitely until expressly vacated by the State Department of Highways.<sup>73</sup> The State of Alaska has never vacated this roadway. Therefore, the right-of-way over Nikishka Beach Road was in existence at the time of the State's conveyance to KP.B. The State's Patent of Section 36 to KP.B expressly reserved the Nikishka Beach

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<sup>66</sup> OSK argues that the easements in the Quitclaim deed were extinguished because they were not specifically mentioned in the patent by the Federal government granting Section 36 to the State. This argument is not convincing. It is reasonable to assume the roadways previously quitclaimed to the State in 1959 were not included in the patent because the federal government's interest in them had already passed to the State.

<sup>67</sup> Def.'s Ex. 29.

<sup>68</sup> *Id.*

<sup>69</sup> Def.'s Ex. 4.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Def.'s Ex. 6.

<sup>73</sup> AS § 19.05.070(a).

Road for the State.<sup>74</sup> Consequently, OSK took ownership of the property from KPB subject to all existing easements, including the Nikishka Beach Road. Since the Department of Highways has not vacated or sold the right-of-way, the public still maintains an easement over Nikishka Beach Road.

The length and possibly the width of this roadway, however, are disputed. The Nikishka Beach Road which exists by virtue of the Federal Omnibus Quitclaim Deed and ADL 32264 runs .8 miles and follows the trajectory of the plat. The parties' surveying experts apparently disagree as to where that mileage places the end of the right-of-way. The exact location of the easements stopping point is, therefore, a question of fact to be resolved at trial.

OSK is correct that the Nikishka Beach Road, as defined by permit ADL 32264, seemingly ends before the "Y" and at the current location of the guard shack. It is a question of fact, however, whether the State intended the right-of-way to extend past the "Y."

The 1964 lease (ADL 01391) to Arness for Lot 3 does not mention any right-of-way – including the road built by Arness to the south which accesses the dock area.<sup>75</sup> Nevertheless, the 1966 the leases for both Lot 1 and Lot 2 specifically provide they are subject to a 60' right-of-way for existing roads.<sup>76</sup> The Lease for Lot 2 also adds the language " and Highway Right-of-way Permit serialized ADL 32264."<sup>77</sup> The use of the plural term "roads" suggests the State was contemplating more than one road and something more than the length of ADL 32264. Both the right-of-way map prepared in

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<sup>74</sup> Pl.'s Ex. N.

<sup>75</sup> Def.'s Ex. 3.

<sup>76</sup> Def.'s Ex. 5, 6.

<sup>77</sup> Def.'s Ex. 6.

1965, and the map prepared in 1968 show roads, evidenced by dotted lines, leading to the dock and the beach.<sup>78</sup> Therefore, it is a question of fact whether these roads are the roads referred to in the State's lease. These facts, in combination with conflicting testimony by witnesses as to the State's maintenance of the road and whether it extended past the "Y," demonstrate considerable questions of fact to be resolved at trial.

Moreover, the State's patent to KPB not only excludes the right-of-way permit ADL 32264, it also provides that the transfer is "subject to all valid existing trails, roads and easements."<sup>79</sup> It is a question of fact whether the roads shown as the dotted lines on the State's right-of-way maps in 1965 and 1968 constitute "existing roads" under the State patent.

As previously noted, the State's patent to KPB states it is subject to the reservation of a 50 foot wide perpetual public access easement to the lineal public easement that extends along the high water mark of Cook Inlet. While KPB had a duty to plat this easement before conveying the property, it is a question of fact whether KPB's failure to plat the easement eliminated the easement, and/or whether this or any other easement was readily ascertainable by visual inspection and therefore separately reserved by the quitclaim deed to OSK. A photo taken of the property in 1990 only two weeks after the property was conveyed to OSK clearly shows two visible access routes to the beach: the south access leading to the dock and the north access leading to the beach.

Therefore, for purposes of summary judgment, this Court finds as a matter of law, that the Nikishka Beach Road right-of-way extends, at the very least, from its commencement at the Kenai Spur Highway toward the Cook Inlet and terminating at the

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<sup>78</sup> Def.'s Ex. 29, 30.

<sup>79</sup> Def.'s Ex. 7.

present site of Off Shore Systems-Kenai's gate and guard shack, consistent with permit ADL 32264. All other remaining issues, including the existence of a further right-of-way to the beach, are questions of fact to be determined at trial.

## **II. THE DOCTRINE OF LACHES DOES NOT BAR THE STATE'S OR KPB'S CLAIMS FOR RELIEF**

OSK's motion on summary judgment asserts a rather confusing argument based upon the Doctrine of Laches. OSK's primary argument seems to be that the Doctrine of Laches bars the State from attempting to force OSK to perform the covenant to plat an easement contained within the State Patent. This argument, however, contains other assertions based on the Doctrine of Laches, which both the State and KPB address in their Opposition Memoranda. Accordingly, all of these arguments will be briefly addressed.

OSK's principal argument is the language in the State Patent does not create a specific easement but imposes an executory duty on the Grantee. Consequently, OSK argues that this clause cannot be enforced against OSK. OSK reasons that this relief would require a mandatory injunction directing OSK to "identify" and "plat" the easement. OSK contends that such injunctive relief is subject to the Doctrine of Laches.

Whether the Doctrine of Laches applies to this specific claim for relief is not an issue for summary judgment at this time. First, as OSK readily admits, the exact interpretation of this patent would require further discovery and trial.<sup>80</sup> Second, OSK is presuming a claim for relief, not expressly stated in the complaint, which stems from the

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<sup>80</sup> OSK takes issue with this clause in the patent for multiple reasons. First, it argues that it did not apply to the lands leased to its predecessor in interest, Jesse Wade, because those lands were already developed at the time. Second, OSK argues that the executory duty contained in the covenant does not pass to subsequent grantees.

potential interpretation of this Patent. Consequently, this Court declines to rule on the application of the Doctrine of Laches to this potential argument.

Since the Doctrine of Laches argument is applicable to all of the State and KPB's claims for relief, however, and those parties address it in their Opposition Memoranda, it is appropriate to address its application generally.<sup>81</sup> The Doctrine of Laches is an equitable defense which bars suit when a party has delayed bringing a claim for an unconscionable period.<sup>82</sup> In order to prevail on a laches argument, the defendant must show, "that the plaintiff has unreasonably delayed in bringing the action, and (2) that this unreasonable delay has caused undue harm or prejudice to the defendant."<sup>83</sup> Prejudice occurs, "when money or valuable services will be wasted as a result of the unreasonable delay."<sup>84</sup>

OSK argues that there has been unreasonable delay and extreme prejudice under these circumstances. The State has waited 28 years to secure recognition of the easement and the Borough has waited 18 since it conveyed its fee simple interest to OSK. During that time, OSK undertook construction project in the area and on the disputed road for costs of over \$ 1 million.

The State argues that it did not delay in bringing suit against OSK. The State contends that the dispute between the two parties only arose when OSK began blocking

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<sup>81</sup> The State infers an argument into OSK's Doctrine of Laches argument and responds to it in its Opposition Memorandum. The State argues that KPB's failure to plat the easements did not result in a divestiture of the easement. This Court is not ruling on this argument, either, as it also requires an interpretation of the Patent.

<sup>82</sup> State, Dept. of Commerce and Economic Development, Div. of Ins. v. Schnell, 8 P.3d 351, 358 (Alaska 2000) (citing Concerned Citizens of So. Kenai Peninsula, 527 P.2d at 457)).

<sup>83</sup> Breck v. City and Borough of Juneau, 706 p.2d 313, 315 (1985) (citing Sheehan v. Estate of Gamberg, 677 P.2d 254, 258 n.8 (Alaska 1984); Concerned Citizens of So. Kenai v. Kenai Pen. Bor., 527 P.2d 447, 457 (Alaska 1974)).

<sup>84</sup> Keener v. State, 889 P.2d 1063, 1067 (Alaska 1995) (citing Wolff v. Arctic Bowl, Inc., 560 P.2d 758, 767 (Alaska 1977)).



access to the beach in 2007. Thereafter, in 2008, the State filed the present lawsuit against OSK.

In *Keener v. State*, the Supreme Court held that, “[t]he period of delay for laches begins to run when the party discovers or could have discovered the wrong of which complains, or where, in light of any resulting prejudice to the defendant, it became reasonable to expect the plaintiff to act upon the wrong.”<sup>85</sup> Under the circumstances, the State is correct that the wrong for which they complained occurred when OSK blocked access to the beach. The Court in *Keener* held that, “the State does not have to sue to establish its ownership of the right-of-way simply because problems *might* arise.”<sup>86</sup> The State and KPB had reason to believe that the public possessed a right-of-way over the Nikishka Beach Road to the beach. Moreover, the parties were under the belief that numerous legal documents recognized the right-of-way. The State and KPB, therefore, were not under an affirmative obligation to sue for the recognition of easements which they already believed to be recognized by OSK. Accordingly, the doctrine of laches does not bar the State or KPB’s claims for relief.

### **III. THE STATE CAN ASSERT A PRESCRIPTIVE EASEMENT ON BEHALF OF THE PUBLIC. EVIDENCE OF ADVERSE POSSESSION MUST TAKE PLACE AFTER OFFSHORE SYSTEMS - KENAI ACQUIRED FULL OWNERSHIP OF THE PROPERTY**

The Supreme Court of Alaska, in *Weidner v. State*, reiterated that, “a public way may be created by public use of private property for the ten-year prescriptive period.”<sup>87</sup> OSK argues that any prescriptive easement claim asserted by the State may only be supported by evidence of adverse use following OSK’s assumption of ownership over the

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<sup>85</sup> *Id.*; *McGill v. Wahl*, 839 P.2d 398, 398 (Alaska 1992)).

<sup>86</sup> *Keener*, 889 P.2d at 1067.

<sup>87</sup> *Weidner v. State*, 860 P.2d 1205, 1209 (Alaska 1993) (*citing* *Dillingham Commercial Co. v. City of Dillingham*, 705 P.3d 410, 416-17 (Alaska 1985)).

property.<sup>88</sup> First, OSK argues that both the common law and Alaska statutes preclude the assertion of prescriptive easements against federal, state, and municipal governments.<sup>89</sup> Specifically, AS § 38.95.010 and AS § 29.71.010 hold that no title may be divested from the State of Alaska or a municipality by adverse possession.<sup>90</sup> Second, OSK notes that Section 36 remained in government ownership, whether Federal, State, or municipal, until October 1, 1990, when the Kenai Peninsula Borough quitclaimed its interest in the leased parcels to OSK. From that date, the land through which Nikishka Beach Road runs was under private ownership and susceptible to a claim for prescriptive easement. Accordingly, OSK argues that the State may only present evidence of activities, post Oct. 1, 1990, to establish the elements of a prescriptive easement.

The State argues that evidence of use prior to OSK's full ownership of the property is necessary to show that Nikishka Beach Road is a public access right-of-way. The State's assertion, however, is unconvincing. Although evidence of prior use may be integral to demonstrating either that the State purposefully expanded a pre-existing easement or that OSK had notice of an easement at the time of conveyance, neither of those scenarios concern a claim for prescription. For the narrow purposes of this claim for relief, OSK is correct. The State may only present evidence of adverse use occurring after October 1, 1990.

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<sup>88</sup> KPB argues that the prescriptive easement is not being asserted against the State but against the leaseholder interest. KPB cites *Price v. Eastham*, for this proposition. See 75 P.3d 1051 (Alaska 2003). The State does not raise this argument on summary judgment and this argument is outside of KPB's limited intervention in this case. Accordingly, this Court cannot consider it for the purposes of summary judgment.

<sup>89</sup> Restatement (Third) of Property, *Servitudes*, § 2.17, Comment e [*hereinafter* Restatement]. See also *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1329 (Alaska 1975) (regarding prescriptive easements against the federal government).

<sup>90</sup> See AS § 29.71.010 ("A municipality may not be divested of title to real property by adverse possession."); AS § 38.95.010 ("No title or interest to land under the jurisdiction of the state may be acquired by adverse possession or prescription, or in any other manner except by conveyance from the State.").

OSK also argues that the Borough cannot assert a prescriptive easement on behalf of the public. OSK contends that because the State has control of a public easement and the public only has a vested right of use, a municipality cannot assert a prescriptive easement claim.<sup>91</sup> This Court, however, does not need to address the merits of OSK's argument because KPB's limited intervention in this matter is confined to whether it inherited and then passed on a public easement by deed.<sup>92</sup> KPB is not asserting a prescriptive easement on behalf of the public in this action.<sup>93</sup> OSK's argument is, therefore, moot.

#### **IV. THE DOCTRINE OF MERGER DOES NOT EXTINGUISH ANY POTENTIAL RIGHT-OF-WAY THROUGH NIKISHKA BEACH ROAD**

OSK argues that any right-of-ways which existed through Section 36 were extinguished by the Doctrine of Merger. The Doctrine of Merger holds that when a property owner requires fee simple title to both the servient and dominant tenements of an easement, the easement merges into the fee simple estate and is extinguished.<sup>94</sup> First, OSK argues that the public rights-of-way created through Revised Statute (RS) 2477 or PLO 601 and DO 2665 were terminated after the federal government patented Section 36

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<sup>91</sup> See Restatement, § 2.18, Comment b. ("Under the rule stated in this section, if application of the rules set forth in §§ 4.1 through §§ 4.3 does not lead to a different conclusion as to the parties' intent, control rights are lodged in the state."). The weight of the authority, however, seems to be against this proposition. In *Dillingham Commercial Company, Inc. v. City of Dillingham*, the Supreme Court of Alaska, found that a claim for a prescriptive easement on behalf of the public asserted by the City of Dillingham should have been submitted to a factfinder. *Dillingham Commercial Company, Inc. v. City of Dillingham*, 705 P.2d 410, 417 (1985). Likewise, in *Interior Trails Preservation Coalition v. Swope*, the Supreme Court found that a non-profit corporation could maintain an action for a public prescriptive easement for recreational use. *Interior Trails Preservation Coalition v. Swope*, 115 P.3d 517 (2005).

<sup>92</sup> See Intervenor's Compl., 2. See also Order Concerning Intervention and Lodging Compl. and Reply by the Kenai Peninsula Borough (10/14/08).

<sup>93</sup> See *Id.*

<sup>94</sup> *Glenbrook Homeowners Association v. Tahoe Regional Planning Agency*, 425 F.3d 611, 618 (9<sup>th</sup> Cir. 2005).

to the State.<sup>95</sup> OSK argues that because the right-of-way is an easement not a fee simple interest, it merged into the fee simple estate when the State assumed full ownership.

The State correctly argues that because both the burdens and benefits do not accrue solely to the State, an easement could not be extinguished by operation of law. The Restatement (Third) of Property, *Servitudes*, § 7.5 states, “A servitude is terminated when all the benefits and burdens come into a single ownership.”<sup>96</sup> If there are outstanding interests in the estate concerned, merger will not occur.<sup>97</sup>

The Merger Doctrine originates from the idea that person cannot have an easement in his or her own land because their general right of ownership comprehends all possible uses.<sup>98</sup> Public easements, however, differ from private easements in the allocation of interests. Beneficial rights in publicly held easements are split into use and control rights.<sup>99</sup> The right to control and manage the servitude for the benefit of the public is located in the State.<sup>100</sup> The right to use the servitude rests with the public.<sup>101</sup> While control of the benefit includes the right to transfer, terminate, or otherwise dispose of the servitude benefit,<sup>102</sup> legal title does not trigger the doctrine of merger for the purposes of a public easement. To find otherwise would mean that all public roadways deeded to the State of Alaska by quitclaim deed by the federal government in 1959 were

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<sup>95</sup> OSK’s argument does not concede that these instruments created a right-of-way across Section 36. See Def.’s Mem. Mot. Summ. J., 8–9.

<sup>96</sup> Restatement, § 7.5. See also *Will v. Gates*, 89 N.Y.2d 778, 784, 680 N.E.2d 1197, 1200 (N.Y.App. 1997) (“An easement ceases to exist by virtue of a merger only when there is a unity of title of all the dominant and servient estates.”).

<sup>97</sup> Restatement, § 7.5, Comment d.

<sup>98</sup> *Will v. Gates*, 89 N.Y.2d 778, 784, 680 N.E.2d 1197, 1200 (N.Y.App. 1997)

<sup>99</sup> Restatement, § 2.18, Comment a.

<sup>100</sup> *Id.*, Comment b. The right to control is located with the State because it is capable of exercising that right. *Id.*

<sup>101</sup> Restatement, § 2.18.

<sup>102</sup> See *Id.*, Comment b.

automatically vacated upon issuance of the federal patent for the remainder of these lands in 1962.

Even if the Doctrine of Merger applies, it holds no significance in this case because the State of Alaska expressly adopted the Nikishka Beach Road as a state highway when it issued permit ADL 32264. Thus, by 1990 when OSK acquired the property from KPB, Nikishka Beach Road was firmly established as a state highway rendering the doctrine of merger moot.

Second, OSK argues that even though Arness might have been subject to an easement reserved by the State in his lease, the easement terminated through subsequent conveyances. The State passed its interest under the lease to the Borough by means of the State patent. The Borough conveyed its interest in the leases to OSK by means of the 1990 quitclaim deeds. Following Oct. 1, 1990, OSK argues that it owned both the dominant and servient estates and any lease reservation merged into the fee simple interest.

The State misconstrues OSK's argument. The State argues that a local government, such as KPB, cannot extinguish a State highway right-of-way.<sup>103</sup> The State relies on AS § 19.05.070(a) which states that the State Department of Transportation can only vacate an easement by executing and filing a deed.<sup>104</sup> OSK's argument is much more limited. Simply, OSK correctly asserts that if a reservation for a right-of-way existed solely through the State and KPB's leases to Arness and his successors in interest, the reservation no longer exists when legal title to the land is conveyed. In other words,

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<sup>103</sup> The State also makes two other points. First, the State cannot lose a right-of-way if the party purchasing has actual and constructive notice. Second, KPB's failure to plat the public access right-of-way cannot preclude its recognition under Alaska law.

<sup>104</sup> AS § 19.05.070(a) ("The department may vacate land, or part of it, or rights in land acquired for highway purposes, by executing and filing a deed in the appropriate recording district.").

OSK is not subject to enforcement of any reservations contained in the former leases, because the quitclaim deed from KPB to OSK extinguished the leases under the doctrine of merger. However, as noted above, the language in the leases describing the reservations may be critical to establishing the existence of the alleged rights of way reserved by the State patent and KPB's quitclaim deed to OSK.

**CONCLUSION**

Accordingly, for the reasons stated above, the parties' summary judgment motions are GRANTED IN PART and DENIED IN PART.

Dated this 9<sup>th</sup> day of July 2009 at Kenai, Alaska.



ANNA M. MORAN  
Superior Court Judge

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