

Bennett, John F (DOT)

From: Borghesan, Dario (LAW)
Sent: Friday, July 27, 2012 2:18 PM
To: Geraghty, Michael C (LAW); Cantor, James E (LAW); Gordon, Nancy R (LAW)
Cc: Grace, Joanne M (LAW); Burke, Dana S (LAW); Moore, Colleen J (LAW); Currie, Jennifer A (LAW); Parsi, John (LAW); Bennett, John F (DOT)
Subject: Supreme Court decision in Offshore Systems-Kenai v. DOTPF

Today the Alaska Supreme Court issued a decision favorable to the state in *Offshore Systems-Kenai (OSK) v. State of Alaska, Department of Transportation and Public Facilities*. The court held that the public retains an easement across OSK's property that provide access from the Kenai Spur Highway north of Nikiski all the way to Nikishka Beach on Cook Inlet. A copy of the decision is attached.

The key issue in the case is whether the public retained a right to access the beach by traversing parcels of land that had been transferred to OSK's private ownership. Since before statehood, members of the public have accessed the beach via a road that begins at a junction with the Kenai Spur Highway and ends on the beach. The United States passed title to the road and to the underlying lands to the State of Alaska at statehood, and the state continued to reserve a right-of-way for public access to the beach when it leased the underlying lands to a company that built a commercial dock on the beach. The company built a spur off the main road going down the other side of the dock, so that roads now existed on each side of the dock; the public began using both roads to access the beach. In the 1960s DOTPF widened and improved much of the existing road, except for the last stretch road going down to the beach itself. In 1980, the state conveyed ownership of the underlying lands to the Kenai Peninsula Borough, but reserved one 50 foot-wide easement along the shoreline and another 50 foot-wide easement providing access from the public highway to the shore. In 1990, the borough transferred ownership of the lands to OSK, which by then was operating the commercial dock. OSK made improvements to the roads in the late 1990s for use by heavy equipment.

The public had accessed the beach via the road on both sides of the dock unhindered until 2007, when OSK erected a gate and began blocking public access to the beach. DOTPF requested that OSK take the gate down, and when OSK refused DOTPF filed this lawsuit. After an eight-day trial, the superior court ruled that the public maintains a right-of-way providing access to the beach and ordered that OSK must take down its gate.

The Alaska Supreme Court affirmed the superior court's ruling. In particular, the supreme court ruled that the state properly created a public easement to the beach when it transferred ownership of the underlying lands to the borough. Although the borough failed to properly record the easement, the court ruled that this failure on the borough's part did not negate the public's right to access the beach. Furthermore, the court ruled that it was proper for the superior court to determine that the easement's location tracks the existing road to the beach going down each side of OSK's dock. (Because the court ruled that an easement existed by virtue of the 1980 conveyance, the court found it unnecessary to address DOTPF's arguments that the public easement had been preserved by earlier actions of both the state and the federal government).

As a result of the decision, the public retains the right to access the beach on each side of OSK's dock. Public access to the beach is an issue of major local concern; when OSK first closed off beach access, it was reported that hundreds of people showed up to protest the closure. Also, the decision is significant because it affirms the principle that an easement continues to exist even if the exact path the easement follows changes over time. AAGs in the transportation section have noted that this precedent may prove helpful in future cases involving RS 2477 easements.

Much credit is due to Dana Burke for prevailing at trial and compiling a very thorough and persuasive record and to John Bennett of DOTPF for sharing his much-needed expertise on many recondite issues of federal land law presented by this appeal.

Dario Borghesan
Assistant Attorney General

Opinions, Appeals, and Ethics Section
Alaska Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5100