IN THE SUPREME COURT OF THE STATE OF ALASKA

Offshore Systems – Kenai, An Alaskan Partnership,	)	
Appellant,	)	
v.	)	
State of Alaska, Department of Transportation and Public Facilities, and Kenai Peninsula Borough, a Municipal Corporation,	)	Supreme Court No.: **S-13994**
Appellees.	)	

Trial Court Case No. **3KN-08-453 CI**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT KENAI
HORNORABLE ANNA MORAN, JUDGE

BRIEF OF APPELLEE STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

JOHN J. BURNS
ATTORNEY GENERAL

Dario Borghesan (1005015)
Assistant Attorney General
Department of Law
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501
(907) 269-5100

Filed in the Supreme Court
of the State of Alaska
this 28 day of June,
2011

MARILYN MAY, CLERK
Appellate Courts
By: Beth A. Pechota
Deputy Clerk

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AUTHORITIES PRINCIPALLY RELIED UPON

AS 38.05.127 (1980). Access to navigable or public waters. (a) Before the sale, lease, grant, or other disposal of any interest in state land adjacent to a body of water or waterway, the Department of Natural Resources shall,

(1) under regulations, determine if the body of water or waterway is navigable water, public water, or neither;

(2) upon finding that the body of water or waterway is navigable or public water, provide for the specific easements or rights-of-way, or both, reasonably necessary to insure free access to and along the body of water, unless the department finds that regulation or limiting access is necessary for other beneficial uses or public purposes.

(b) The Department of Natural Resources shall adopt regulations implementing this section.

(c) Nothing in this section affects valid existing rights.

Public Land Order 601. Reserving Public Lands for Highway Purposes. 14 Fed. Reg. 5048 (Aug. 15, 1949).

(b) A strip of land 600 feet wide, 300 feet on each side of the center line of the Gulkana-Slana-Tok Road as constructed from Tok Junction at about Mile 1319 on the Alaska Highway to the junction with the Richardson Highway near Gulkana, Alaska.

Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway, 150 feet on each side of the center line of all other through roads, 100 feet on each side of the center line of all feeder roads, and 50 feet on each side of the center line of all local roads, in accordance with the following classifications, are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral-leasing laws, and reserved for highway purposes:

...

Local Roads. All roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior.

Department of the Interior, Office of the Secretary Order 2665, Rights-of-Way for Highways in Alaska. 16 Fed. Reg. 10752 (Oct. 16, 1951).

SECTION 1. *Purpose.* (a)The purpose of this order is to (1) fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior and (2) prescribe a uniform procedure for the establishment of rights-of-way or easements over or across the public lands for such highways. Authority for these actions is contained in section 2 of the act of June 30, 1932 (47 Stat. 446, 48 U.S.C. 321a).

SEC. 2. *Width of public highways.*

...

(3)For local roads: All public roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.
SEC. 3. *Establishment of rights-of-way or easements.*
...
(b) A right-of-way or easement for highway purposes covering the lands embraced in the feeder roads and the local roads equal in extent to the width of such roads as established in section 2 of this order, is hereby established for such roads over and across public lands.
(c) 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.
....

Act of March 4, 1915, Pub. L. No. 63-180, 38 Stat. 1214 (1915).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when the public lands of the Territory of Alaska are surveyed, under direction of the Government of the United States, 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 of Alaska . . . .
Provided further, That the Territory may, by general law, provide for leasing said land in area not to eceed one section to any one person, association, or corporation for not longer than ten years at any one time . . . .

Restatement (Third) of Property: Servitudes § 2.18. Acquisition of Servitudes by Governmental Bodies and the Public.

(1) Governmental bodies may acquire servitudes by dedication and condemnation, as well as by the methods set forth in §§ 2.1 through 2.17. The public may acquire servitudes by dedication and prescription.
(2) Unless application of the rules set forth in §§ 4.1 through 4.3 leads to a different conclusion as to the intention of the parties creating the servitude, the right to control a servitude for the benefit of the public is located in the state and the right to use the servitude benefit extends to the public at large.

Restatement (Third) of Property: Servitudes § 4.8. Location, Relocation, and Dimensions of a Servitude.

Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows:
(1) The owner of the servient estate has the right within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude.
(2) The dimensions are those reasonably necessary for enjoyment of the servitude.

(3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not

(a) Significantly lessen the utility of the easement,

(b) Increase the burdens on the owner of the easement in its use and enjoyment, or

(c) Frustrate the purpose for which the easement was created.

PARTIES

The State of Alaska, Department of Transportation and Public Facilities ("the state") was the plaintiff in this action is now an appellee.

The Kenai Peninsula Borough ("the borough") was a plaintiff-intervenor in this action and is now an appellee.

Offshore Systems Kenai ("OSK") was the defendant in this action and is now the appellant.

ISSUES PRESENTED

The appellant raises the following issues for this Court's review:

Did the federal government create a public right-of-way pursuant to Department of the Interior Order 2665 when placed survey stakes along and performed maintenance on a road constructed across school trust lands?

Did this right of way extend all the way to the beach, and if so, did the federal government convey the entire right-of-way to the state when it issued a quitclaim deed conveying all its interests in Alaska highways to the state at statehood?

When the state created a public right-of-way to the beach by leasing shorefront property subject to a right-of-way to the beach, did the right-of-way continue to exist when the public began using a different route to access the beach?

When the state created a public right-of-way to the beach by leasing shorefront property subject to a right-of-way to the beach, did the right-of-way continue to exist when the state conveyed the underlying lands to the borough subject to existing easements and when the borough, in turn, quitclaimed those lands to OSK?

When the state conveyed the shorefront lands to the borough subject to the reservation of an easement for public access to the beach, which easement was to be located and platted by the borough, does a public access easement exist across those lands despite the borough's failure to locate or plat the easement?

When the state conveyed the shorefront lands to the borough subject to the reservation of an easement for public access to the beach, which easement was to be located and platted by the borough, does the court have jurisdiction to determine the location of the easement when the borough did not do so within a reasonable amount of time?

Did the public acquire a right-of-way by prescription when the public traversed OSK's property to get to the beach for seventeen years and both the public and OSK's own employee believed the public had the right to do so?

Is OSK entitled to a judgment that expressly quiets title to various peripheral claims when the parties' stipulations and the court's orders specifically address those claims?

Does quasi-estoppel or laches bar the State's Claims?

Was the borough a prevailing party?[1]

Was the award of attorney's fees to the borough reasonable?

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[1] The State takes no position on whether the borough was a prevailing party or whether the award of attorney's fees to it was reasonable.

INTRODUCTION

This appeal is about whether the final stretch of Nikishka Beach Road, a road providing access to the beach north of Nikiski on the Kenai Peninsula, is a public right-of-way or a private road. The public has used this road to get to the beach since it was built in the early 1950s. However, in 2007 OSK (which operates a commercial dock that is accessed by Nikishka Beach Road) blocked off the road several hundred feet short of the beach, preventing the public from accessing the shore without OSK's express permission. When OSK would not remove its barrier, the state filed suit to enforce the public's right to use the road. The superior court rendered a judgment in the state's favor, and OSK now appeals that decision.

STATEMENT OF THE CASE

I. Background

Nikishka Beach Road traverses section 36 of Township 8 North, Range 12 West, Seward Meridian, [Exc. 281, 408, 478] which is located north of Nikiski in the Kenai Peninsula. The North boundary of section 36 is formed by the shore of Cook Inlet and is called Nikishka Beach. [Exc. 281, 408] Nikishka Beach Road begins at a point on the Kenai Spur Highway and heads north to the beach. [Exc. 281, 408]

OSK acquired in 1990 [Exc. 488-90] three beachfront parcels of land which the final stretch of Nikishka Beach Road traverses.[2] Specifically, OSK owns: the

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[2] After the superior court issued its judgment in this case, the parties jointly adopted a survey of the lands in question based on that judgment. [Exc. 401-06] Although the parties do not agree on whether the survey precisely describes the roads, rights-of-way, and easements reflected in the court's order on the merits, they agree that

west 1/2 of Lot 1 ("Lot 1"), whose northern boundary abuts Nikishka Beach [Exc. 489, 518]; the Northwest 1/4 of the Northwest 1/4 of the Southeast 1/4 of Section 36 ("Lot 2"), whose northern boundary abuts the southern edge of Lot 1 [Exc. 488, 519]; and the north 1/2 of Lot 3 ("Lot 3"), whose northern boundary abuts Nikishka Beach and which sits directly west of both Lot 1 and Lot 2.

The highway portion of Nikishka Beach Road traverses and ends in Lot 2, short of the bluff overlooking the beach. [Exc.403-04] Shortly after that point, the roadway forms a "Y", with one road heading down the bluff in a northeast direction ("the north road") and the other heading down the bluff in a southwest direction (the "south road"). [Exc. 344-45, 403] The "Y" and the north road lie entirely within Lot 1. [Exc. 345, 403] The south road begins in Lot 1 and then traverses Lot 3 on its way to a dock owned by OSK and to the beach. [Exc. 345, 403] On the area of the beach between the north and south roads sits OSK's dock and warehouse; the dock and warehouse are located on Lot 3. [Exc. 345, 403]

There is no dispute that the highway portion of Nikishka Beach Road is a public right-of-way. The dispute is about whether the road beyond the highway to the "Y", the north access road, and the south access road are public rights-of-way or private property.

"the survey sufficiently describes the declared roads, rights of way, and easements so as to protect" their interests pending appeal. [Exc. 401] The survey provides a helpful depiction of the relationship between the various lands and rights-of-way at issue in this case. For ease of reference, the small-scale survey [Exc. 403] is attached to this brief as appendix A.

II. Facts

Nikishka Beach Road was constructed by a local homesteader, Mazzie McGahan, in the early 1950s. [Exc. 346; Tr. 442] The road extended from what was then the north terminus of the Kenai Spur Highway all the way to the beach. [Exc. 350-51; Tr. 439-40, 442, 527] Mr. McGahan built the road to give people access to the beach so they could reach their homesteads and fish sites. [Tr. 442-43, 505] As the road approached the bluff, it headed right (roughly to the northeast) as it descended down to the beach. [Exc. 408; Tr. 442, 505]

In August 1954, the federal Alaska Roadway Commission set survey stakes in Nikishka Beach Road. [Exc. 282, 521] Public authorities performed maintenance on that road with heavy equipment in the late 1950s. [Tr. 445-47] Shortly after statehood, the federal government quitclaimed its interest in all public highways to the State of Alaska. [Exc. 410, 415] The deed specifically mentions Nikishka Beach Road: "From a point on FAS Route 490 approx. 15.5 miles north of the Village of Kenai, north to Nikishka Beach. Length 0.8 miles." [Exc. 415] The underlying section 36, which was school trust land, was conveyed to the state on the date of statehood, and a patent was issued to the state in 1962. [Exc. 416]

In 1960, James Arness submitted an application to lease lands in section 36 in order to build a dock for loading freight and supplies. [Exc. 531] The application noted that the "Bureau of Public Roads" had installed a road to the beach across these lands. [Exc. 531] Mr. Arness entered into a five-year lease for Lot 3. [R. 814] He also applied for a permit to build a dock. [Exc. 533] Mr. Arness built the dock from 1960-

1961and built a road from Nikishka Beach Road southwards down to the dock in 1961. [Tr. 449-50] Once the south road was constructed, the public began to use it to access the beach both north and south of the dock, and the north road eventually fell into disrepair. [Exc. 351-52; Tr. 450]

In 1962, Mr. Arness entered into a lease for Lot 1. [Exc. 538] The lease specifically provided that the lessee "shall not prevent the public from using the Nikishka Beach Road." [Exc. 538] An appraiser's report for this lease states that the parcel is "traversed by the Nikishka #2 State road, which leads through subject and offers a road approach to the beach," and the report contains a drawing showing the road extending all the way to the beach. [Exc. 536-37]

In 1966 the Alaska Department of Highways began a project to widen a substantial portion of Nikishka Beach Road. [Exc. 347; 435-48] The tract description shows that the department sought to add roughly 4.7 acres to its existing right-of-way for Nikishka Beach Road, [Exc. 448] and the right-of-way map the department prepared for the project shows where the project expanded that existing right-of-way. [Exc. 435-38] The project stops short of the bluff overlooking the beach. [Exc. 438] The map also shows narrower routes extending from the project area: two of these are the north road and south road heading down to the beach. [Exc. 438] At trial, testimony showed that the department stopped the project short of the bluff at the request of Mr. Arness, who feared his heavy equipment would damage an improved road surface. [Tr. 456-61]

A few months after the department initiated this project, Mr. Arness renewed his lease for Lot 1 and entered into a lease for Lot 2. [Exc. 449, 453] Each

lease had a term of 55 years. [Exc. 449, 453] The lease for Lot 1 was "[s]ubject to a 60 foot wide right-of-way for existing roads to the beach." [Exc. 452] The lease for Lot 2 was also "[s]ubject to a 60 foot wide right-of-way for existing roads to the beach" as well as "Highway Right-of-Way Permit serialized ADL 32264," which is the permit for the road expansion project on Nikishka Beach Road. [Exc. 447, 453] The rights-of-way to which the leases are subject correspond to the highway portion of Nikishka Beach road and the narrower north access road that goes from the end of the highway, across Lot 1, and down to the beach. [Exc. 351]

Mr. Arness assigned his leases[3] to Foss Tug and Barge Co. in 1972. [Exc, 556] Foss Tug and Barge assigned the leases, still subject to the rights-of-way, to Jesse Wade in 1977. [Exc. 557-559]

In 1980, the state conveyed section 36 to the Kenai Peninsula Borough. [Exc. 468-69] The patent to section 36 lists specific encumbrances on the borough's title, including land leases and right-of-way permit 32264 (the highway right-of-way for Nikishka Beach Road). [Exc. 468] The patent also makes the borough's title to section 36 "subject to valid existing trails, roads, and easements." [Exc. 468] Finally, the patent states the borough's title is:

> 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

[3] In 1964 Mr. Arness had renewed his Lot 3 lease for a 55-year term, [Exc. 419] so that he had long-term leases to all three lots.

> 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. [Exc. 469]

The borough never identified the location of the easement or platted it.

In 1986 Mr. Wade assigned his leases in Lots 1, 2, and 3 to OSK. [Exc. 554-55, Exc. 560] OSK had already begun making substantial improvements to Lots 1, 2, and 3 by 1985. [Exc. 352] OSK improved the south access road, partially excavating the bluff to do so. [Exc. 352; Tr. 627-29] It also built a warehouse on the dock. [Exc. 352; Tr. 629] The warehouse blocked access to the beach north of the dock, so the public could no longer use the south road to access the beach north of the dock (but could still access the beach south of the dock). [Exc. 352; Tr. 335] OSK re-cleared the north access road in 1986. [Exc. 352; Tr. 631] The north road became the only access to the stretch of beach north of the dock, and the public began using it for that purpose as soon as it was constructed. [Exc. 352]

The borough quitclaimed its interest in Lots 1, 2, and 3 to OSK in 1990. [Exc. 488-90] At that point, OSK became the fee owner of those parcels. The public continued to use both the north and south roads to access the beach. [Exc. 352-53, 360; Tr. 652-54, 660-67, 672-78, 682-83] The state also periodically performed maintenance on Nikishka Beach road all the way to the beach, including cutting brush, blading the road, and installing a culvert on the North access road. [Tr. 351, 359-62]

Despite the public's long history of using Nikishka Beach Road to access the beach, in 2007 OSK blocked the public's beach access by erecting a guard shack

and gate across Nikishka Beach Road where the highway portion ends, before the "Y". [Exc. 348] Although the state informed OSK that it was illegally obstructing a public right-of-way, OSK did not remove the gate. [Exc. 348] The state filed suit in order to enforce the public's right to access the beach.

III. Proceedings

In May 2008 the State sued OSK to establish the public's right to traverse Nikishka Beach Road all the way to the beach. [Exc. 1] The state asserted that a right-of-way existed under: (1) Public Land Order 601[4] (a federal administrative order that withdrew lands for public rights-of-way in Alaska) and the state's 1980 patent to the borough; (2) R.S. 2477,[5] a federal law which authorized the creation of public rights-of-way by public use; and (3) a theory of prescription. [Exc. 4-9]

OSK answered and asserted counterclaims seeking declaratory judgment and to quiet title to its properties. [Exc. 58, 63] The borough moved to intervene, and the superior court granted limited intervention. [Exc. 68] The borough asserted that public rights-of-way to Nikishka Beach were created by Arness leases and then incorporated into the state's patent of section 36 lands to the borough. [Exc. 70-74]

All parties moved for summary judgment. [Exc. 112, 127, 158] The superior court granted partial summary judgment in favor of the state and borough, ruling that: (1) the state's and borough's claims are not barred by the doctrine of laches

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[4] Reserving Public Lands for Highway Purposes, 14 Fed. Reg. 5048 (Aug. 10, 1949).

[5] Act of July 26, 1866, Ch. 262, § 8, 14 Stat. 251, 253 (1866) (repealed 1976).

[Exc. 294-96] and (2) the doctrine of merger did not extinguish the state's interests in any rights-of-way [Exc. 298-301]. The superior court also ruled that the state possessed a public right-of-way in Nikishka Beach Road, but whether that right-of-way extended all the way to the beach was subject to a factual dispute. [Exc. 289-94]

After trial, the court ruled in favor of the state and borough, concluding that the public has a sixty foot-wide right-of-way across on the north road and a fifty foot-wide right-of-way across the south road. [Exc. 344-63] The court also ruled that, in the alternative, the public had acquired an easement by prescription over both routes. [Exc. 359-61] Finally, the court ordered that the state's claims were not barred by quasi-estoppel. [Exc. 361-63] OSK now appeals the superior court's judgment.

STANDARDS OF REVIEW

Questions of statutory construction and whether a deed is ambiguous are questions of law, which this Court reviews de novo.[6]

This Court reviews the superior court's factual findings for clear error and will disturb those findings only when left "with a definite and firm conviction on the entire record that a mistake has been made."[7] The intent of the parties to a contract is a question of fact to be determined from the contract's language and extrinsic circumstances surrounding it.[8]

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6 *Cowan v. Yiesley*, --P.3d--, No. S-13380, 2011 WL 2084008 *4 (May 27, 2011); *Estate of Smith v. Spinelli*, 216 P.3d 524, 528 (Alaska 2009).

7 *Labrenz v. Burnett*, 218 P.3d 993, 997 (Alaska 2009).

8 *K&K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 712 (Alaska 2003).

In determining whether an easement by prescription was created, whether a use is with permission or by acquiescence is a factual question reviewed for clear error.[9]

Whether quasi-estoppel applies is a legal question that is reviewed de novo.[10] Whether a party's claims are barred by the doctrine of laches is a question committed to the discretion of the trial court.[11]

ARGUMENT

I. The Public Has the Right To Use the North and South Access Roads To Get To Nikishka Beach.

The public has used Nikishka Beach Road to get to the beach continuously for almost fifty-five years. Testimony of area residents and even OSK's own employee show that it did not even occur to people that the last stretch of Nikishka Beach Road leading down to the beach might be a private road subject to OSK's control until OSK blocked the road in 2007. [Tr. 652-54, 660-62, 677-78, 682-83]

The public has a right to travel Niksihka Beach Road all the way to the beach because both federal and state authorities have created a public right-of-way that provides beach access. First, federal authorities established Nikishka Beach Road as a

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9 *See McDonald v. Harris*, 978 P.2d 81, 83 (Alaska 1999) ("The question of whether a claimant has satisfied the elements of a prescriptive easement is factual in nature. We will overturn such findings 'only if they are clearly erroneous.' " (quoting *McGill v. Wahl*, 839 P.2d 393, 397 n.10 (Alaska 1992))).

10 *See Labrenz v. Burnett*, 218 P.3d 993, 999 (Alaska 2009) ("[T]he superior court did not err when it declined to rule that the Burnetts' requested relief was barred by the doctrine of quasi or equitable estoppel.").

11 *See Keener v. State*, 889 P.2d 1063, 1066 (Alaska 1995) ("The trial court has broad discretion to sustain or deny a defense based on laches.")

public road to the beach pursuant to an order of the Department of the Interior authorizing creation of public highways in Alaska. Second, the state reserved a public right-of-way to the beach when it leased to James Arness shorefront property which the road traversed. [Exc. 452-53, 538] When the state later transferred ownership of those underlying lands to the borough, it made the borough's title subject to that existing right-of-way. [Exc. 468-69] Third, the state also reserved a fifty foot-wide public right-of-way to the shoreline when it conveyed those lands to the borough. [Exc. 469]Therefore, when the borough quitclaimed Lots 1, 2 and 3 to OSK, [Exc. 488-90] OSK's ownership of those parcels was subject to the three public rights-of-way giving beach access.

Alternatively, the public obtained an easement by prescription due to its continuous and adverse use of the north and south roads from the date OSK became owner in 1990 to the date it closed off access in 2007. Either way, the public has a right to get to Nikishka Beach across these roads.

A. The State Reserved a Public Right-of-Way to the Beach When It Conveyed Section 36 to the Borough, and the Superior Court Did Not Err in Locating the Right-of-Way on the Existing Route of Nikishka Beach Road.

The superior court ruled that the state reserved a fifty foot-wide right-of-way for public access to the beach when it conveyed section 36 lands to the borough. [Exc. 469] AS 38.05.127 requires that the state, before disposing of land adjacent to a navigable body of water, must "provide for the specific easements or rights-of-way, or both, reasonably necessary to insure free access to and along the body of water, unless the department finds that regulating or limiting access is necessary for other beneficial

uses or public purposes."[12] The statute is "a clear indication of the public's concern for the preservation of public access rights to all navigable waters."[13] The superior court observed that the easement "pursuant to this statutory mandate was the most specific easement identified in patent 5124" and ruled that this easement traversed both the north and south roads down to the beach. [Exc. 357-59] The court's ruling is correct.[14]

The state's patent to the borough reserved two easements. It reserved a fifty-food wide easement along the ordinary high water mark of Cook Inlet (a "shoreline easement") and a fifty foot-wide public access easement extending from a point on the land to the first easement (an "access easement"). [Exc. 469] The patent did not specify the exact location of the access easement. Rather, the patent provided that the borough was to identify the easement, plat it, and notify the state of its location:

> Said public access easement shall be identified by the Grantee and shall be subject to the convenant 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. [Exc. 469]

The borough never platted the easement, but the superior court rejected OSK's argument that this failure negated the easement's existence. [Exc. 357] The superior court concluded instead that the borough's failure to locate and plat created a cloud on

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12 AS 38.05.127 was enacted in 1976. Ch. 117, §2, SLA 1976.

13 *CWS Fisheries, Inc. v. Bunker*, 755 P.2d 115, 1120 n.12 (Alaska 1988).

14 The court ruled that although only one easement was access easement was reserved by the patent, an easement traveled down both the north and south access roads because OSK's dock blocked the public's passage across the beach, [Exc. 359] an easement for which was also reserved in the patent. [Exc. 469] Without access easements on either side of the dock, the public would be cut off from one section of the beach. OSK does not challenge this portion of the court's ruling.

OSK's title, and the court then located the access easement on the current route of the North access road. [Exc. 357. 359] The superior court did not err in ruling that an easement exists or in locating the easement: when a conveyance gives the owner of the servient estate the authority to locate the easement and it fails to do so within a reasonable time, the owner of the dominant estate may resort to judicial proceedings to locate the easement.[15]

> The Restatement of Property: Servitudes provides:
>
> Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows: (1) The owner of the servient estate has the right within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude. . . .[16]

When the state conveyed section 36 to the borough, the state gave the borough the power to choose where on that property the access easement would be located. [Exc. 469] Neither the borough nor OSK, the borough's successor-in-interest, ever formally identified where the easement should be. "If the servient owner"—in this case, the borough and then OSK—"fails to designate a suitable location within a reasonable time after requested to do so, the owner of a servitude may proceed to locate it. . . . If necessary, the parties may resort to legal proceedings in which a location should be selected . . . ."[17] This is exactly what happened in this case. Because neither the borough nor OSK located the access easement or initiated proceedings to plat it, the state could request the court to determine the easement's location.

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15 RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8 cmt. B (2000).

16 RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8 (2000).

17 RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8 cmt. B (2000).

OSK argues that the language of the patent creates an executory duty to identify and plat the easement and that until this duty is carried out, the easement cannot be imposed on OSK's lands. [App. Br. 44-46] But this is not a reasonable interpretation of the patent or of AS 38.05.127: giving the owner of the servient estate the power to prevent the easement from ever coming into being simply by failing to locate the easement would defeat the state's purpose of ensuring public access to the shore.

"The proper first step in deed construction is to look to the four corners of the document to see if it unambiguously presents the parties' intent . . . . If a deed when taken as a whole is open to only one reasonable interpretation, the interpreting court need go no further. Whether a deed is ambiguous is a question of law."[18] The patent expressly reserves the access easement in order to give the public access to the shoreline. It would not make sense for the state to intend that the easement arises only when the borough (or a private party to whom the borough might convey the land) decides to formally locate and plat the easement. If that were the case, the borough—or a private company like OSK—could prevent the easement from ever coming into being, frustrating the state's purpose of ensuring shoreline access. The state would not reserve an easement in the patent if it intended the landowner to have the power to decide whether the easement should even exist.

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[18] *Estate of Smith v. Spinelli*, 216 P.3d at 528.

Furthermore, the patent's language does not suggest that the existence of the easement is conditional.[19] It says that the easement "shall be identified" by the borough and "shall be subject to the convenant 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." [Exc. 469] The only thing that is arguably conditional is the borough's power to convey section 36 lands, which power is conditioned on locating and platting the easement. Absent conditional language, the patent cannot reasonably be interpreted to condition the existence of the access easement on the borough's locating and platting it. The only reasonable interpretation of the patent is that it created an easement of undetermined location and gave the borough the power to locate it. And because the borough failed to exercise that power within a reasonable time, the state may exercise it by asking the court to determine the easement's location.[20]

The court has the jurisdiction to do that. As comment the restatement recognizes, a court may determine the location of an easement when the conveyance creating the easement does not expressly establish its location.[21] This Court has

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19 *See* 26A C.J.S. *Deeds* § 377 (2011) (""In determining whether a condition is created, the terms of the deed are controlling. Conditions are imposed only by the express terms of the instrument, or by necessary implication from the language used, although technical words are unnecessary if a clear intent on the part of the grantor or of the parties appears . . . .").

20 RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8 cmt. b (2000).

21 *Id.*; *accord Davidson v. Ellis*, 98 P. 254, 256 (Cal. App. 1908) ("Whatever may be the effect of the nonlocation [of the right-of-way] for the period shown, as affecting the right of plaintiff to arbitrarily fix the same, the right to have a court of equity definitely locate the right of way exists, if plaintiff's right to fix has lapsed. The

remanded a case to the superior court with express instructions to determine the exact location of an easement whose existence was disputed.[22]

OSK argues that AS 38.05.127 does not authorize the superior court to declare an easement across its property. [Ae. Br. 46-48] This argument is misplaced because the court did not declare an easement pursuant to AS 38.05.127. The court ruled that state, pursuant to its statutory obligation under AS 38.05.127 to reserve shoreline access when disposing of state land, reserved a public access right-of-way in the patent to the borough: "The public access easement pursuant to this statutory mandate *was the most specific easement identified in Patent 5124*." [Exc. 357 (emphasis added)] The court then determined the location the easement reserved in the patent. [Exc. 359] OSK's jurisdictional argument is therefore meritless.[23]

B. The State Reserved a Public Right-of-Way to the Beach when It Leased Shore Lands to James Arness, and It Preserved this Right-of-Way when It Conveyed the Underlying Lands to the Borough.

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complaint states a cause of action therefore, and no uncertainty or ambiguity therein is manifest.").

[22] *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1022 (Alaska 1996) (ruling that public right-of-way was created pursuant to RS 2477 and remanding "the case to the superior court for a determination of the precise location and extent of the right-of-way").

[23] The superior court properly located the access easement on the site of the existing north and south access roads. As the superior court observed, AS 38.04.050 provides that an easement "shall be located to assure adequate and feasible access for the purposes for which the . . . easement was intended." Locating the easement on the site of the existing beach access serves the purpose of the easement. It is also consistent with the standards articulated in the Restatement of Property: Servitudes: "A location is suitable if it reasonably allows the purpose for which the servitude was acquired to be carried out while inflicting the minimum amount of damage on the servient estate." RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8 cmt. b (2000).

The superior court ruled that the public also has a sixty foot-wide roadway easement extending from the terminus of the state's paving project to the beach, following the route of the existing north access road. [Exc. 354] The state expressly reserved this right-of-way when it leased Lots 1 and 2 to James Arness. [Exc. 452-53] The court ruled that the state did not relinquish this right-of-way when it conveyed the underlying lands to the borough. [Exc. 354] The court found that although the exact route of the roadway shifted over time, the North access "is a continuation of the original Nikishka Beach Road" and "provides public access to the beach." [Exc. 353] OSK argues the superior court erred because: (1) the public right of way to Nikishka Beach was extinguished because the original north access road "ceased to exist"; (2) the state did not retain the right to enforce the right-of-way when it conveyed the underlying lands to the borough in 1980; and (3) the right-of-way was destroyed by merger of interest when the borough quitclaimed the underlying lands to OSK in 1990. [App. Br. 38-44] OSK's arguments are unavailing.

1. The public right-of-way reserved in the state's leases to Arness never expired.

The public right-of-way reserved when the state leased Lots 1, 2, and 3 to James Arness were not extinguished when the public began accessing the beach primarily by using the south access road and the north access road fell into disuse. OSK argues that the public right-of-way reserved by the Arness leases expired according to the terms of the lease when the north access road to the beach ceased to exist—in other words, the right-of-way was conditioned on the physical road's existence. [App. Br. 38-

40] This argument is incorrect for two reasons: (1) OSK's interpretation of the reservation is contrary to its language and to evidence of the parties' intent; (2) even if the original north access road had ceased to exist, that was because Mr. Arness and the public relocated the public's right-of-way to the nearby South access road. For these reasons, the public's right-of-way continued to exist even though its original route fell into disrepair.

First, OSK's argument that the parties intended the "right-of-way for existing roads to the beach" to expire if the road ceased to exist is contrary to a commonsense reading of the provision's text and extrinsic evidence of the parties' intent.[24] What the phrase "a right-of-way for existing roads to the beach" means is that the parties intended to create a right-of-way on the existing road, not in a new location. There is no conditional language (for example, "so long as the road to the beach exists") that would indicate the right-of-way is conditioned on the road's physical existence. Nor would it make sense for the state to condition public access to the beach on a road's physical existence: if the road were destroyed by storms, erosion, or even the lessee's own construction, the public would lose beach access. That cannot be what the state intended. Rather, evidence that the public continued to access the beach, albeit by a

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[24] The superior court did not expressly rule on the intent of this provision, and the intent of the parties to a contract is a question of fact to be determined from the contract's language and extrinsic circumstances surrounding it. *K&K Recycling, Inc.*, 80 P.3d at 712. However, "the words of the contract are nevertheless the most important evidence of intention," *id.*, and OSK does not present any extrinsic evidence showing that the parties intended the easement to expire if the roadway were destroyed. [App. Br. 38-40] This Court may therefore determine the parties' intent from the terms of the lease.

different route, [Tr. 507-10] that when OSK re-cleared the north access road, the public began to use that route again, [Exc. 352-53] and that the state performed maintenance on the re-cleared north road [Tr. 351, 359-62] shows the parties intended public access to the beach to continue even if the roadway on which the right-of-way was originally located ceased to exist.

Second and just as importantly, the court did not actually find that the road ceased to exist; it found that the road "fell into disrepair and became overgrown with alders" and that "over time, use of the original roadway was discontinued in favor of easier access down the better maintained Dock Access Road as a new access to north beach." [Exc. 351-52] Thus, OSK's argument that the right-of-way for "existing roads" expired because the road no longer existed fails because the court never found that the road ceased to exist.

What the court actually found was that the location of the public right-of-way to the beach shifted from the north access road to the south access road. [Exc. 352] The court concluded that Mr. Arness, as owner of the servient estate, had made a reasonable change in the easement's location, as permitted by section 4.8 of the Restatement of Property: Servitudes.[25] OSK argues that this conclusion is clearly erroneous because Mr. Arness did not construct the South access road for public use—he constructed it to access his dock. [App. Br. 37] However, the fact that Mr. Arness originally constructed the road for a private purpose does not mean that he did not agree to permit public use of the road. The superior court's conclusion that he *did* intend to

[25] *See also* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8 cmt. f (2000).

allow public use of the road is well-supported by evidence that he instructed his employees to clear debris so that people could travel down the south road and then access the north beach off the dock. [Tr. 507-510] This is consistent with the restatement's rule permitting the servient estate owner to unilaterally relocate the easement. And even if section 4.8's rule of unilateral relocation does not apply in Alaska, it is well-established that the parties can relocate an easement by mutual consent.[26] Such consent may be implied from the parties' actions, "such as when an easement holder uses a new location established by the owner of the servient estate or when a landowner stands by while the easement holder utilizes a new route."[27] The superior court's findings that Mr. Arness agreed to the public's using the South access road to get to the beach and that the public did so are as consistent with a finding of mutual relocation as they are with a finding of unilateral relocation. Whichever law is applied, the superior court's finding that the location of the public right-of-way to the beach changed is not clearly erroneous.

By relocating the easement, the public and Mr. Arness preserved the public right-of-way to the beach even though the road bed it originally followed fell into disrepair. The right-of-way thus existed at the time the state conveyed section 36 to the borough "subject to valid existing trails, roads, and easements." [Exc. 468] The public right-of-way was therefore preserved by the express terms of the patent.

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[26] John W. Bruce & James W. Ely, THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:15 (2001).

[27] *Id.*

2. When the state conveyed section 36 to the borough, the state retained the power to enforce its rights in the public right-of-way to the beach.

The superior court correctly concluded that the state retained its rights and the public's rights in the right-of-way to the beach when the state conveyed section 36 to the borough: "the State made it clear to the public that it was not relinquishing any easements by explicitly stating the patent was 'subject to valid existing trails, roads, and easements.' " [Exc. 354] OSK argues that this provision in the patent was not intended to preserve the state's right to the public right-of-way to the beach; [App. Br. 40-42] it was intended merely to indicate that the patent was not disturbing the existing rights of lessees or other rights potentially in existence but not mentioned in the patent. [App. Br. 41] OSK's interpretations of the patent are not reasonable.[28]

According to OSK, if the state had wanted to retain rights in the public right-of-way, the state would have specifically used the term "reservation," as it did in the case of the statutory shoreline and access easements, rather than the term "subject to." [App. Br. 40-41] The meaning of those terms does not support OSK's argument. The parties used the term "reservation" with respect to the statutory shoreline and

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[28] As noted above, the first step in unambiguously presents the parties' intent"; if the deed "is open to only one reasonable interpretation, the interpreting court need go no further. *Estate of Smith v. Spinelli*, 216 P.3d at 528.

[28] *See* BLACK'S LAW DICTIONARY 1473 (4th interpreting a deed is to examine "the four corners of the document to see if it unambiguously presents the parties' intent"; if the deed "is open to only one reasonable interpretation, the interpreting court need go no further. *Estate of Smith v. Spinelli*, 216 P.3d at 528.

access easements because they were creating those easements in the patent.[29] The parties used the term "subject to" with respect to existing roads and easements because those interests did not need to be created; they already existed. By making the patent conveyance subject to those interests, the parties made the borough's title "subordinate, subservient, inferior" to those interests.[30]

Moreover, the notion that the state made the patent subject to existing roads and easements solely to preserve its lessees' rights is not reasonable because the state separately addressed the rights of its lessees elsewhere in the patent. [Exc. 468] The state's patent was expressly subject to the 1966 leases to Arness of Lot 1 (lease no. 02844) Lot 2 (lease no. 21879), and Lot 3, as well as to several other leases. [Exc. 449, 453, 468] OSK's interpretation that the state made the patent subject to existing roads and easements solely in order to preserve lessee's rights would render the clause in question superfluous.

OSK's second proffered interpretation, that the state made the patent subject to existing roads and easements so as not to disturb other unmentioned rights that may exist, suffers from the same flaw. As OSK observes, the state's patent operates as a quitclaim deed.[31] [App. Br. 40] A quitclaim deed "merely conveys

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[29] *See* BLACK'S LAW DICTIONARY 1473 (4th ed. 1968) ("RESERVATION. A clause in a deed or other instrument of conveyance by which the grantor creates, and reserves to himself, some right, interest, or profit in the estate granted, which had no previous existence as such, but is first called into being by the instrument reserving it; such as rent, or an easement.").

[30] BLACK'S LAW DICTIONARY 1594 (4th ed. 1968).

[31] *Ellingstad v. State, Dept. of Natural Res.*, 979 P.2d 1000, 1006 (Alaska 1999).

whatever interest the State has in the land."[32] If other rights or interests in the land exist, they are not destroyed by the quitclaim deed, as they might be by a warranty deed. A provision stating that a quitclaim deed is not disturbing existing rights would thus be superfluous.

The only reasonable interpretation of the provision making the patent "subject to valid existing roads, trails, and easements" is that the state intended the borough's interest in section 36 to be subordinate to existing easements and roads, including the 60 foot-wide right-of-way leading down to the beach that it had reserved, even if the conveyances creating those easements were destroyed. If the state intended to preserve the public rights-of-way contained in the Arness leases only so long as the leases themselves continued to exist, it would have been sufficient to make the patent subject only to the leases. But the state did not do that—in addition to making the patent subject to the leases, it also made it subject to valid easements and roads. Therefore the superior court correctly concluded that the patent retained the state's and the public's rights to use and enforce the right-of-way to the beach.

3. Because public enjoys the benefit of the right-of-way to the beach, the right-of-way was not extinguished when OSK acquired fee title to the underlying lands: the burdens and benefits of the easement were not unified in a single owner.

The superior court correctly ruled that the public right-of-way was not extinguished under the doctrine of merger when OSK acquired fee title to Lots 1, 2, and 3 in 1990. [Exc. 353]

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32 *Id.*

Easements are extinguished "when all the benefits and burdens come into a single ownership."[33] In this case, the benefits and burdens of the public right-of-way never came into a single ownership because the benefit is held by the state and the public. Unless the parties indicate otherwise, "the right to control a servitude for the benefit of the public is located in the state and the right to use the servitude benefit extends to the public at large."[34] As discussed above, the state made the borough's title subject to existing easements, including the public right-of-way to Nikishka Beach. [Exc. 468] When the borough quitclaimed fee title to OSK in 1990, that title was subject to this easement because the borough could convey only the interest that it had.[35] The public still held the benefit of the right-of-way that burdened OSK's land. Since the burdens and benefits of the easements were owned by different parties, no merger of interest occurred.

OSK argues that because it acquired both the lessor's and tenant's interest in Lots 1, 2, and 3, the leases to those properties were extinguished and, with them, the public right-of-way to Nikishka Beach they reserved. [App. Br. 43] However, the patent made the borough's title to those lands subject to existing roads and easements independently of the burden the Arness leases imposed. Because the borough's title *was* subject to existing rights-of-way, including the public's right-of-way to Nikishka Beach, [Exc. 468] merger of the lessor's and tenant's interests in Lots 1, 2, and 3 did not extinguish the public's right to enjoy that right-of-way.

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33 RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.5 (2000).

34 RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.18 (2000).

35 *See Ellingstad*, 979 P.2d at 1006.

For the foregoing reasons, the superior court correctly ruled that the public right-of-way to Nikishka Beach created in the leases to Mr. Arness survived the change in route from the North access road to the South access road, was incorporated into the state's conveyance of the underlying lands to the borough, and thus was not destroyed by the doctrine of merger when OSK acquired fee title to those underlying lands. The court's ruling that the public is entitled to a sixty foot-wide right of way from the terminus of the highway portion of Nikishka Beach Road, across the current location of the North access road, and down to the beach should be affirmed.

C. A Public Right-of-Way Extending All the Way to the Beach Was Created In Territorial Days, Conveyed by the Federal Government to the State of Alaska, and Still Exists Today.

The superior court found on summary judgment that by 1954, Nikishka Beach Road was established as a federal roadway. [Exc. 283] It also found that the federal government granted Nikishka Beach Road to the state for highway purposes. [Exc. 290-91] The court reserved judgment until trial on the question of whether this right-of-way extended all the way to the beach. [Exc. 292] After trial, the superior court concluded that since before statehood there has been a right-of-way that travels over what is now Lots 1 and 2 for access to the beach, basing its conclusion on testimony of people familiar with the original Nikishka Beach Road, a 1963 survey, Mr. Arness's lease applications referring to a road to the beach, and the Arness leases themselves, which are subject to a right-of-way for beach access. [Exc. 350-51] Therefore, the court found that the north access road is a continuation of the original Nikishka Beach Road, "taking into consideration changes to the topography occasioned by construction of the

dock and other environmental factors over the years." [Exc. 353] The court's rulings are correct.

When Mazzie McGahan built Nikishka Beach Road, he constructed it all the way to the beach so that people could access their fish sites and homesteads along the shore. [Exc. 350-51; Tr. 439-40, 442-43, 505, 527] Nikishka Beach Road was made a public right-of-way shortly after it was constructed, when workers for the Alaska Road Commission (a federal agency within the Department of Interior) set survey stakes in the road in accordance with DO 2665, which set standards for creating public rights-of-way in Alaska.[36] [Exc. 282, 521] The federal government conveyed this right-of-way, along with all other public right-of-ways in Alaska, to the State of Alaska shortly after statehood. [Exc. 410, 415] Therefore, a public right-of-way existed for the entire length of Nikishka Beach Road, from the Kenai Spur Highway to Nikishka Beach.

OSK argues that the federal government never created a public right-of-way across section 36 because the federal government had earlier reserved section 36 as school trust lands for Alaska and because the Alaska Road Commission did not comply with the technical requirements of DO 2665. [App. Br. 29, 33] OSK then argues that the federal quitclaim deed specifically referring to Nikishka Beach Road did not actually convey Nikishka Beach Road to the state. [App. Br. 31-32] Finally, OSK argues the government did not convey the entire length of the roadway, conveying

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[36] Rights-of-Way for Highways in Alaska, 16 Fed. Reg. 10752 (Oct. 19, 1951).

instead a right-of-way that stopped short of the beach. [App. Br. 34-36] All these arguments are incorrect.

1. A public right-of-way pursuant to DO 2665 was established on section 36 even though it was reserved for school lands, because the reservation was only "from sale or settlement".

Although the federal government reserved section 36 for the support of the Territory of Alaska's schools, this reservation did not prevent the same federal government from later creating a public highway on section 36 pursuant to an administrative order authorizing it to create public highways across public lands in Alaska. First, the reservation for school lands is a reservation only from "sale or settlement"; building a public road is neither. Second, the general rule that laws authorizing disposal of the public lands do not apply to lands already reserved for specific purposes is not applicable here because the federal government's creating a public road on its own property is not the kind of disposal the rule was developed to target.

a. Creating a public right-of-way across section 36 was not barred by, and is consistent with, the terms of the reservation for school lands.

In 1915, the federal government enacted a law providing that when the Territory of Alaska's public lands were 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 of Alaska."[37]

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[37] Act of March 4, 1915, Pub. L. No. 63-180, 38 Stat. 1214 (1915).

DO 2665 reserves an easement for public roads.[38] Creating an easement for a public road is neither sale nor settlement. In *State v. First National Bank of Anchorage*, this Court observed in a footnote that PLO 601 (the predecessor to DO 2665) did not reserve a right-of-way for a public highway across lands that had been reserved for military purposes.[39] That decision does not control here because the order creating the military reservation withdrew the subject lands "from all forms of appropriation under the public land laws."[40] By its own terms, the military reservation forbade subsequent appropriations of that land. By contrast, the school lands reservation bars only "sale or settlement." The terms of the reservation thus do not prevent the federal government from creating a public right-of-way across its own land.

Creating a public right-of-way across section 36 is actually consistent with the purposes of the reservation. Congress intended, in reserving school lands, to give the territory (and later the state) a source of revenue to fund its public schools.[41] For this reason, the Alaska school lands act provided that the territory could lease school

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38 16 Fed. Reg. 10752 § 2.

39 689 P.2d 483, 486 n.10 (Alaska 1984).

40 *Id.* at 484.

41 *See Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1072-73 (9th Cir. 2010) ("Given . . . the Congressional intent of enabling the state to use school lands as a means of generating revenue . . . .") (quoting *Utah v. Andrus*, 486 F. Supp. 995, 1002 (D. Utah 1979)). The United States reserved lands in the Western states for the support of those states' public schools because so much of the land within the western states was public land not subject to taxation; western states would otherwise not have an adequate property tax base to fund their schools. *State of Utah, Division of Lands v. Kleppe*, 586 F.2d 756, 758 (10th Cir. 1978), *judgment reversed on other grounds*, 446 U.S. 500 (1980). "The specific purpose was to create a binding permanent trust which would generate financial aid to support the public school systems of the 'public land' states." *Id.*

lands to individuals or businesses.[42] Creating a public road through section 36 increases the value of that land to individuals and businesses and, consequently, to the state.[43] Because creating a public right-of-way across section 36 is not barred by the terms of the reservation and in fact furthers the reservation's purpose, the reservation did not bar the federal government from making Nikishka Beach Road a public right-of-way.

b. The rule that laws providing for the disposal of public lands do not apply to reserved lands does not apply when the law in question authorizes the federal government to create a public road across its own land.

OSK's argument that DO 2665 did not apply to section 36 is premised on the general rule that "statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose."[44] [App. Br. 29-31] However, the disposal DO 2665 authorizes—the government's creating a public right-of-way on its own land—is not the type of disposal to which this rule has been, or should be, applied. Rather, this rule has been applied to statutes that that open up federal lands to the acquisition of state or private rights.[45]

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[42] *Id.* § 1 ("*Provided further*, That the Territory may, by general law, provide for leasing said land in area not to exceed one section to any one person, association, or corporation for not longer than ten years at any one time . . . .").

[43] *Cf. Lyon*, 626 F.3d at 1073 ("In granting lands to a state for the purpose of funding schools, the federal government must have intended some right of access to the land or the purpose of the land grant would fail.").

[44] *Fed. Power Comm'n v. Oregon*, 349 U.S. 435, 448 (1955).

[45] *See Fed. Power Comm'n*, 349 U.S. at 447-48; *United States v. Minnesota*, 270 U.S. 181, 202 (1926).

In *Federal Power Commission v. Oregon*, the Supreme Court held that the State of Oregon lacked the authority to veto a hydroelectric project spanning the Deschutes River, since each terminus of the dam was located on a federal reservation (an Indian Reservation and a reservation for power purposes).[46] The Court applied the rule in rejecting the state's argument that the Desert Land Act, which provided that water rights on public lands "were to be acquired in the manner provided by the law of the State of location" applied to these reserved lands and gave the state jurisdiction over water rights on those lands.[47] In *United States v. Minnesota*, on which OSK also relies, the Court applied the rule in holding that the Swamp Lands Act, by which Congress granted to the states "the whole of the swamp lands therein remaining unsold," did not apply to land reserved for several Indian tribes.[48] In *Wilcox v. Jackson*, the decision first establishing the rule OSK cites, the court held that a settler who established a homestead on military land near Chicago had no rights to the property, because the act under which he claimed title did not operate on lands reserved by the federal government.[49] In each case, permitting disposal of rights in land to the states or to private individuals could have frustrated the purpose of the reservations. If the states or private individuals gained property interests in reserved lands, the federal government

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46 *Fed. Power Comm'n*, 349 U.S. at 437-39.
47 *Id.* at 448.
48 270 U.S. at 201, 206.
49 38 U.S. 498, 510-11, 513-14 (1839).

lost some power to ensure the reservation would serve its intended purpose.[50] The rule applied in *Wilcox*, *United States v. Minnesota* and *Federal Power Commission* averts that potential harm.

Because DO 2665 does not authorize the kind of disposal at issue in those cases, it does not threaten the kind of harm justifying the rule they apply. Although creating a public right-of-way does dispose of an interest in the land by giving the public at large the benefit to use it, the government retains the right to control the servitude.[51] The government thus retains the right to manage and, if warranted, terminate the servitude.[52] For this reason, it retains the power to ensure use of the public right-of-way on reserved lands is consistent with the purpose of the reservation, a power it does not retain when transferring rights in reserved land to the states or private parties. Because DO 2665 authorizes the government to create public rights-of-way,[53] it does not create the kind of disposal that would threaten reserved lands.

The federal government can build roads across reserved federal lands in a way that ensure the purposes of its reservations are protected. And when private parties build a road themselves, as was the case when Mazzie McGahan built Nikishka Beach Road, [Exc. 346] the federal government can decide whether or not to adopt it as a public right-of-way, depending on whether the road serves or frustrates the reservation's

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50 *See id.* at 514 ("The right of preemption was a bounty extended to settlers and occupants of the public domain. We cannot suppose that this bounty was designed to be extended at the sacrifice of public establishments, or great public interests.").

51 RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2:18 (2000).

52 *Id.* § 2:18 cmt. b.

53 16 Fed. Reg. 10752.

purpose. Creating a public right-of-way is not the kind of disposal to which cases have applied the "*Wilcox* rule," and the policy behind that rule does not apply. Therefore, DO 2665 authorized the federal government to establish a public right-of-way across section 36 even though the section was reserved for the financial support of public schools.

2. Nikishka Beach Road became a public right-of-way even if the Alaska Road Commission did not post notices indicating how wide it was.

OSK argues that Nikishka Beach Road never became a public right-of-way pursuant to DO 2665 because there is no evidence that the Alaska Road Commission posted notices along its route. [App. Br. 33] DO 2665 provides that an easement "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."[54] The apparent purpose of the staking and posting requirements is to give public notice of the width of public rights-of-way and that the road in question is a public road.[55] Placing survey stakes in the ground effectively accomplishes both purposes: one can determine the width of the road by looking at the stakes, and one is placed on notice that the authorities are treating the road as public. Since the road commission's placing survey stakes in the ground [Exc. 521] accomplished the purpose

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[54] 16 Fed. Reg. 10752, § 3(c).

[55] *See State v. Alaska Land Title Ass'n*, 667 P.2d 714, 722 (Alaska 1983) ("One purpose of DO 2665 was to define . . . the width of roadway easements . . . which would be created in the future by the construction of new roads.").

of DO 2665's procedural requirements, any failure to also post notices on the route should not frustrate the government's intent to make Nikishka Beach Road a public right-of-way.

3. The federal government conveyed Nikishka Beach Road to the state.

In June 1959, a few months after Alaska became a state, the federal government quitclaimed all its rights, title, and interest in public highways in Alaska to the state. [Exc. 410] The quitclaim deed includes a schedule that specifically mentions Nikishka Beach Road. [Exc. 415]

OSK argues that no interest in section 36 passed to the state pursuant to this quitclaim deed. [App. Br. 31-32] It is unclear whether OSK means to argue that the quitclaim deed did not effectively convey the public right-of-way for Nikishka Beach Road or that the patent's silence is evidence that no such public right-of-way ever existed, but both arguments are unavailing.

The quitclaim deed effectively conveyed the public right-of-way from the federal government to the state. As discussed above, when a public right-of-way is created, the right to enjoy its benefits rests in the public.[56] A servitude that runs with the land, like a right-of-way, passes automatically with the land when ownership changes hands.[57] Thus, when title to school trust lands passed to the state on the date of

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56 Restatement (Third) of Property: Servitudes § 2.18 (2000).

57 *Id.* § 1.1 cmt. b.

statehood,[58] under normal property rules the lands passed subject to valid interests in them, such as public rights-of-way. The statehood act specifically provides that transfer of school trust lands to the state "shall not affect any outstanding lease, permit, license, or contract issued under section 1 [of the school lands act], or any rights or powers with respect to such lease, permit, license, or contract."[59] It would be incongruous for Congress to intend that those interests be preserved, but that public roads which make those interests useful be destroyed. Moreover, a federal patent operates as a quitclaim deed; it conveys only whatever interest the government has in the subject property.[60] Unless the government had terminated the public's right to use Nikishka Beach Road, the interest it conveyed through a quitclaim deed is subject to that right.

As the superior court found, the patent's silence about a public right-of-way across section 36 is not evidence that the public right-of-way never existed. [Exc. 291 n.66] The patent was not issued until April 1962, [Exc. 416-17] almost three years after the federal government conveyed its interest in all highways to the state. [Exc. 410] In 1962, the federal government no longer had any rights in public roads in Alaska, so it is not surprising that no roads are mentioned in the patent.[61]

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58 Alaska Statehood Act, Pub. L. No. 85-105, § 6(k), 72 Stat. 339 (1958).

59 *Id.*

60 *Ellingstad*, 979 P.2d at 1006 ("In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quit-claim, or rather of the conveyance of such an interest as the United States possessed in the land . . . .") (quoting *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491 (1866)).

61 OSK also cites, as evidence that the federal government never established a public right-of-way for Nikishka Beach Road, a memorandum produced in 1964 by an assistant attorney general concluding that DO 2665 did not apply to lands reserved for support of public schools. [Exc. 433-34] A state official's belief to that effect does not

Since the federal government established a public right-of-way on Nikishka Beach Road, its conveyance of all roads to the state included Nikishka Beach Road.

4. The federal government transferred the entire road, including the last several hundred feet, to the state.

The superior court OSK argues that even if a public right-of-way was created by the federal government and conveyed to the state, the right-of-way did not extend all the way to the beach. [Exc. 34-36] It argues that because the quitclaim deed describes Nikishka Beach Road as "[f]rom a point on [Kenai Spur Road] . . . north to Nikishka Beach, 0.8 mile," and 0.8 miles from Kenai Spur Road falls short of the beach, Nikishka Beach Road as conveyed by the federal government does not extend all the way to the beach. [App. Br. 34-36] OSK does not specify whether its argument is based on an assertion that the original road constructed by Mr. McGahan and staked by the roadway commission did not extend to the beach, or that this road did go to the beach but the federal government did not convey the entirety of the road when it quitclaimed all interests in public roads to the state. [App. Br. 35-36] Neither argument is meritorious.

The superior court found that the original Nikishka Beach Road, built in territorial days, extended all the way to the beach. [Exc. 350-51] This finding is not

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mean that DO 2665 didn't apply. The state has explained why DO 2665 created a public right-of-way across section 36, and any contrary belief held by some state officials does not change that analysis. Moreover, by 1992 the state was of the belief that the federal government had effectively created a right-of-way on Nikishka Beach Road and conveyed it to the state. [Exc. 561-562].

clearly erroneous. It is supported by the testimony of Mr. McGahan's relatives, who lived in the area prior to statehood. [Tr. 439-40, 44-432, 505, 527] It is supported by a survey performed for Mr. Arness in 1963, which shows Nikishka Beach Road forking in Lot 1 into the south road to the dock and the north road heading to the beach. [Exc. 418] It is supported by the U.S. Department of Commerce's 1957 vicinity map for the North Kenai area, which shows Nikishka Beach Road going to the beach. [Exc. 408] And it is supported by Mr. Arness's 1960 lease application, [Exc. 531] the appraisal report prepared for that lease, [Exc. 536-37] and the original lease for Lot 1 stipulating that Mr. Arness shall not prevent the public from using Nikishka Beach Road, [Exc. 538] and the 55 year leases for Lots 1 and 2, which are expressly subject to existing roads to the beach. [Exc. 452, 453] The only contrary evidence OSK presents is testimony from Mr. Arness's widow and son, who wouldn't say that the north road didn't exist, but just didn't recall. [Tr. 709, 720] The Alaska Road Commission's report expressly states that the commission placed survey stakes in the road to station 45+00, [Exc. 521] which is well beyond station 41+00, which was the end of the 1966 highway expansion project. [Exc. 404] The court's finding that the road extended to the beach and that the entire road was made a public road by the federal government [Exc. 350-51] is not clearly erroneous.

The argument that the federal government did not deed the entire road to the state, but rather deeded only 0.8 miles of road, is meritless. "If a deed when taken as a whole is open to only one reasonable interpretation, the interpreting court need go no

further."[62] The notion that even though the federal government expressly conveyed "all rights, title, and interest of the Department of Commerce in and to all of the real properties . . . held, administered, or used by the Department of Commerce in connection with the activities of the Bureau of Public Roads in Alaska," including highways, [Exc. 410] it specifically intended to convey most of Nikishka Beach Road to the state but to reserve to itself the final few hundred feet, is nonsensical. The length of every roadway conveyed by the federal government to the state is described in terms of tenths of a mile. [Exc. 410] It is not reasonable to think that every road in Alaska except Nikishka Beach Road ends on the exact tenth of a mile, nor is it reasonable to think that the federal government conveyed most of every road in Alaska except the last few feet. The only reasonable interpretation is that the description of length, 0.8 miles, is an approximation and does not define the exact interest conveyed. The deed thus unambiguously quitclaims the entire Nikishka Beach Road—which the superior court correctly found extended all the way to the beach—to the state.

D. Alternatively, the Public Acquired a Right-of-Way to the Beach Across the North and South Access Roads By Continuous, Notorious, and Adverse Use of Those Roads Since 1990.

The superior court found clear and convincing evidence that the public acquired a right-of-way to Nikishka Beach by prescription. [Exc. 359-61] The court found that the public's use of both the North and South access roads was continuous, uninterrupted, and visible to OSK for at least ten years. [Exc. 360] The court also found that the public's use of the roads was adverse to OSK: the public did not use the roads

62 *Spinelli*, 216 P.3d at 528.

under permission from OSK, but rather with OSK's acquiescence. [Exc. 360-61] OSK contests only the "adverse" element of the court's finding. [App. Br. 52-54]

To establish prescription, the adverse possessor "must show that he acted as if he were the owner and not merely one acting with the owner's permission."[63] "If the true owners merely acquiesce, and do not intend to permit a use, the claimant's use is adverse and hostile."[64] Whether a use is with permission or by acquiescence is a factual question reviewed for clear error.[65]

"[T]he key difference between acquiescence by the true owner and possession with the permission of the true owner is that a permissive use requires the acknowledgement by the possessor that he holds in subordination to the owner's title."[66] The superior court's finding that OSK acquiesced in the public's use is well-supported by the evidence. The testimony of area residents shows that they did not believe they had to ask OSK's permission to use the dock; they testified it was their right to traverse the south and north access roads to get to the beach. [Tr. 660-62, 677-78, 682-83] As the superior court points out, when OSK was assigned the Arness leases, OSK was obliged under those leases to provide public access to the beach; once OSK acquired fee title to the underlying lands and the leases were extinguished, it did nothing to alert the

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63 *Swift v. Kiffen*, 706 P.2d 296, 303 (Alaska 1985).

64 *Tenala Ltd. v. Fowler*, 921 P.2d 1114, 1120 (Alaska 1996) (citing *Swift*, 706 P.2d at 304).

65 *See McDonald v. Harris*, 978 P.2d 81 at 83 (Alaska 1999) ("The question of whether a claimant has satisfied the elements of a prescriptive easement is factual in nature. We will overturn such findings 'only if they are clearly erroneous.' " (quoting *McGill v. Wahl*, 839 P.2d 393, 397 n.10 (Alaska 1992))).

66 *Tenala Ltd.*, 921 P.2d at 1120 (quoting *Hubbard v. Curtis*, 684 P.2d 842, 848 (Alaska 1984)) (internal quotation marks omitted).

public that use of the roads was now subject to OSK's permission. [Exc. 361] OSK's own employee testified that members of the public had the right to go down the north and south access roads to the beach. [Tr. 652-54] Finally, the state's maintenance crews performed maintenance on Nikishka Beach road all the way to the beach, including brush-cutting, blading the road, and installing a culvert on the North access road. [Tr. 351, 359-62] Trial testimony shows that it is state policy to maintain only state roads, not private roads, [Tr. 309] so state maintenance is strong evidence of a belief that the public has the right to use that roadway.[67]

The evidence OSK cites [App. Br. 54] does not show the superior court was wrong in concluding OSK acquiesced to public's use of the roads, rather than permitted it. OSK's reconstruction and maintenance of the north and south roads reveals that it needed the road built to a higher standard for industrial use than the public needed for beach access, but shows little about whether OSK permitted the public to use the road or believed the public had a right to use the road because it those actions are consistent with both beliefs. The same goes for paving. Although OSK may have plowed snow in a way that blocked the North access in winter, this does not show OSK believed it could block off access to Nikishka Beach entirely. Finally, OSK's argument that none of the public's uses ever interfered with its own activities is not strong evidence that OSK believed it had the right to close off public access. The testimony of

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[67] *Cf. Weidner v. State*, 860 P.2d 1205, 1210 (Alaska 1993) ("The dedication of State resources to the construction and maintenance of a public roadway is not the type of land use which one would subject to the permission of a servient landowner.").

its own employee that he believed the public had the right to access the beach from the North and South roads shows much more directly what OSK's belief really was.

OSK's legal arguments are similarly unavailing. It argues that the use of a road constructed and used by the true owner cannot be adverse, citing the Restatement of Property: Servitudes and two cases from other jurisdictions. [App. Br. 53] Those authorities do not stand for that proposition. The court in *Gerberding v. Schnakenberg* held that although under Nebraska law use is normally presumed to be adverse, the use of a roadway constructed by the true owner for his own purposes is presumed to be permissive.[68] The court in *Stone v. Henry Enterprises, Inc.* held that although Oregon law has a presumption of adverse use, that presumption was rebutted because the use did not interfere with the true owner's use of the road, which the owner had built himself.[69] Neither court held that, as a rule, the public's use of a road constructed by the true owner cannot be adverse.[70] The cases listed under comment f of section 2:16 of the restatement, which OSK cites, discuss decisions in which evidence was held to overcome the presumption of adverse use.[71] These cases are inapposite because Alaska

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68 *Gerberding v. Schnakenberg*, 343 N.W.2d 62, 65-66 (Neb. 1984).

69 *Stone v. Henry Enterprises, Inc.*, 768 P.2d 442, 443-44 (Oregon App. 1989).

70 *See Gerberding*, 343 N.W.2d at 65-66; *Stone*, 768 P.2d at 444. In *Stone*, the court held that "[t]he evidence as a whole is insufficient to prove that it is 'highly probable' that plaintiff's predecessor's use was 'adverse' to defendant." The court was not articulating a blanket rule that use of a road constructed by the true owner can never be adverse; it simply held that in that particular case, the evidence did not establish adverseness.

71 RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. f, at 249-50 (2000).

does not have a presumption of adverse use; it has a presumption of permissive use.[72] And the court specifically found that testimony of area residents and OSK's own employee, not to mention the state's history of maintaining the roads, *overcame* that presumption and showed that both the public and OSK believed the public had a right to travel the North and South roads down to the Nikishka Beach.

OSK also argues that the use of "semi-public" property which has intentionally been left open and unenclosed is generally regarded as permissive. The circumstances of the case it cites in support of that proposition, *Bob's Ready to Wear, Inc. v. Weaver*,[73] are quite different than the circumstances here. In that case, a store owner was asserting an easement across an open lot that had for decades been leased to the city and used "expressly for the benefit of the general public" as a parking lot.[74] The court unsurprisingly held that the store owner's travel between the public parking lot and the back door to his store was permissive.[75] Here, OSK alleges that the public has been travelling across roads constructed, owned, and operated by a private party for private purposes. If those assertions are true, then the roads are hardly "semi-public" the way a public parking lot operated by a municipal entity for the express benefit of the public is. The rule from the *Weaver* case simply does not apply here.

The superior court found that the public's use of the North and South access roads was adverse because both the public and OSK believed the public had the

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72 *Tenala Ltd.*, 921 P.2d at 1120 (citing *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1330 n.16 (Alaska 1975)).

73 569 S.W.2d 715 (Ky. App. 1978).

74 *Id.* at 718.

75 *Id.*

right to use those roads. This finding is well-supported by the evidence. Accordingly, the superior court's ruling that the public acquired an easement by prescription across the North and South access roads should be affirmed.

II. Equitable Doctrines Do Not Bar the State's Claims for Relief.

A. Quasi-Estoppel Does Not Apply Because the State Has Not Taken Inconsistent Positions, Nor Has It Acted Unconscionably.

The superior court ruled that the state's claims are not barred by quasi-estoppel because the state never made any representation that would justify an estoppel claim. [Exc. 362] OSK argues that the state made two representations that are inconsistent with its position that the public has a right-of-way across the property OSK now owns. First, the state created a right-of-way map [Exc. 435] showing an easement stopping short of the bluff and installed survey monuments at that point in the ground. [Exc. 459] OSK argues the state thus represented that the public right-of-way on Nikishka Beach road extended only that far, and not all the way to the beach. Second, the state sent letters to Mr. Wade, OSK's predecessor-in-interest, stating that its conveyance of section 36 to the borough "includes all of the Grantor's rights, title, and interest in and to the surface estate." [Exc. 470-71] OSK argues these letters represented that the state did not retain a public right-of-way across Mr. Wade's lands. [App. Br. 51-52] OSK is incorrect on both counts.[76]

In applying the doctrine of quasi-estoppel, this Court considers:

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[76] Whether quasi-estoppel applies is a legal question that is reviewed de novo. *See Labrenz v. Burnett*, 218 P.3d 993, 999 (Alaska 2009) ("[T]he superior court did not err when it declined to rule that the Burnetts' requested relief was barred by the doctrine of quasi or equitable estoppel.").

> Whether the party asserting the inconsistent position has gained an advantage or produced some disadvantage through the first position; whether the inconsistency was of such significance as to make the present assertion unconscionable; and whether the first assertion was based upon a full knowledge of the facts.[77]

An essential element to a quasi-estoppel claim is a representation that is inconsistent with a party's current position.[78] Neither of these actions is a representation that the public did not have a right-of-way extending all the way to the beach. And even if they were, OSK did not suffer any prejudice as a result of them.

The project map does not represent the end of the public right-of-way on Nikishka Beach Road. When the Department of Highways (the predecessor to the Department of Transportation and Public Facilities) decided to widen the bulk of Nikishka Beach Road, it obtained a right-of-way permit from the Department of Natural Resources, which controlled the underlying lands. [Exc. 439] The state's project engineers created a map for the project. [Exc. 435-38] Although the map shows that construction and the particular right-of-way being expanded stops short of the bluff, [Exc. 438] the map does not represent that there are no public rights-of-way extending beyond that point. In fact, it shows two routes extending from beyond the project heading down to the beach. [Exc. 538] The map simply represents the right-of-ways within the scope of the project, and it was reasonable for the state to stop a project to

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77 *Safeway, Inc. v. State, Dept. of Transp. and Public Facilities*, 34 P.3d 336, 341 (Alaska 2001) (quoting *Keener v. State*, 889 P.2d 1063, 1067-68 (Alaska 1995)).

78 *See Keener*, 889 P.2d at 1068 ("While we believe that the State has made a good argument that these depictions do not rise to the level of a representation, it is not necessary to resolve this issue because the Keeners have failed to show any of the other elements of quasi-estoppel.").

widen and pave the road short of a bluff overlooking the beach to avoid the road being destroyed by future erosion or Mr. Arness's heavy equipment. [Tr. 451-56] As the superior court found, it didn't mean they were abandoning the public right-of-way to the beach. [Exc. 353-54]

Moreover, the purported inconsistency is neither unconscionable nor disadvantageous to OSK. The state had already reserved a public right-of-way in the 1962 lease to Mr. Arness, and it did so again in the 55-year leases, [Exc. 449, 452-53] which were executed the same years as the state's highway project (and the map in question). The state has been asserting a right-of-way across the lands OSK now owns (through the Arness leases incorporated in the patent and the specific 50 foot-wide easement reserved in the patent [Exc. 468-69]) since well before OSK acquired them or made any improvements. Given the recorded patent, OSK could not have reasonably concluded, solely from the project map, that its parcels were unburdened by public access.

The 1980 letters to Mr. Wade do not amount to a representation inconsistent with the state's current position either. The letters state that the conveyance of section 36 to the borough "includes all of the Grantor's rights, title, and interest in and to the surface estate." [Exc. 470-71] If the letter were read in a complete vacuum it could suggest that the state was relinquishing any rights-of-way that it or the public had in in the properties, but that reading makes no sense in light of the fact that a public highway traverses OSK's Lot 2. One would have had to think that the state was abandoning Nikishka Beach Road entirely to conclude that the state meant to relinquish

every right it had in these properties. Of course, it did not: the patent it issued specifically excluded the highway portion of Nikishka Beach Road, reserved "to" and "along easements" for shoreline access, and made the borough's title subordinate to other existing roads and easements, including the public right-of-way to Nikishka Beach. [Exc. 468-69] Thus, what the state represented in the letters it sent to Mr. Wade is that it was conveying all its interests as owner of the fee title—not any interests it had as beneficiary of these easements across the land.[79] And even if the Court were to conclude that those letters did amount to a representation that the state was relinquishing all interest in the properties, the representation is clearly the result of inartful drafting (the state did not actually intend to relinquish its interest in the public highway) and is thus not unconscionable.

B. The Doctrine of Laches Does Not Bar the State's Claims Because the State Filed Suit Soon After OSK Challenged the Public's Right to Traverse Nikishka Beach Road.

The superior court ruled that the doctrine of laches does not bar the state's claims for relief because the state did not unreasonably delay legal action to establish its rights. [Exc. 296] The court did not abuse its discretion.[80]

"The doctrine of laches 'creates an equitable defense when a party delays asserting a claim for an unconscionable period.' To bar a claim under laches, 'a court

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[79] *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.18 (2000) ("[T]he right to control a servitude for the benefit of the public is located in the state and the right to use the servitude benefit extends to the public at large.").

[80] *See Keener*, 889 P.2d at 1066 ("The trial court has broad discretion to sustain or deny a defense based on laches.").

must find both an unreasonable delay in seeking relief and resulting prejudice to the defendant.' "[81] OSK established neither.

"[T]he state does not have to sue to establish its ownership of the right of way simply because problems might arise."[82] Even if the state has an obligation to bring an action to resolve problems with its title once it becomes aware of those problems (an issue the Court has not decided), "this requirement does not accrue until the landowner challenges its property right."[83] In this case, OSK challenged the state's property right by blocking public access on Nikishka Beach Road in 2007. [Exc. 348] The state sent a cease-and-desist letter in March 2008. [Exc. 497] When this letter was ignored, the state filed suit in May 2008. [Exc. 10] The court did not abuse its discretion in concluding that the state did not unconscionably delay filing suit to enforce the public's rights.

Furthermore, OSK suffered no prejudice as a result of the delay. Prejudice, for purposes of laches, must be the result of the *delay*.[84] OSK does not show that it suffered any harm from the roughly year-long period between when it closed off the road and when the state filed suit. Since the road remained closed during that time, [Exc. 287, 363] OSK enjoyed whatever benefit closing off the road provided.

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81 *State, Dept. of Commerce and Econ. Dev. v. Schnell*, 8 P.3d 351, 358-59 (Alaska 2000) (quoting *Concerned Citizens of So. Kenai peninsula*, 527 p.2d 447, 457 (Alaska 1974)).

82 *Keener*, 889 P.2d at 1067.

83 *Id.*

84 *Id.* (quoting *Pavlik v. State, Dept. of Comm. and Reg. Affairs*, 657 P.2d 1045, 1047 (Alaska 1981)).

OSK argues that the state's requested relief—that the superior court should declare that an easement exists over OSK's properties and determine its location—is an improper attempt to avoid a laches problem. [App. Br. 49] According to OSK, the laches problem is that the borough for many years did not locate or plat the statutory access easement reserved in the patent it received from the state, so it cannot force OSK to do so now. [App. Br. 49] However, any unreasonable delay in locating the easement by the *borough* does not change the fact that the *state*'s right to a public road across OSK's properties was not challenged until 2007, at which point the state acted promptly to defend that right.[85] For these reasons, the superior court did not abuse its discretion in ruling that laches does not bar the state's claims.

III. OSK Is Not Entitled to a Judgment Quieting Title to Its Land.

Because the court's ruling on the merits of this case is binding on the parties and any attempt to relitigate the issues would be barred by res judicata, it is not clear exactly what OSK seeks in arguing that the superior court should have quieted title to its parcels consistent with its order on the merits.

First, OSK contends that the superior court's judgment is silent as to which instruments give rise to the easements it declares. [App. Br. 55] To the extent there is any ambiguity in the court's order about whether the 60 foot wide easement on

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[85] *See id.* (holding that state does not have duty to bring action to resolve problems with its property right until landowner challenges that right). OSK's citation to *Laverty v. Alaska Railroad Corp.*, 13 P.3d 725 (Alaska 2000) is misplaced. Although OSK is correct to point out that laches *can* be applied to a request for declaratory relief, *id.* at 730-31, the party claiming laches must still show unreasonable delay and prejudice. In this case, OSK has shown neither.

the north access is based on the patent to the borough or DO 2665, this Court's ruling will clarify any ambiguity as to the legal basis for any easements recognized.

Second, OSK contends that the court should quiet title as to claims resolved in OSK's favor. With respect to the state's original RS 2477 claim, the court's order on the merits does just that, concluding that no right-of-way was established pursuant to RS 2477. [Exc. 348 n.9] The superior court's judgment form references its order containing findings of fact and conclusions of law. [Exc. 379-80] Although the judgment does not specifically mention RS 2477 (or any claims), this silence does not lessen the res judicata effect of the court's order.

Third, a ruling on the borough's allegation that Nikishka Beach Road was ascertainable by physical inspection when the borough deeded the property to OSK would have no effect on the outcome. The borough's quitclaim was subject not only to easements ascertainable by physical inspection, but also to easements of record. [Exc. 488] The state's patent to the borough, which reserved the statutory "to and along" easements and incorporated other valid easements, was recorded. [Exc. 286, 469] And since the borough conveyed only a quitclaim deed to OSK, it conveyed only the interest that it had,[86] which was defined by the patent. Thus the court was not obliged to determine whether any easements were ascertainable by physical inspection, and OSK is not entitled to a judgment quieting title to that claim.

Fourth, the parties stipulated that they were not asking the court to order OSK to plat anything. [Tr. 8-14] They did *not* stipulate that no easement pursuant to the

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86 *See Ellingstad*, 979 P.2d at 1006.

patent's reservation of statutory "to and along" easements could be imposed, which is what OSK's brief seems to suggest. [App. Br. 55] Since the stipulation is on record, the parties are bound by it, and it need not be specifically mentioned in the judgment.

Finally, with regard to the shoreline easement, the court specifically ordered that it would not determine the location of the statutory easement along the high water mark of Cook Inlet and dismissed any claims seeking this relief. [Exc. 343] Although the final judgment does not mention the shoreline easement, the judgment's silence does not diminish the legal effect of the court's order. OSK's argument that the superior court erred in not specifically mentioning the shoreline easement in the judgment is meritless.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the superior court in full.

DATED June 24, 2011

JOHN J. BURNS
ATTORNEY GENERAL

By: 
Dario Borghesan
Alaska Bar No. 1005015
Assistant Attorney General

Appendix

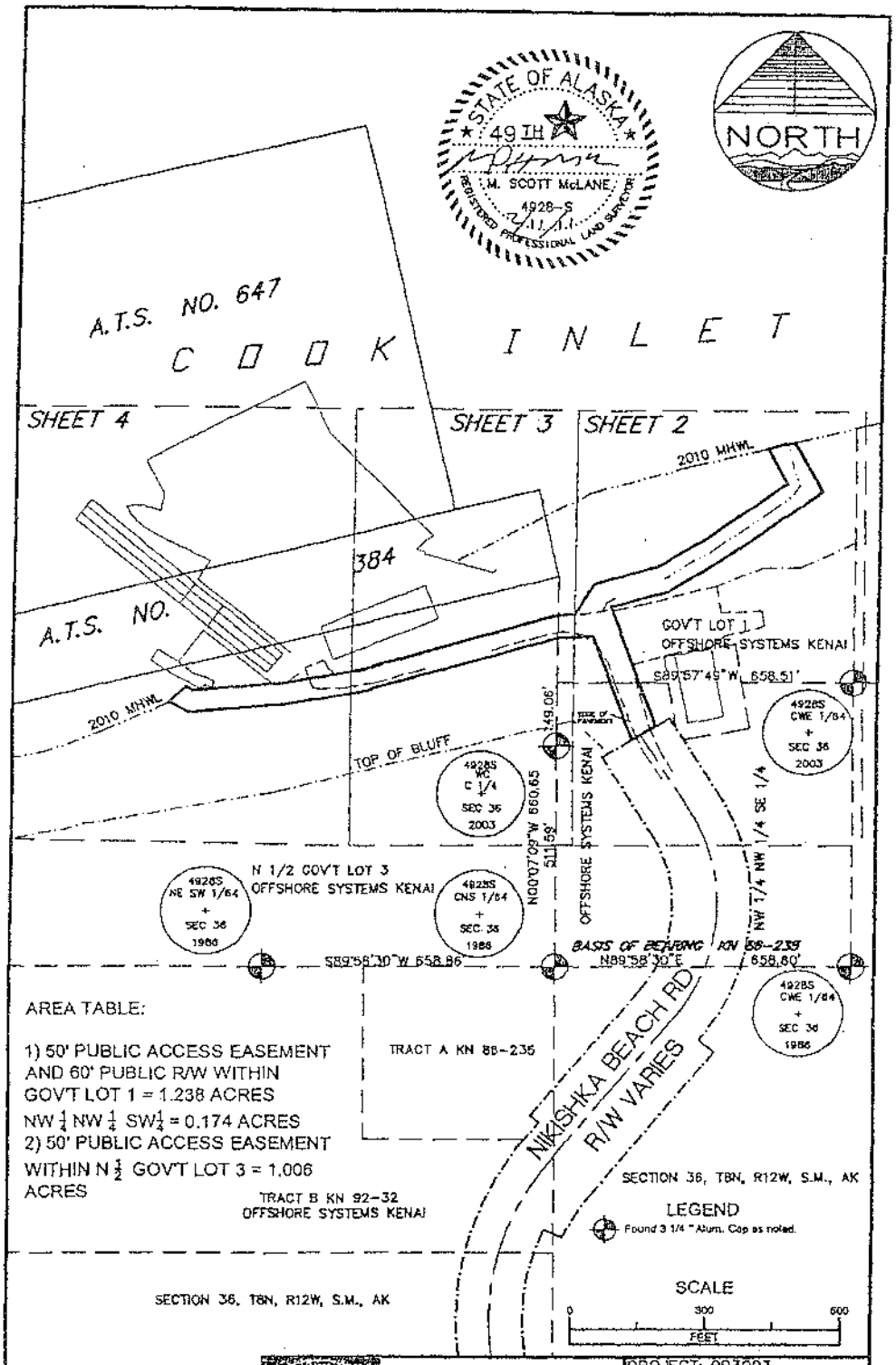

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EXHIBIT A
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