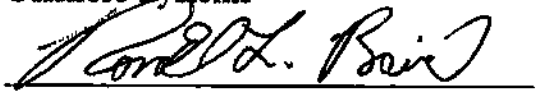
IN THE SUPREME COURT FOR THE STATE OF ALASKA

OFFSHORE SYSTEMS – KENAI, an Alaska general partnership Appellant. v. STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, and KENAI PENINSULA BOROUGH, a municipal corporation Appellees.	Alaska Supreme Court No. S-13994 Alaska Superior Court Case No. 3KN-08-453 CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT KENAI
THE HONORABLE ANNA MORAN, PRESIDING

BRIEF OF APPELLANT OFFSHORE SYSTEMS – KENAI

Office of Ronald L. Baird
Attorney for Appellant
Offshore Systems



Ronald L. Baird
Alaska Bar No. 7811079
P.O. Box 112070
Anchorage, AK 99511-2070
Phone No. 907-565-8818

Filed in the Supreme Court of the State of Alaska
this _____ day of March, 2011.
Marilyn May, Clerk

By: _____
Deputy Clerk

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Act of March 4, 1915, 38 Stat. 1214

> An Act To reserve lands to the Territory of Alaska for educational uses, and forother purposes.
>
> *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; . . .

Act of June 21, 1934, 48 Stat. 1185

AN ACT

Authorizing the Secretary of the Interior to issue patents to the numbered school sections in place, granted to the States by the Act approved February 22, 1889, by the Act approved January 25, 1927 (44 Stat. 1026), and by any other Act of Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior shall upon the application by a State cause patents to be issued to the numbered school sections in place, granted for the support of common schools by the Act approved February 22, 1889, by the Act approved January 25, 1927 (44 Stat. 1026), and by any other Act of Congress, that have been surveyed, or may hereafter be surveyed, and to which title has vested or may hereafter vest in the grantee States, and which have not been reconveyed to the United States or exchanged with the United States for other lands. Such patents shall show the date when title vested in the State and the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any. In all inquiries as to the character of the land for which patent is sought the fact shall be determined as of the date when the State's title attached.

Alaska Statehood Act, Public Law No. 85-508, 72 Stat. 339, Sec. 6(k)

Grants previously made to the Territory of Alaska are hereby confirmed and transferred to the State of Alaska upon its admission. Effective upon the admission of the State of Alaska into the Union, section 1 of the Act of March 4, 1915 (38 Stat. 1214; 48 U.S.C. 353), as amended, and the last sentence of section 35 of the Act of February 25, 1920 (41 Stat. 450; 30 U.S.C., sec 191), as amended, are repealed and all lands therein reserved under the provisions of section 1 as of the date of this Act shall, upon admission of said State into the Union, be granted to said State for the purposes for which they were reserved; but such repeal shall not affect any outstanding lease, permit, license, or contract issued under said section 1, as amended, or any rights or powers with respect to such lease, permit, license, or contract, and shall not affect the disposition of the proceeds or income

derived prior to such repeal from any lands reserved under said section 1, as amended, or derived thereafter from any disposition of the reserved lands or an interest therein made prior to such appeal.

Alaska Omnibus Act of June 25, 1959, Public Law No. 86-70, 73 Stat. 141, Sec. 21(a) (excerpt)

The Secretary of Commerce shall transfer to the State of Alaska by appropriate conveyance without compensation, but upon such terms and conditions as he may deem desirable, all lands or interests in lands, including buildings and fixtures, all personal property, including machinery, office equipment and supplies, and all records pertaining to roads in Alaska, which are owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska, . . .

Public Land Order No. 601, Sixth Paragraph

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 right-of-way purposes.

THROUGH ROADS

Alaska Highway, Richardson Highway, Glenn Highway, Haines Highway, Tok Cut-Off.

FEEDER ROADS

Steese Highway, Elliott Highway, McKinley Park Road, Anchorage-Potter-Indian Road, Edgerton Cut-Off, Tok-Eagle Road, Ruby-Long-Poorman Road, Nome-Soffmoir Road, Kenai Lake-Homer Road, Fairbanks-College Road, Anchorage-Lake Spenard Road, Circle Hot Springs Road.

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.

Departmental Order 2665

Rights-of-Way for Highways in Alaska

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).

Section 2. *Width of public highways.* (a) The width of the public highways in Alaska shall be as follows:

(1) For through roads: The Alaska Highway shall extend 300 feet on each side of the center line thereof. The Richardson Highway, Glenn Highway, Haines Highway, Seward-Anchorage Highway, Anchorage-Lake Spenard Highway and Fairbanks-College Highway shall extend 150 feet on each side of the center line thereof.
(2) For feeder roads: Abbott Road (Kodiak Island), Edgerton Cutoff, Elliott Highway, Seward Peninsula Tram road, Steese Highway, Sterling Highway, Taylor Highway, Northway Junction to Airport Road, Palmer to Matanuska to Wasilla Junction Road, Palmer to Finger Lake to Wasilla Road, Glenn Highway Junction to Fishhook Junction to Wasilla to Knik Road, Slana to Nabesna Road, Kenai Junction to Kenai Road, University to Ester Road, Central to Circle Hot Springs to Portage Creek Road, Manley Hot Springs to Eureka Road, North Park Boundary to Kantishna Road, Paxon to McKinley Park Road, Sterling Landing to Ophir Road, Iditarod to Flat Road, Dillingham to Wood River Road, Ruby to Long to Poorman Road, Nome to Council Road and Nome to Bessie Road shall each extend 100 feet on each side of the center line thereof.
(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.

Section 3. *Establishment of rights-of-way or easements.* (a) A reservation for highway purposes covering the lands embraced in the through roads mentioned in section 2 of this order was made by Public Land Order No. 601 of August 1949, as amended by Public Land Order No. 757 of October 16, 1951. That order

operates as a complete segregation of the land from all forms of appropriation under the public-land laws, including the mining and the mineral leasing laws.

(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 the 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.

Section 4. *Road maps to be filed in proper Land Office.* Maps of all public roads in Alaska heretofore or hereafter constructed showing the location of the roads, together with appropriate plans and specifications, will be filed by the Alaska Road Commission in the proper Land Office at the earliest possible date for the information of the public.

Alaska Constitution Article VIII, Section 14

Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

AS 09.25.040

Rules for construing real estate descriptions. The following are the rules for construing the descriptive part of a conveyance of real property when the construction is doubtful and there are no other sufficient circumstances to determine it:

. . . .

(2) when permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount;

AS 09.45.010

Action to quiet title. A person in possession of real property, or a tenant of that person, may bring an action against another who claims an adverse estate or interest in the property for the purpose of determining the claim.

AS 29.71.010 formerly 29.73.030

No adverse possession. A municipality may not be divested of title to real property by adverse possession.

A.S. 38.05.127 (as of 1976)

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 regulating 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.

A.S. 38.95.010

State's interest may not be obtained by adverse possession or prescription. No prescription or statute of limitations runs against the title or interest of the state to land under the jurisdiction of the state. No title or interest to land under the jurisdiction of the state may be acquired by adverse possession or prescription, or in any other manner except by conveyance from the state.

Chap. 182, Session Laws of Alaska 1978 (excerpt)

Sec. 2. REDESIGNATION AND DISPOSAL OF SCHOOL LAND. (a) Land granted to the state in sections 16 and 36 in each township surveyed before January 3, 1959 under the Act of March 4, 1915, 48 U.S.C. 353, and patented to or approved for patent to the state on July 1, 1978 and land designated as school land which was received in exchange for land granted under that federal land grant and land granted to the state as lieu or indemnity land is redesignated as general grant land and shall be managed consistent with applicable provisions of law.

(b) The redesignation of school land in (a) of this section does not affect the validity of a deed, contract for sale, lease, easement, right-of-way, permit, mineral lease disposal, or a reservation for public use of that land by statute, in effect before July 1, 1978 or land management actions including use classifications under AS 38.05.300, and interagency land management assignments of that land made by the Department of Natural Resources before July 1, 1978.

JURISDICTIONAL STATEMENT

This is an appeal from the final judgments of the superior court in an action brought by the State Of Alaska (herein "State") for declaratory and injunctive relief concerning easements on property of Offshore Systems – Kenai, an Alaska general partnership (herein "OSK") along Cook Inlet at Nikishka Bay. (Exc. 1.) OSK counterclaimed to quiet title to its property free of such claims. (Exc. 58.) The Kenai Peninsula Borough (herein "Borough") was allowed to intervene and OSK cross-claimed against the Borough to quiet title free of any Borough claims. (Exc. 70,103.) The superior court entered judgment on July 14, 2010 concerning the State of Alaska's claims (Exc. 379) and on July 15, 2010 concerning the Borough's claims (Exc. 381). OSK filed a timely motion to alter or amend the judgments on July 20, 2010. (Exc. 383) The court denied that motion on August 13, 2010 (Exc. 387). This appeal was filed September 2, 2010. This court has jurisdiction pursuant to the Alaska Constitution, Art. IV, Sec. 2 and A.S. 22.05.010(a) and (b).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issues Relating to Public Land Order 601 and the 1959 Quitclaim Deed of the Department of Commerce

1. Did any easement in OSK's property, which had originally been reserved for school purposes pursuant to the Act of March 4, 1915, 38 Stat. 1214, vest in the State under Public Land Order 601?

2. Was the State required to prove compliance with the posting requirement of Departmental Order 2665 of the United States Department of the Interior in order to establish a valid easement for a roadway?

3. If an easement in Section 36 vested in the State pursuant to Public Land Order 601 and the 1959 Quitclaim Deed of the Department of Commerce, did that easement extend through OSK's lands to the shore of Cook Inlet?

4. If an easement in Section 36 vested in the State pursuant to Public Land Order 601 and the 1959 Quitclaim Deed of the Department of Commerce, did that easement extend through OSK's parcel described as the North 1/2 of Government Lot 3?

Issues Relating to the Covenant Pertaining to "Existing Roads to the Beach" in the Leases of 1966

5. Did the covenant in the leases of 1966 between the State and OSK's predecessor concerning a 60 foot right-of-way for existing roads to the beach (herein "the covenant") impose any burden on OSK's lands after those roads ceased to exist?

6. If the covenant did impose a burden on OSK's lands after the roads ceased to exist, did the State retain the right to enforce that covenant after it transferred all interests in the leases to the Borough?

7. If the covenant did impose a burden on OSK's lands after the roads ceased to exist, was that burden extinguished under the doctrine of merger when OSK acquired the fee simple estate from the Borough?

Issues Relating to State Patent 5124 And AS 38.05.127

8. Did the provision in State Patent 5124 requiring the Borough to identify and plat an easement to the shore of Cook Inlet (herein "identify and plat provision"), which it never did, authorize the superior court to declare such easement?

9. Did AS 38.05.127 authorize the superior court to declare an easement through OSK's lands to the shore of Cook Inlet?

Laches and Estoppel

10. Is enforcement of the identify and plat provision or a judicial declaration of an easement against lands of OSK barred by the doctrine of laches?

11. Were the State's claims to an easement through OSK's lands barred by the doctrine of estoppel?

Prescription

12. Did any public easements by prescription vest in roads constructed, maintained and used by OSK for its own purposes?

Quiet Title

13. Was OSK entitled to judgment quieting its title from one or more claims of the State and the Borough?

Attorney's Fees Issues

14. Was the Borough a prevailing party for purposes of awarding attorney's fees and costs?

15. Was the award of attorney's fees to the Borough reasonable?

STATEMENT OF THE CASE

Facts

Pre-Statehood

On March 4, 1915, Congress enacted a statute providing:

> 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 . . .[1]
>
> (Emphasis added)

Section 36, Township 8 North, Range 12 West of the Seward Meridian (herein "Section 36"), the property at issue here, was surveyed in 1922. (Exc. 407.) The survey created three parcels of land which are at issue in this case: Lot 1 which borders Cook Inlet and consists of 6.22 acres, the southeast ¼ of the section which is immediately to the south of Lot 1, and Lot 3 consisting of 42.51 acres which borders Cook Inlet and is adjacent to Lot 1 on the west. (Exc. 407.) The shore of Cook Inlet which borders Section 36 runs generally in an east/west direction but many of the locals who testified refer to the easterly or right direction as "north" and the westerly or left direction as "south" because,

[1] Act of March 4, 1915, 38 Stat. 1214.

viewed more broadly, these are the directions one is moving along Cook Inlet. (See, e.g. Tr. 441-442, 631, 720, 1250.) In 1934, Congress passed the Act of June 21, 1934, 48 Stat. 1185 authorizing the issuance of patents for school lands. The act provided that when patents to school lands are issued, they are to show "the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any."[2]

On August 10, 1949, Public Land Order 601 ("PLO 601") was issued withdrawing public lands along certain roads for highway purposes "subject to existing surveys and withdrawals for other than highway purposes."[3] In 1951, Departmental Order 2665 was issued by the Secretary of Interior converting the prior withdrawals to easements but requiring that for roads constructed thereafter, survey stakes were to be set in the ground and notices posted along the route.[4]

Sometime before 1955, Mack McGahan, a homesteader along North Kenai Road (later "Kenai Spur Road"), and another person named McCoy plowed a "Cat trail" from from North Kenai Road into Section 36. (Tr. 438, 442, 503, 527.) There is no photographic evidence of the extent of the road prior to 1963. Dale McGahan, a nephew of Mack McGahan who would have been teenager at the time, testified that the road went to the beach. (Tr. 438.) According to Dale McGahan, the road veered to the "north" or right as it approached the bluff and went down to the beach. (Tr. 441-442.) His brother, Richard McGahan, was not sure that it did. (Tr. 503-4.) Mack's son, Merrill McGahon

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[2] Act of June 21, 1934, 48 Stat. 1185 (emphasis added).
[3] The history and terms of these orders was considered at length in *State v. Alaska Land Title Association*, 667 P.2d 714 (Alaska 1983). The relevant text of PLO 601 is quoted at 718, n.4.
[4] *Alaska Land Title, supra*, 719 n.5.

who would have been nine at the time, testified that the Cat trail went to the beach. (Tr. 526-7.) Peggy Arness and her son, James Arness, who lived at the beach in the early 1960's, did not recall a road to the beach in that direction. (Tr. 709, 720.)

On August 25, 1954, an engineer with the Alaska Road Commission noted in a report that "ditch and slope stakes Nikishka No. 2 Beach Road" had been set. (R. Exh. 2.) In January of 1957, the Bureau of Roads of the United States Department of Commerce issued a small-scale (two inches equal 1 mile) map showing a "Nikishka Beach Road" extending from North Kenai Road to Cook Inlet which as it approaches Cook Inlet veers to the right or east approaching the Inlet at an angle. (Exc. 408.) Dale McGahan testified that he had "seen state equipment or federal or whatever you want to call it at the time, territory, whatever you want to call it, maintaining the road." (Tr. 446-447.) There was no other evidence of activity on Nikishka Beach Road by the Bureau of Public Roads of the U.S. Department of Commerce. There was no evidence that Nikishka Beach Road was ever posted.

Early Statehood, the Arness Terminal, the Federal Patent and the 1964 Leases

On January 3, 1959, Alaska was admitted into the Union.[5] Title to Section 36 vested in the State of Alaska as of that date.[6] On June 30, 1959, the Secretary of Commerce executed a Quitclaim Deed to various roads in the state "now owned, held, administered, or used by the Department of Commerce in connection with the activities

[5] Proclamation No. 3269. 24 Fed. Reg. 81 (January 6, 1959); Exc 416.
[6] Alaska Statehood Act, Public Law 85-508, 72 Stat. 339, Sec. 6(k) (1958).

of the Bureau of Public Roads in Alaska." (Exc. 409.) Included among these is "Nikishka Beach Road" described in the deed as:

> From a point on . . . [Kenai Spur Road] . . . north to Nikishki Beach. Length 0.8 miles. (Exc. 415.)

As measured and calculated by OSK's surveyor expert, Scott McLane, 0.8 mile along the original road right-of-way from its intersection with Kenai Spur Road falls short of even the top of the bluff above Cook Inlet let alone to the beach itself along any route including straight down the bluff. (Tr. 1022-1023; Exc. 511.)

On March 7, 1960, James Arness applied to lease 365.9 acres within Section 36. (R. Exh. 6.) On June 2, 1960, the Division of Lands of the Department of Natural Resources issued Arness a lease of the north ½ of Lot 3 (R. Exh. 3004.) and a special land use permit for tidelands adjacent to Lot 3 (R. Exh. 10) both for a five year term ending June 2, 1965 and for the purpose of allowing Arness to construct to "a barge unloading facility." The lease makes no mention of any right-of-way for any roads. (R. Exh. 3004) The special use permit for the tidelands provides that "The Permittee shall not obstruct beach in any manner that will prohibit normal beach traffic."(R. Exh.10)

On March 28, 1961, Arness applied for a lease of the West ½ of Lot 1 answering a question concerning what improvements were on the land with "none."(R. Exh. 3007) On February 15, 1962, the Division of Lands issued a lease, ADL 02844, of the West ½ of Lot 1 to Arness for a five year term ending February 14, 1967 "subject to the stipulation that the Lessee shall not prevent the public from using the Nikishka Beach Road."(R. Exh. 12.)

Arness began constructing a dock out into the water in 1960 using nearby spruce trees and fill. (Tr. 448-449, 688-689, 716; R. Exh. 3023.) Later, surplus "Liberty Ships" were towed to the site, sunk and filled to create a dock face. (Tr. 693-694, 716-717; R. Exh. 3023.) Arness also constructed a road down to the dock. (Tr. 449-450, 504-505, 699-700, 718; R. Exh. 3023, p. 2-3, 5, Exc. 511) The land uphill of the dock was used for storage of material coming in and going out over the dock. (Tr. 699-700; R. Exh. 3023, p. 4.) Business at the dock boomed. (Tr. 692.)

A survey of the "Arness Terminal" was prepared by Stanley McLane on January 23, 1963. (Exc. 418.) The drawing depicting this survey shows a road angling torward the dock and another road heading easterly but steeply down the bluff. (*Id.*) The purpose of this document, however, was not to locate this road but rather to locate the dock. (Tr. 1174.) An aerial photograph dated May 2, 1963 (Exc. 511) shows that a dock has been constructed with a road leading from it through the north ½ of Lot 3 and the west ½ of Lot 1 connecting to a road to the south.

On April 2, 1962, the United States Bureau of Land Management issued Patent 1226102 to the State encompassing several sections including Section 36. (Exc. 416.) The patent provides that the grant to the State is subject to "vested water rights," and reserves a "right-of-way . . . for ditches and canals" and a "right-of-way for the construction of railroads, telegraph and telephone lines." (*Id.*) There are no other easements or rights-of-way identified. (*Id.*)

On April 13, 1964, the State issued Lease ADL 21903 to the tidelands seaward of Lot 3 providing for a 55 year term ending April 12, 2019. (Exc. 426.) On May 15, 1964,

the Division of Lands replaced its prior lease of the North ½ of Lot 3 with a 55 year lease to Arness, ADL 01391, again with no mention of any right-of-way for any roads. (Exc. 419.) The lease also provides:

> 6. The Lessor expressly reserves the right to grant easements or rights-of-way across the land herein leased if it is determined to be in the best interests of the State to do so; provided, however, that the Lessee shall be entitled to compensation for all improvements or crops which are damaged or destroyed as a direct result of such easement or right-of-way.
>
> (Exc. 421, emphasis added.)

Highway Project S-0490 and the 1966 Leases

Soon after statehood, the Alaska Department of Highways began developing a project known as Wildwood North, Project S-0490, to reconstruct a portion of what is now Kenai Spur Highway and "Nikishka Beach Road." (Exc. 433.) A memorandum dated August 19, 1964, from Assistant Attorney General, Norman F. Glass of Juneau to a counterpart in Anchorage addressed the effect of PLO 601 on Project No. S-0490 stating:

> In response to your inquiry of July 20, 1964, concerning the right-of-way width of the above captioned project we are of the opinion that Department of the Interior Order 2665, as amended, was inoperative as to establishment of right-of-way width across school lands.
>
> The establishment of school lands in Alaska was accomplished by the Act of Congress of March 4, 1915 (38 Stat. 1214) as amended. Under the provisions of this Act sections numbered 16 and 36 of each township were to be reserved for the support of schools as of the time they were surveyed. The reservation of a particular section of school land becomes effective at the time the land is surveyed. 42 Am.Jur. Public Lands §79 (1938).
>
> One of the effects of a reservation is to separate the lands reserved from the remaining mass of public lands. Subsequent laws are not to be construed to embrace reserved lands even where no express exception

is made to the subsequent law. U.S. v. Minnesota, 270 U.S. 181, 70 L.Ed. 539 (1925); Wilcox v. Jackson, 13 U.S. 498, 10 L.Ed. 264 (1839).

We are of the opinion that the rule expressed in the above cases applies to the reservation of school lands in Alaska and that orders of the Secretary of the Interior issued subsequent to the reservation do not affect these lands, at least where they are not made expressly applicable. We would conclude, therefore, that Order 2665 as amended did not operate to establish the width of highway right-of-way across school sections.

This conclusion finds support in the language of at least some of the other orders issued by the Secretary of the Interior which operated to establish highway right-of-way widths in Alaska. For example, PLO 601 and PLO 757 both state that their provisions are ". . . subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes . . . " [Emphasis added] While this limitation does not appear in Order 2665, we think it is no less applicable.

(Exc. 433-434, emphasis added)

A right of way map for "Nikishka Beach Road" was prepared by the Department of Highways on September 8, 1965. (Exc. 435.) It shows both an "Existing R/W" for "Nikishka Beach Road" and additional new right-of-way both ending at a surveyed location south of the southern boundary of Lot 1 and far from a line labeled "Edge of Bluff." (Exc. 438.) A dashed line extends beyond the right-of-way to the north which forks into a line ending at "Dock Rd" in Lot 3 and a line along the top of the bluff labeled "Beach Road." (*Id.*) The latter does not extend to an area labeled "Cook Inlet." (*Id.*)

On February 25, 1966, the Department of Highways submitted an "APPLICATION FOR RIGHT OF WAY PERMIT" to the Division of Lands of the Department of Natural Resources for a highway. (Exc. 447.) Enclosed with the application was a surveyed legal description and a plat of the requested right-of-way identical to the earlier right-of-way map. (*Id.*) The legal description states that a certain

amount of the acreage is "contained in existing right of way." (Exc. 448.) The plat shows the requested right-of-way stopping short of the south boundary of Lot 1. (Exc. 445.) On August 8, 1966, the Division issued "Right-of-Way Permit" ADL 32264 to the Department of Highways for a "public highway" attaching this description and plat. (Exc. 439.)

A few days later on August 17, 1966 the Division issued two 55 year leases to Arness for the west ½ of Lot 1 and for the northwest ¼ of the northwest ¼ of the southeast ¼ of section 36. (Exc. 449, 453.) Unlike its predecessor, the new lease for the west ½ of Lot 1 makes no reference to "Nikishka Beach Road" instead stating in the property description "Subject to a 60 foot wide right-of-way for existing roads to the beach." (Exc. 452.) The property description in the lease of the northwest ¼ of the northwest ¼ of the southeast ¼ also states "Subject to a 60 foot wide right-of-way for existing roads to the beach and Highway Right-of-Way Permit serialized ADL 32264." (Exc. 453.) Both leases contain the same clause as the lease in ADL 01391:

> 6. The Lessor expressly reserves the right to grant easements or rights-of-way across the land herein leased if it is determined to be in the best interests of the State to do so; provided, however, that the Lessee shall be entitled to compensation for all improvements or crops which are damaged or destroyed as a direct result of such easement or right-of-way. (Exc. 451, 453, emphasis added.)

According to as-built plans of the State, project S-0490 was constructed between April 26 and August 24, 1967. (Exc. 457.) The plans "entered May 9, 1968" expressly state "END NIKISHKA BEACH ROAD - STATION 41+00.0." (Exc. 457.) A sheet showing the end point is similar to the right-of-way drawing with the constructed road

terminating short of the right-of-way end with a note "Construct connection Sta. 40+00 to 41+00 to meet existing roadway." (Exc. 458.) The as-built also indicates that two right-of-way monuments were placed at Station 41+00 marking the end of the right-of-way provided in ADL 32264. (Exc. 459) The most northerly of these monuments marks the end of the right-of-way on the ground. (Tr. 1177.)

The alignment of "Nikishka Beach Road" as shown on the State's right-of-way map, as-built and ADL permit drawing which clearly ends short of the West ½ of Lot 1 would be reflected on:

(a) State DNR status plats (R. Exh. 3077,pg 2, 3088, 3099),

(b) A plat of a partial vacation in 1986 of a section line easement elsewhere in Section 36 (R. Exh. 3061),

(c) The Borough tax assessor's map (Exc. 487),

(d) A permit for a processing line reviewed by the Borough Planning Commission in 1992 and approved by DNR in 1992 (Exc. 492),

(e) A preliminary plat of an inholding within Government Lot 1 reviewed by the Borough in 1999 (R. Exh. 3090, 3091), and

(f) The final plat of a land exchange between OSK and the Borough reviewed by the State Department of Transportation in 2003 (Exc. 496.).

The concrete monument placed at the end of the right-of-way would be recovered by OSK's surveyor in 1985 prior to OSK's construction project (Exc. 476), by another surveyor doing the survey for the processing line (R. Exh. 3079), and by the surveyor preparing the court approved survey in this case. (Exc. 404.)

Photographic evidence subsequent to 1967 shows nothing which can be interpreted to be a beach road in any alignment to the east ("north"). (Exc. 512-513.)

There is only the dock road originally constructed by Arness. (*Id.*) Ivan Every, a local fisherman testified that there was no road to the east when he acquired his first fish site on Cook Inlet in 1969. (Tr. 1239.) Leon Marcinkoski, another fisherman, testified there was no road to east when he started fishing the area in 1974. (Tr. 1251.)

On May 16, 1967, the Division of Lands wrote to Arness responding to inquiry from him concerning his ADL Lease 01391 and advising him that he could use waste material from the state road project "to improve and repair your existing road." (Exc. 456, emphasis added.) By 1968, a warehouse had been constructed at the top of the bluff in the West ½ of Lot 1. (Exc. 512.) Eventually, a competing dock was built to south along Cook Inlet and business declined at the Arness dock. (Tr. 692.) Through seriatum written assignments, all of the lessee's interests in the Arness leases were assigned to Jesse Wade by 1977. (Exc. 499.)

1980 State Patent

The road to the east ("north") down to the beach was no longer in existence by 1968. (Exc. 352.) (Tr. 1238-1239.) By 1979, the dock still existed connected by the road up the bluff to a warehouse and yard at the top of the bluff. (Esc. 513.) There was no path down to the beach other than the dock road. (*Id.*)

On May 3, 1979, the Borough applied for a conveyance of Section 36 as part of its Municipal entitlement. (R. Exhibit 3034). In late 1979, the DNR issued a public notice of the proposed conveyance of Section 36 and other lands to the Borough and distributed it for interagency review. (Exc. 460.) A proposed decision concerning 3,020 acres of

Borough selections including the 366 acres of Section 36 was issued on February 1, 1980 (R. Exhibit 3037) followed by a final decision concerning the same land on February 26, 1980. (Exc. 462.)

The State patented all of Section 36 to the Borough by State of Alaska Patent No. 5124 dated May 16, 1980. (Exc. 468-469.) The patent expressly states that Government Lot 1 is "subject to" to leases not at issue here and nothing else. (*Id.*) The southeast ¼ is conveyed "Excluding Right-of-Way Permit ADL 32264 (Nikiski Beach Road)" and subject to other ADL lease and permit numbers not at issue here. (*Id.*) The same reference to "ADL 32264 (Nikiski Beach Road)" appears at two locations elsewhere in the patent. (*Id.*) The patent therefore expressly equates "Nikiski Beach Road" with the DNR permit issued to the Department of Highways. (*Id.*) There is no reference in the patent to the language in the 55 year leases, "Subject to a 60 foot wide right-of-way for existing roads to the beach." (*Id.*) The patent concludes with a clause applicable to all of Section 36 as follows:

> 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 other unnamed bodies of water as portrayed on the official township survey plat for Township 8 North, Range 12 West, Seward Meridian, Alaska, examined and approved by the U. S. Surveyor General's Office in Juneau, Alaska on June 12, 1923, and further subject to the reservation of a 50 foot wide perpetual public access easement to the aforementioned lineal public easement along the above bodies of water. Said public access easement shall be identified by the Grantee and shall be subject to the covenant that no development or conveyance shall occur on the Land conveyed by this patent until the Grantee has platted such easements and formally notified the Grantor of the location of such public access easements.
>
> (Emphasis added.)

There is no evidence in the record that the Borough ever complied with this provision by identifying and platting any easement in Section 36.

After, issuance of the patent, DNR sent letters to the then lessee under the three long-term leases, Jesse Wade, advising him that:

> The conveyance, effective May 16, 1980, includes all of the Grantor's rights, title and interest in and to the surface estate.
> . . .
> Administration of the lease, permit or claim shall also vest in the Kenai Peninsula Borough. . . .
>
> Rentals which may have been paid to the State of Alaska after the effective date of the conveyance will be transferred to the Kenai Peninsula Borough. Future payment of rentals should be made to the Kenai Peninsula Borough.
>
> (Exc. 470,471,472, emphasis added.)

By the 1980's, the road to the dock had seriously deteriorated. (Tr. 755-756.)

OSK's 1986 Construction Project

In 1985, Wade was approached by a group of investors interested in making a major investment on the leaseholds in the form of reconstructing the dock road and expanding the dock. (Tr. 772, Exc. 500.) Wade's lawyer wrote to the then Borough attorney advising that a partnership was being formed "for the purpose of constructing and operating a dock and terminal facility" and requesting confirmation that the Wade leases could be assigned to the partnership. (Exc. 473.) Approval of this assignment was argued to be in the Borough's interest because "a productive business will be constructed and operated on the leased property." (Exc. 473.) The leases were carefully reviewed by Borough staff in response to the request from Wade (Exc. 500.) Borough staff required

payment of past unpaid rent according to a detailed analysis by them. (Exc. 509.) No mention was made of any intent by the Borough to plat any easements within the leaseholds pursuant to the state patent. (Exc. 500.) The Borough approved assignment of the leases to OSK. (Exc. 500.)

OSK engaged an engineering firm to survey the site and plan the reconstruction. Tr. 775, 1053.) A topographic map was prepared which shows the only road extending from the end of the state pavement was the road down to the old Arness dock. (Tr. 1034-6, R. Exh. 3043.) There was no road turning right or east and heading down to the beach. (*Id.*; Tr. 774.) As part of the work, a crew located the 6x6 concrete monument at the end of the right-of-way described in the State's as-built of Nikishka Beach Road. (Tr. 1051-1052, Exc. 476.) A state DOT/PF representative was contacted about how the project would affect the culvert at the end of the State pavement. (Tr. 1054-1055, R. Exh. 3052.) No State permit was required for the portion of the project beyond the end of the State pavement. (Tr. 341-342, 1050-1051.)

In 1986, OSK completely reconstructed the site including the road to the dock. (Tr. 775, 1032.) The bluff along Cook Inlet was excavated and contoured generating fill to expand the dock. (Tr. 627-629, 758-759, 778, 779, 1032; Exc. 477, 516.) A new road to the dock was constructed on the reshaped bluff which was about 25 percent longer than the prior road providing a gentler grade and easier access. (Tr. 1033-1034.) A gate was constructed at the top of the road leading down to the dock. (Tr. 760, 799, Exc. 484,485, 486.) OSK's investment in the dock and access road totaled $1.6 million. (Tr. 796, Exc. 483.)

In approximately 1986, OSK also constructed a road "north" down to the beach. (Tr. 631-632.) Louis Oliva who was working elsewhere in the area was hired by OSK to use his dozer to create a trail down to the beach. (Tr. 743-744.) There was no access to the right or east at the time of this construction. (Tr. 744.) OSK used this road to obtain gravel to maintain its road to the dock. (Tr. 632.)

1990 Quitclaim Deeds from the Borough to OSK and Other Platting

On May 20, 1986, the Borough Assembly passed Ordinance 86-19 authorizing the sale by the Borough of certain patented lands to holders of state issued long-term leases. (Exc. 478.) The three parcels at issue here were among the 17 parcels specified in the ordinance. The ordinance provided in part:

> A. All Borough lands sold under this ordinance are sold "as is" and the purchaser shall be responsible for ascertaining the condition of the parcel and the extent of any easements, encroachments, alterations, or infringements upon the parcel by other persons. The Borough will make a reasonable effort to disclose all types of information in its possession to assist in determining soil conditions, wetlands, flood plains, easements and other encroachments. In the event that certain other rights to the parcel have been previously granted by the Borough or the State of Alaska, or any previous owner, then the sale of the parcel shall be made subject to them.
>
> (Exc. 478-479, emphasis added.)

The price was to be determined by the Borough Assessor. (Exc. 479.) The contemporaneous assessor's map for Section 36 shows "Nikishka Beach Road" ending short of the West ½ of Lot 1 and not extending to the beach. (Exc. 487.) The Borough Assessor set the values for the parcels at the 1989 assessed value. (R. Exh. 3067.) The Borough executed quitclaim deeds to the three parcels on October 1, 1990. (Exc. 488-

490.) The deeds contain no specific, express reservations to the Borough. (Exc. 488-490.) Again, there was no use of the language in the leases, by now administered by the Borough, "Subject to a 60 foot wide right-of-way for existing roads to the beach." (Exc. 488-490.)

In 1992 after the Borough's conveyances, the Borough was asked by DNR to evaluate a permit request for a seafood waste line through Lot 1 and into tidelands. (R. Exh. 3074.) The request was reviewed by the Borough's Planning Commission and a borough planner wrote to DNR stating that the Borough had no objection to the pipeline "to be buried in upland areas and will extend approximately 500 feet from the shore up to the existing state right of way for Nikiski Beach Rd." (R. Exh. 3074.) No reference is made to any right-of-way in the area held by the Borough or State.

In 2003, the Borough joined in a plat with OSK to subdivide property for a land exchange. (Exc. 496.) The approved and recorded plat shows "Nikishka Beach Road 175' R/W" in the location of the ADL permit and shows roads extending beyond this into Lot 1. (Exc. 496.) No mention is made of any state or borough right-of-way other than the area of the DNR permit. The Borough made no claim during this transaction that there was any right-of-way extending beyond the ADL one to the beach. (Tr. 945-946.)

OSK's and the Public Uses Beginning in 1990

OSK has continuously used its dock for loading and offloading the supply vessels for all of the oil drilling platforms in Cook Inlet, loading and offloading fish tenders, and movement of general cargo for destinations along Cook Inlet. (Tr. 831-832.) The dock

road connects the dock to an upper yard and office referred to as Pad 2. (Tr. 834.) This connection has been in continuous daily use to accept truck deliveries of cargo to be loaded onto vessels at the dock. (Tr. 835.) The dock is tide dependent so work occurs 24 hours a day. (Tr. 836.) Continuing a practice that had begun as soon as the dock opened (Tr, 838, 840, 841, 843.) OSK routinely closed the road from the dock to Pad 2 for special operations such as:

a. Movement of containers containing explosives (Tr. 845.),
b. Transport of platform pipe racks (Tr. 846.),
c. Installation of a new waterlines for the dock and a warehouse on Pad 2 (Tr. 848, Exc. 491.),
d. Transport of large components of the for the Agrium/Homer Electric co-generation project (Tr. 850-851.),
e. Transport of walkways for the Agrium plant (Tr. 856.),
f. Transport of piling used to install the Osprey platform in 1999 or 2000 (Tr. 852-853.),
g. Transport of a 98 foot long tower used in the gas to liquids project of ConocoPhillips in early 2000 (Tr. 857.),
h. Transport of modular units for the Tesoro low sulfur project (858-860.), and
i. Transport of large pieces of scrap steel (Tr. 860-861.).

OSK also closed the road in order to move its cranes back and forth between the dock and Pad 2. (Tr. 861-864.) In all of these cases, OSK made the ultimate decision concerning the road closure. (Tr. 866.) There was no contact or complaint about the closures from the State. (Tr. 868.) State officials have observed oversized movements on the dock road between the dock and Pad 2, but neither OSK nor any of its shippers have ever been required to obtain oversized permits to move items there. (Tr. 867-870.)

The gate at the top of the road down to the dock was closed from 5:30 at night to 7:30 in the morning but some shippers had their own openers. (Tr. 884-885.) The gate

was destroyed at some point by a runaway semi-tractor, the parking brake of which improperly released. (Tr. 885.) The collision with the gate destroyed the gate, its electrical controller and the junction box for the electrical wiring to the gate. (Tr. 886.) It was not replaced. (Tr. 886.)

In the first few years of the operation of the OSK terminal, the dock road was gravel. (Tr. 888.) OSK personnel maintained the road by filling the pot hole that regularly developed at the end of the State's pavement and grading other areas. (Tr. 888.) Ditches and culverts were also cleared. (Tr. 889-891.) OSK also did winter snow plowing and sanding. (Tr. 893.)

In 1995, OSK paved the road area beginning at the end of the State installed pavement over into Pad 2 and down the dock road to the dock. (Tr. 895, Exc. 493-495.) The purpose of paving was to reduce OSK's maintenance costs. (Tr. 896.) About half of the paving cost or about $49,300 was for paving from the end of the State pavement down to the dock. (Tr. 898-899, Exc. 494.) The road was closed during this project. (Tr. 900.) OSK was not required to obtain a permit for this paving even though the Department of Transportation normally requires a permit for even minor encroachments. (Tr. 390, R. Exh. 100.)

OSK has performed extensive maintenance on the areas which it paved including snow plowing, winter sanding, brush cutting, ditch cleaning, frost heave and pothole repair, sweeping, guard rail maintenance, culvert repair, and slope maintenance. (R. 908-910.) The guard rail on the dock road was installed by OSK and is a type not used by the State. (Tr. 403.) The Superior Court found and the State has not cross appealed that

finding that OSK, not the State, was primarily responsible for maintaining the road to the dock. (Exc. 355). The State did not crack seal or stripe any of the area paved by OSK as is typical for State maintained roads. (Exc. 355.) According to the State's own maintenance employee, the State also did not repair any potholes beyond the end of the state pavement. (Tr. 396-397.)

OSK used the east or "north" beach access every year to obtain gravel fill for areas of the dock. (Tr. 917.) The dock is prone to "sink holes" which require gravel to be filled. (Tr. 917-918.) OSK has also maintained this road by regrading to repair sloughing and repair ruts. (Tr. 918.) OSK also replaced a culvert using a used culvert supplied by the State. (Tr. 920.) No plans for the culvert replacement were submitted to the State and no permit for its installation was issued. (Tr. 921.) OSK also installed Jersey barriers at the point where the road descends the bluff to prevent vehicles from going straight off the bluff. (Tr. 408-409, 925.) OSK also installed a used chevron sign at the barriers. (Tr. 925.) OSK also plows the road closed every year beginning with the first substantial snow of the season. (Tr. 514, 519, 927.) This has been done without any consultation with the State. (Tr. 927.)

Witnesses called by the State testified to using both the dock access road and the "north" access road to obtain access to the beach for recreational purposes after 1990.[7] (Tr. 518, 538-539, 552, 606, 665-666, 681.) All of these witnesses testified that their use in no way conflicted with OSK's operations and uses. (Tr. 523-4, 542, 555, 610, 668, 686.)

[7] Prescription does not apply to state or municipal lands. AS 38.95.010, AS 29.71.010.

In early 2008, OSK erected a guard shack and gate near the northwest corner of the upper warehouse as part of a plan to increase security to comply with U.S. Coast Guard directions. (Tr. 957-958, Exc. 497.) On March 21, 2008, the State sent OSK a letter demanding that the gate be removed. (Exc. 497.)

Proceedings

The State initiated this action by filing a complaint on May 22, 2008. (Exc. 1.) The complaint alleged three causes of action: "Right-of-Way Pursuant to P.L.O. 601," "Right-of-Way Pursuant to RS 2477," and "Right-of-Way Pursuant to a Prescriptive Easement." (Exc. 4, 7, 8.) The first cause of action references State Patent 5124 which is also attached as an attachment. (Exc. 6, 15.) The first claim also references and attaches a memorandum dated January 16, 2008 by Marcus Mueller, Land Management Officer for the Kenai Peninsula Borough discussing the public access easements along Cook Inlet off Nikishka Beach Road. (Exc. 7, 17.) The complaint alleges that the conclusion of this memorandum is true and correct. (Exc. 7.)

OSK answered and counterclaimed alleging its fee simple title to the three upland parcels at issue here. (Exc. 58.) OSK alleged two causes of action: an action to quiet title to its uplands pursuant to AS 09.45.010 free of the claims of the State and an action for a declaratory judgment. (Exc. 63.)

The Borough moved to intervene on September 10, 2008 lodging a complaint alleging that an easement existed under the 1966 lease and joining in the State causes of action. (R. 179.) OSK filed a partial opposition objecting to the Borough asserting

causes of action of the State. (R. 221.) The superior court granted leave to the Borough to intervene "but only for the purpose of asserting its own interests in real property of OSK, not the interests presently asserted by the State.' (Exc. 68.) The Borough's complaint was rejected and leave was granted to file an amended complaint "limited to claims of its own interests in property of OSK." (Exc. 68.) The Borough's amended complaint alleged a "Express Right-of-Way or Public Easement by Reservation" referencing the 1966 leases, the State Patent and the Borough's quitclaim deeds. (Exc. 71.) The complaint also alleged that this right-of-way or easement was both of record and was "ascertainable by physical inspection." (Exc. 73.) The complaint prayed for a determination that this right-of-way existed. (Exc. 73.) OSK answered and counterclaimed against the Borough again seeking a decree quieting its title and a declaration concerning the interests of the Borough in OSK lands. (Exc. 107.)

All of the parties moved for summary judgment. (Exc. 112, 127, 158.) In responding to the Borough's motion, OSK objected to the substantial sections of the Borough's memorandum which addressed claims of the State. (Exc. 203.) On July 9, 2009, the superior court entered its Order on Summary Judgment generally denying all of the motions but holding that the prescriptive period could not start before 1990 when title passed from the Borough to OSK. (Exc. 280, 297.)

An eight day bench trial commenced on July 28, 2009. (Tr. 3.) At the outset, OSK's counsel asked for clarification of the role of counsel for the Borough at the trial. (Tr. 3-4.) The court reserved ruling on the matter until later in trial. (Tr. 10-11.) On March 11, 2009, the superior court read a decision on the record and entered a written

injunction enjoining OSK from blocking access to Nikishka Beach via Nikiska Beach Road. (Exc. 341.) and on April 7, 2010, the court entered its written decision. (Exc. 344.) The Borough and State submitted separate judgments (Exc. 379, 381.) OSK objected and submitted its own form of judgment. (Exc. 369, 374.)

The superior court entered judgments for the State on July 14, 2010 and for the Borough on July 15, 2010. (Exc. 379, 381.) OSK moved to alter or amend the judgments. (Exc. 383.) The Borough moved for attorney's fees. (Exc. 385) and OSK opposed. (Exc. 389.) The superior court denied the motion to alter or amend the judgments (Exc. 387.) but authorized OSK to perform a survey of the easements which had been granted by the court. (Tr. Status Hearing on August 13, 2010, 29.) The superior court granted the Borough's motion for fees. (Exc. 398.) Upon joint motion of the parties, the court approved a survey of the awarded easements. (Exc. 401.)

APPLICABLE STANDARD OF REVIEW

This case involves the interpretation of several federal and state statutes. The interpretation of a statute is a question of law reviewed according to this Court's independent judgment and according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose.[8]

This case involves the interpretation of several instruments in the chain of title to real estate. This court has articulated a three-part approach to the interpretation such documents: 1) look to the four corners of the instrument to see if it unambiguously

[8] *Brotherton v. Warner*, 240 P.3d 1225, 1228 (Alaska 2010).

presents the parties' intent, 2) if the document is ambiguous, consider the facts and circumstances surrounding the conveyance, and 3) if these two steps do not resolve the controversy, resort to rules of construction.[9] The determination of whether an instrument of title to real estate is ambiguous is a question of law which this court reviews de novo.[10] If the instrument is ambiguous and there is resort to extrinsic evidence, this court has said on several occasions that the superior court's determination is one of fact which this court will reverse only if left with a definite and firm conviction that a mistake has been made.[11] As this court has at least twice observed, this approach is similar to but not identical with the approach to the interpretation of contracts.[12] The principal difference is that a threshold finding of ambiguity is not required before considering extrinsic evidence of the parties' expectations concerning a contract.[13] This court has never explained why two approaches are appropriate but has adhered to the difference.[14] At least one case of this court, never expressly overruled, applied the contract approach to interpretation of a deed.[15]

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[9] *Dias v. State*, 240 P.3d 272, 274 (Alaska 2010); *Estate of Smith v. Spinelli*, 216 P.3d 524, 529 (Alaska 2009); *Ashley v. Baker*, 867 P.2d 792, 794 (Alaska 1994); *Norken v. McGahan*, 823 P.2d 622, 625-6 (Alaska 1991).
[10] *Spinelli, supra*, at 7; *Norken, supra*, at 626.
[11] *Spinelli, supra*, at 8; *Norken, supra*, at 626.
[12] *Spinelli, supra*, at 11-12; *Ashley, supra*, 867 P.2d at 794, n. 1.
[13] *Id.*
[14] *Spinelli, supra.* In *Ashley*, this court characterized the three-step deed approach as "seemingly rigid." *Ashley, supra*, 867 P.2d at 794, n. 1
[15] *Ault v. State*, 688 P.2d 951, 955 (Alaska 1984).

This case also requires the interpretation of several leases. Leases are interpreted according to contract principles.[16] Interpretation of contracts generally presents an issue of law reviewed by this court de novo.[17] Only background findings of fact are given differential treatment in those cases.[18] Why one standard should apply to deeds and another to leases when the subject matter, real estate, is the same has never been explained by this court.

Application of the doctrine of laches to bar a suit is reviewed for abuse of discretion and the superior court's decision is not overturned unless this court's review of the record leaves the court with a definite and firm conviction that a mistake has been committed.[19]

The question of whether a claimant has satisfied the elements of a prescriptive easement is factual in nature.[20] This court will overturn such factual findings only if they are clearly erroneous and there exists a definite and firm conviction that a mistake has been made.[21] The application of legal doctrines to the facts presents legal questions which are reviewed independently.[22]

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[16] *Adams v. Adams*, 89 P.3d 743, 748 (Alaska 2004); *Rockstad v. Global Finance and Investment Co.*, 41 P.3d 583, 586 (Alaska 2002); *Wessells v. State, Dept. of Highways*, 562 P.2d 1042, 1048-50 (Alaska 1977).
[17] *Adams, supra*; *Rockstad, supra.*
[18] *Id.*
[19] *Laverty v. Alaska Railroad Corp.*, 13 P.3d 725, 729 (Alaska 2000).
[20] *McDonald v. Harris*, 978 P.2d 81, 83 (Alaska 1999).
[21] *Id.*
[22] *Tenala Ltd. v. Fowler*, 921 P.2d 1114, 1121 (Alaska 1996).

Whether the superior court correctly applied the law in awarding fees is reviewed by this court de novo.[23] The determination of prevailing party and an award of attorney's fees are reviewed for abuse of discretion.[24]

SUMMARY OF ARGUMENT

Entry by Mack McGahan and the Bureau of Public Roads on lands reserved for school purposes did not operate to create any public easement on such lands. Federal and state officials soon after statehood both were both of that view. A statute enacted 19 years later did not operate retroactively to alter that result. The drafters of the 1980 state patent rejected such an interpretation.

The State and Borough sought below to upset a policy decision which was made over 40 years ago by two departments of the State executive branch each acting within their spheres of authority and which is expressly and consistently reflected in numerous public records since then. That decision was to limit the public road administered by the then Department of Highways to an area short of the beach and public land valuable as an industrial property and to leave administration of the valuable industrial site to the Department of Natural Resources under a long-term lease. The public road was described in a public survey document and was monumented on the ground with concrete monuments, one of which exists to this day. The lease covenant concerning a 60 foot right-of-way for "existing" roads to the beach ceased to have any effect when those roads ceased to exist for 18 years. To create new easements in the leasehold, the lessor was

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[23] *Beal v. McGuire*, 216 P.3d 1154, 1162 (Alaska 2009).
[24] *Wooten v. Hinton*, 202 P.3d 1148, 1151 (Alaska 2009).

required to give notice of such a grant so the tenant could make any claim for compensation the tenant might have. No such notice was ever given to OSK or its predecessors. In any event, OSK acquired all of the lessor's interest in the leases when it purchased the property from the Borough and any easement was extinguished by merger.

The superior court erred as a matter of law in interpreting the provision in the state patent to "identify and plat" an easement as an authorization for declaratory relief by the court instead of a requirement for executory action by the Borough. The Borough admitted that the required executory action never took place and stipulated that the Borough's obligations under the patent did not devolve upon its successor, OSK.

OSK constructed, maintained and continuously used both of the means of access to the shore from the end of Nikishka Beach Road as part of its business premises. The use of these accesses by members of the public never conflicted with OSK's uses and therefore was never adverse. OSK's paving of most of the area of the two accesses and its annual blockage of the east access with a snow berm prevented public easements by prescription from arising. Application of the doctrine of prescription here penalizes the record owner for improving his property by awarding his improvements to others.

Even if the superior court's decision was otherwise correct, its refusal to quiet title to OSK's lands subject to interests of the State which it declared impairs OSK's title for no reason and prevents a judgment in this case from having appropriate preclusive effect.

The Borough obtained no affirmative relief and was not a prevailing party for purposes of an award of attorney's fees. The Borough's fees were duplicative and unnecessary.

ARGUMENT

I. The State Did Not Acquire Any Interest In OSK's Properties Pursuant To Public Land Order 601 And The 1959 Quitclaim Deed Of The Department Of Commerce.

A. Section 36 was reserved for school purposes pursuant to the Act of March 4, 1915, 38 Stat. 1214, and Public Land Order 601 did not create any interest in such lands.[25]

On March 4, 1915, Congress enacted a statute providing:

> 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 . . .[26]
>
> (Emphasis added)

Section 36 was surveyed in 1922. (Exc. 407.) The settled rule of federal land law is that lands reserved for a particular purpose are presumed to not be encompassed by subsequent land actions unless specific provision in the later action provides that they are.[27] Public Land Order 601 contains no such provision but instead provides that the withdrawals which it makes are "[s]ubject to valid existing rights and to existing surveys and withdrawals for other than highway purposes."

The Bureau of Land Management implicitly agreed with this analysis when it issued the patent to Section 36. Charged by statute with specifying in the patent

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[25] OSK raised this issue in its Trial Brief (Exc. 305) and in closing argument at the trial. (Tr. 1399-1402.)

[26] Act of March 4, 1915, 38 Stat. 1214.

[27] *Federal Power Commission v. Oregon*, 349 U.S. 435, 448 (1955); *U.S. v. Minnesota*, 270 U.S. 181, 206 (1925).

easements to which school lands are subject,[28] the Bureau makes no reference in the patent to any easement for Nikishka Beach Road. (Exc. 416.) The Alaska Attorney General office was specifically of the same view when it advised the Department of Highways concerning right-of-way for project S-0490 that it could not rely on subsequent land orders for right-of-way on school lands surveyed before such orders came into effect. (Exc. 433.)

The superior court correctly relied on these principles to conclude that the State's second cause of action for a right-of-way under RS 2477 was without merit. (Exc. 348, note 9.) But the court also held that the enactment in 1978 of Section 2, Chapter 182, Session Laws of Alaska 1978, "eliminate[ed] any problems associated with the use of school lands for other purposes." (Exc. 347.)

There are four problems with this analysis. First, the statute itself provided that it did not "affect the validity of a . . . easement, right-of-way . . . in effect before July 1, 1978."[29] Under the court's analysis, Chapter 182 had the effect of making something valid, a reservation for road purposes, which had previously been invalid thus violating the express command of the statute. Second, the superior court's analysis gives retroactive effect to Chapter 182 to make something valid which was invalid. A statue has retroactive effect if it gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute.[30] Statutes are given

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[28] Act of June 21, 1934, 48 Stat. 1185.
[29] Section 2, Chapter 182, Session Laws of Alaska 1978.
[30] *Eastwind, Inc. v. State*, 951 P.2d 84, 847 (Alaska 1997) *quoting, Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1093 (Alaska 1985).

retroactive effect only if there is an express legislative directive to that effect.[31] No such legislative directive exists in Chap 182. Third, the effect asserted would infer a legislative intent to violate a basic principle of real estate law, namely, first in time is usually first in right. Under the superior court's interpretation, the legislature intended to reinsert a right-of-way into what by 1978 were 19 year old chains of title giving the right-of-way priority over existing rights. Such an extraordinary effect should only be inferred on the basis of clear language expressing such intent which is absent from Chapter 182. Fourth, the Department of Natural Resources which prepared the 1980 state patent implicitly rejected the superior court's interpretation. There is no reservation anywhere in the patent for a 100 foot right-of-way all the way to the shoreline of Cook Inlet based on public land orders. Indeed, the provision that is in the patent for the Borough to identify and plat an easement to the shoreline would have been superfluous if the 601 right-of-way had been "revived" by Chapter 182 in 1978. Thus, as a matter of law, the superior court should have dismissed the State's first cause of action under Public Land Order 601 and quieted OSK's title free of any interest under such order.

B. No Interest In Section 36 Passed To The State Pursuant To The Quitclaim Deed Of 1959 From The Department Of Commerce.[32]

The "Public Land Order" cause of action of the State's complaint references (Exc. 5) the Quitclaim Deed of the U.S. Department of Commerce of dated June 30, 1959 and

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[31] AS 01.10.090. *Eastwind, supra,* at 846.

[32] OSK raised this issue in closing argument at the trial. (Tr. 1401.)

the superior court also discusses this deed. (Exc. 349.) This deed quitclaimed to the State:

> . . . all rights, title, and interest of the Department of Commerce in and to all of the real properties . . .which properties are now owned, held, administered, or used by the Department of Commerce in connection with the activities of the Bureau of Public Roads in Alaska.
> (Exc. 410.)

As demonstrated in the previous section, Section 36 was reserved for school purposes and was not validly segregated for use by the Department. But in addition, title to school lands like Section 36 passed to the State pursuant to Section 6(k) of the Alaska Statehood Act[33] as of the date Alaska became a state, January 3, 1959 and prior to the date of the quitclaim deed.[34] The federal patent to Section 36, though issued in 1962, expressly so states. (Exc. 416.) That patent makes no reference to any interest of the Department or the State under the quitclaim deed. And neither of the 1966 leases to Arness (Exc. 439, 449) reference this quitclaim deed allegedly providing for a 100 foot right-of-way for "Nikishka Beach Road" even though as the State now claims, that right-of-way would have extended through these leaseholds. Instead, the leases reference a "60 foot right-of-way for existing roads to the beach." (Exc. 452, 453.) Accordingly, as a matter of law, OSK was entitled to a decree quieting its title to its lands free of any claim based on the 1959 Quitclaim Deed.

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[33] Alaska Statehood Act, Public Law 85-508, 72 Stat. 339, Sec. 6(k).
[34] Proclamation No. 3269. 24 Fed. Reg. 81 (January 3, 1959).

C. The State Failed To Prove That Nikishka Beach Road Was Posted In Compliance With Departmental Order 2665.[35]

Departmental Order 2665 of the United States Department of the Interior provided for a reservation of an easement for roads which would:

> 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.

The State produced no evidence of the posting of any notices for Nikishka Beach Road. Even if that order could affect school lands, therefore, no easement for Nikishka Beach Road came into existence under the terms of this order. The superior court concluded (Exc. 283, note15), relying on *State v. Alaska Land Title Association,*[36] that this court had excused the posting requirement in that case. This was error. *Alaska Land Title* was concerned with roads which validly existed prior to the issuance of Departmental Order 2665 in 1951.[37] The entry here was after the date of the order and therefore subject to it. As a matter of law, no easement arose under Departmental Order 2665.

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[35] OSK raised this issue in its memorandum on the summary judgment motions. (Exc. 216.)
[36] 667 P.2d 714 (Alaska 1983).
[37] Id. at 722-723.

D. Even If An Easement In Section 36 Vested In The State Pursuant To Public Land Order 601 And The 1959 Quitclaim Deed Of The Department Of Commerce, That Easement Did Not Extend Through OSK's Lands To The Shore Of Cook Inlet.[38]

The 1959 quitclaim deed transferred real property "owned, held, administered, or used by the Department of Commerce in connection with the activities of the Bureau of Public Roads." (Exc. 410.) Other than the vague testimony of Dale McGahan (Tr. 446-447) and the cryptic reference in 1954 to staking (R. Exh. 2), there was no testimony concerning the extent of the Bureau activities on "Nikishka Beach Road" in 1959. The Bureau's January 1957, small-scale (two inches equal 1 mile) map shows a different alignment of how that road approaches Cook Inlet than either the sketch of the road on the 1963 McClane survey or the State depicted alignment in its right-of-way map. (Exc. 408, 418, 438.)

The deed purported to convey "Nikishka Beach Road" described as

> "From a point on . . . [Kenai Spur Road] . . . north to Nikishki Beach. Length 0.8 miles. (Exc. 415.)

The word "to" in this context is ambiguous meaning either in the direction of or actually arriving at the object.[39] Thus, the extent of the road must be determined from the additional specification of a length. At trial, Scott McClane, a surveyor, testified that 0.8 mile along the original alignment of Nikishka Beach road does not reach the beach or even the top of the bluff as it existed at approximately the time of the deed. (Tr. 1022,

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[38] OSK raised this issue in its memoranda concerning summary judgment (Exc. 220) and in its Trial Brief. (Exc. 306.)

[39] Webster's Third New International Dictionary, 2401 (1993).

Exc. 511.) There was no testimony at trial to the contrary. As noted previously, the 1966 leases do not reference a 100 foot right-of-way for Nikishki Beach Road but instead refer to a 60 foot right-of-way for existing roads to the beach. (Exc. 452, 453.) These leases amount to a closely contemporaneous interpretation of the grant by the grantee and are thus highly probative of the grant's meaning. The State right-of-way permit, ADL 32264, and the limited extent of Project S-4090 are also further evidence of the construction of the grant by the grantee. This extrinsic evidence amply explains the meaning of "to" as "in the direction of", not "arriving at."

The superior court concluded that the various depictions of "Nikiska Beach Road" on the 1957 map, the 1963 McLane dock survey, and the beach road on the State's right-of-way drawing (Exc. 408, 418, 438) describe the same road. (Exc. 350, 351.) Simple visual inspection of the exhibits indicates that this is not the case.

Rather than resolving the meaning of the deed by properly interpreting the extrinsic evidence, the superior court relied primarily (Exc. 349) on a rule of construction set forth in AS 09.25.040 which provides:

> **Rules for construing real estate descriptions.** The following are the rules for construing the descriptive part of a conveyance of real property when the construction is doubtful and there are no other sufficient circumstances to determine it:
>
> . . . .
>
> (2) when permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount;

Primary resort to this statute by the superior court was an error of law. Resort to rules of construction is warranted only when it is impossible to ascertain the parties' intent from the deed and the extrinsic evidence.[40] In addition, it is doubtful that this statute has any applicability to a federal conveyance of the unique nature of the quitclaim deed from the Department of Commerce, a once in the history of the State event. Thus, the right-of-way, if any, conveyed by the quitclaim deed did not extend to the shore of Cook Inlet.

E. If an easement in Section 36 vested in the State pursuant to Public Land Order 601 and the 1959 Quitclaim Deed of the Department of Commerce, that easement did not extend through the North 1/2 of Government Lot 3.[41]

The superior court finds at one point in its post-trial decision that "Nikishka Beach Road does not include that portion of Dock Access Road that continues west from the "Y" intersection." (Exc. 355-356.) The State has not cross-appealed from that decision. However, the superior court's analysis contains a discussion which seems to be inconsistent with its ultimate conclusion. For the sake of clarity, OSK contends that this analysis should be reversed.

The superior court found that "use of the original roadway was discontinued in favor of easier access down the better maintained Dock Access Road constructed by Arness, with an exit off the dock to the north beach." (Exc. 351.) It then cites the

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[40] *Estate of Smith v. Spinelli*, 216 P.3d 524, 529 (Alaska 2009); *Norken Corp. v. McGahan*, 823 P.2d 622, 625-6 (Alaska 1991)

[41] OSK has consistently asserted that no right-of-way for a beach road existed in the North ½ of Government Lot 3 because the lease of that parcel does not mention any roads. (Tr. 1417, Exc. 215, 206-207.)

Restatement (3d) of Property (Servitudes) §4.8[42] for the proposition that the owner of the servient estate can reasonably relocate an easement suggesting that Nikiska Beach Road was relocated onto the North ½ of Lot 3, the site of the dock road.. (Exc. 352.) This analysis is factually and legally erroneous.

There is no evidence that Arness constructed the dock road to replace the location of any existing road to the beach. He constructed the dock road to provide access to his dock. (Tr. 449-450, 504-505, 699-700, 718; R. Exh. 23, pg 2-3, 5, Exc. 511.) The road was complete by May 2, 1963 before the 55 year lease was made and at a time when the north beach access road still existed. (Exc. 511.) The 1964, 55-year lease of the North ½ of Lot 3 makes no mention of "Nikiska Beach Road" or "existing roads to the beach." (Exc. 419.) The 1966 leases of the adjacent parcels to the east do reference "existing roads to the beach." (Exc. 452, 453.)

If the Nikiska Beach Road referenced in the 1959 quitclaim deed extended to the beach, it became part of the State highway system. The rule in Section 4.8 is based on a tiny minority of jurisdictions which have never applied it to authorize a landowner to unilaterally relocate a public highway as distinct from a private way.[43] There is nothing in the Restatement itself to support such an extraordinary application. OSK was entitled to judgment quieting its title to the North ½ of Lot 3 free of any interest in the State under Public Land Order 601 and the 1959 Quitclaim Deed.

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[42] *Restatement (3d) of Property (Servitudes)* §4.8 (2000).
[43] *Id.*, comment f.

II. No Road Easement Exists On OSK's Lands Pursuant To The Covenant Pertaining To "Existing Roads To The Beach" In The Leases Of 1966.

A. The Covenant In The Leases Of 1966 Between The State And OSK's Predecessor Concerning A 60 Foot Right-Of-Way For Existing Roads To The Beach Did Not Impose Any Burden On OSK's Lands After Those Roads Ceased To Exist.[44]

On August 17, 1966 the Division issued two 55 year leases to Arness for the west ½ of Lot 1 and for the northwest ¼ of the northwest ¼ of the southeast ¼ of section 36. (Exc. 449, 453.) Unlike its 1962 predecessor, the new lease for the west ½ of Lot 1 makes no reference to "Nikishka Beach Road" instead stating in the property description "Subject to a 60 foot wide right-of-way for existing roads to the beach." (Exc. 452) The property description in the lease of the northwest ¼ of the northwest ¼ of the southeast ¼ also states "Subject to a 60 foot wide right-of-way for existing roads to the beach and Highway Right-of-Way Permit serialized ADL 32264." (Exc. 453.)

The superior court found that the road to which these covenants applied was the north access road constructed by McGahan. (Exc. 350.) The superior court also found that this road ceased to exist by as early as 1968. (Exc. 352, 511.) The superior court found that by 1990 OSK had "created Beach Access Road as a new access to the north beach." (Exc. 352, emphasis added.) The court then concluded that a 60 foot wide right-of-way to the beach existed over this new road. (Exc. 354.)

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[44] The leases are raised as a ground for a right-of-way in the Borough's complaint (Exc. 72) which OSK denied (Exc. 104.) On summary judgment, the superior court appeared to have adopted OSK's argument that any easement contained in the leases was extinguished by the doctrine of merger (Exc. 300-301) so the issue of the interpretation of the leases was not discussed at trial.

The court's interpretation of the covenant in the lease was erroneous as a matter of law. Essentially, the court's interpretation reads the word "existing" out of the provision.[45] If the road ceased to exist, there is no object to which the duty of the covenant would apply. If the drafter of the leases had intended a permanent right-of-way, the phrase would have simply been "for a road to the beach." Moreover, unlike the surveyed description in Right-of-Way Permit ADL 32264, the only way to locate the object of the covenant would be the physical manifestation of the road on the ground. The lease tenant was entitled to know the specific location of this restriction so it could properly locate its leasehold improvements and have quiet enjoyment of the balance of the leasehold. The most that OSK could have been expected to investigate concerning this covenant when locating its improvements in 1985 and 1986 was the ground itself. It is undisputed on this record that no trace of the "original" north road existed at this time.

It is also important that the leases contained an express provision concerning the granting of easements:

> 6. The Lessor expressly reserves the right to grant easements or rights-of-way across the land herein leased if it is determined to be in the best interests of the State to do so; provided, however, that the Lessee shall be entitled to compensation for all improvements or crops which are damaged or destroyed as a direct result of such easement or right-of-way.
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> (Exc. 451, 454.emphasis added)

This clause envisions grants of easement at the discretion of the lessor during the term of the lease. But implicitly, the grant would be by some express, affirmative act so that the

[45] The court should have strived to give effect to all provisions of the leases. *Rockstad v. Global Finance and Investment Co.*, 41 P.3d 583, 586 (Alaska 2002).

tenant could make a compensation claim if it had one. This clause would have governed the assertion of a right-of-way in the same area as a road which had not existed for 18 years. But no such express grant was ever made.

This court should not charge, as the superior court may have charged, the tenant under the 1966 leases with notice of what the digital orthophotos, produced by 2009 sophisticated computer hardware and software (Tr. 1009), reveal about the relationship of OSK's 1986 road and the original road as of its last depiction in 1963. (Exc. 511.) Even if it did, that evidence shows that the original road and the 1986 road do not begin or end at the same place and overlap only slightly in route. (Exc. 511.) The covenant in the 1966 leases therefore did not impose any restriction on the leasehold after the road to which it refers ceased to exist for 18 years.

B. If The Covenant Did Impose A Burden On OSK's Lands After The Roads Ceased To Exist, The State Did Not Retain The Right To Enforce That Covenant After It Transferred All Interests In The Leases To The Borough.

The State patented all of Section 36 to the Borough by State of Alaska Patent No. 5124 dated May 16, 1980. (Exc. 468-469.) There is no reference in the patent to the language in the 55 year leases, "Subject to a 60 foot wide right-of-way for existing roads to the beach." (*Id.*) The patent operates as a quitclaim of all interest the government had at the time of the conveyance.[46] The patent "excludes" the right-of-way permit, makes certain parcels "subject to" leases then assigned to Wade, and provides that the whole

[46] *Ellingstad v. State, Dept. of Natural Resources*, 979 P.2d 1000, 1006 (Alaska 1999); *North Star Terminal & Stevedore v. State*, 857 P.2d 335, 340 (Alaska 1993).

section is "subject to the reservation" concerning the shoreline easement and a duty to plat an easement to the shoreline. While "subject to" can occasionally mean "reserving," here the express use of "reservation" elsewhere in the patent simply indicates that the patent is not disturbing the rights of the lessee. [47] The letters written after the patent to Wade (Exc. 468-471), expressly stating that all of the State's interest had been transferred to the Borough and that lease administration had been transferred to the Borough confirm that all rights under the leases were transferred to the Borough.

Despite these express provisions and the letters, the superior court concluded (Exc. 354) that the State retained a 60 foot easement pursuant to the generic provision of the patent providing that the grant was "[s]ubject to existing trails, roads and easements." Again, "subject to" can occasionally mean "reserving," but here the express use of "reservation" elsewhere in the patent simply indicates that the patent is not disturbing other rights if they exist. But as discussed previously, at the date of the state patent, the north road did not exist and no easement had been granted previously over these leaseholds. Reliance on the generic provision of the patent to find a reservation to the State therefore was circular and an error of law.

The superior court also concluded (Exc. 353) that the State reserved public access to the beach in the patent under the authority of *Lake Colleen Enterprises, Inc. v. Estate*

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[47] *See, Hendrickson v. Freericks*, 620 P.2d 205, 209-210 (Alaska 1980)("subject to lease . . . recorded at . . ." qualified statutory warranty). *See, also, Aszmus v. Nelson*, 743 P.2d 377, 379 (Alaska 1987)(general "subject to" clause usually intended only to protect grantor from claims of breach of warranty).

of Mark.[48] *Lake Colleen* is inapposite. First, the easement in question there had been dedicated and platted before the conveyance and the conveyance from the State of the servient parcel was expressly made subject to "platted" easements.[49] Here the alleged restriction on the servient estate is a lease covenant and relates to an unsurveyed road not in existence at the time of the State's conveyance. Second, the issue in *Lake Colleen* was whether transfer of the dominant estate into private ownership deprived the private owner of the right to enforce the easement.[50] The court held that such a result would have the potential to diminish the value of the property to be conveyed and thus the consideration which the state would receive and would also have the potential to eliminate the only legal or practical access to a given parcel.[51] No such considerations are present here.

C. If The Lease Covenant Did Impose A Burden On OSK's Lands After The Roads Ceased To Exist, That Burden Was Extinguished Under The Doctrine Of Merger When OSK Acquired The Fee Simple Estate From The Borough.[52]

Easements are terminated when all of the benefits and burdens come into a single ownership.[53] Transfer of ownership thereafter does not revive a previously terminated easement.[54] The rational for this settled rule is:

> A servitude benefit is the right to use the land of another or the right to receive the performance of an obligation on the part of another. A

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[48] 951 P.2d 427 (Alaska 1997).
[49] *Id.* at 428.
[50] *Id.* at 430.
[51] *Id.*
[52] OSK raised this issue in its motion for summary judgment. (Exc. 118, 120.)
[53] *Restatement (3d) of Property, Servitudes*, §7.5 (2000). Easements are a class of servitude under the *Restatement* definitions. Id. §1.1(2), 1.2.
[54] *Restatement*, supra, §7.5

> servitude burden is the obligation not to interfere with another's use of the burdened party's land, or the obligation not to use land in the burdened party's possession in particular ways, or the obligation to render a specified performance to another. When the burdens and benefits are united in a single person, or group of persons, the servitude ceases to serve any function. Because no one else has an interest in enforcing the servitude, the servitude terminates. The previously burdened property is freed of the servitude. If the ownership of the property is separated, no new servitude arises unless a new servitude is created . . . .[55]

The *Restatement (3d) of Property, Servitudes*[56] provides the following illustration among others:

> 2. Recreation Club owned an easement in gross for hunting and fishing on Blackacre. Recreation Club then acquired the fee simple interest in Blackacre. Ten years later Recreation Club conveyed Blackacre to Developer. The deed made no mention of an easement. In the absence of other facts or circumstances, Blackacre is not subject to an easement for hunting and fishing in favor of Recreation Club.

Although the State had the fee simple interest in the leased lands at the time, it is possible to create an easement in another lesser estate held by another.[57] Thus, Arness' interest as tenant under the leases could be validly subjected to an easement in favor of the State as landlord. However, the State transferred its interest as landlord to the Borough which quitclaimed its interest as landlord in the three parcels at issue here in 1990. (Exc. 488-490.) Thus, OSK acquired both the lessor's and tenant's interest and any easement reserved in the lease was extinguished.

The superior court initially appeared to have granted summary judgment to OSK on this issue. (Exc. 300-301.) After trial, however, the superior court held that while

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[55] *Id.*, Comment a.
[56] *Id.*
[57] *Restatement, supra*, §2.5.

"any enforcement rights under the leases" were extinguished under the doctrine of merger, "the public's access to the beach" was not. (Exc. 353.) As noted previously, the the superior court sites *Lake Colleen* in this discussion. But *Lake Colleen* does not discuss the doctrine of merger at all.[58] OSK as a matter of law, therefore, was entitled to have its title to the West ½ of Lot 1 and the NW ¼, NW ¼, SW ¼ quieted free of any interest in the State or Borough under the 1966 leases.

III. State Acquired No Easement For Access To The Shoreline Of Cook Inlet In OSK's Lands Pursuant To State Patent 5124 And The Superior Court Was Not Authorized To Declare The Existence Of One.[59]

A. The Provision In State Patent 5124 Requiring The Borough To Identify And Plat An Easement To The Shore Of Cook Inlet, Which It Never Did, Did Not Create An Easement To The Shore Of Cook Inlet Within OSK's Lands.

State Patent 5124 expressly states that Government Lot 1 is "subject to" to leases not at issue here and nothing else. (Exc. 468-469.) The southeast ¼ is conveyed "Excluding Right-of-Way Permit ADL 32264 (Nikiski Beach Road)" and subject to other ADL lease and permit numbers not at issue here. (*Id.*) The same reference to "ADL 32264 (Nikiski Beach Road)" appears at two locations elsewhere in the patent. (*Id.*) The patent therefore expressly equates "Nikiski Beach Road" with the DNR permit issued to the Department of Highways. (*Id.*) The patent concludes with a clause applicable to all of Section 36 as follows:

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[58] *Lake Colleen, supra*, 951 P.2d 427 (Alaska 1997).

[59] OSK consistently maintained that no easement arose on OSK's lands pursuant to the State Patent because the Borough had never identified and platted an easement. (Exc. 121, 224, 306, Tr. 45, 1419-20.)

> 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 other unnamed bodies of water as portrayed on the official township survey plat for Township 8 North, Range 12 West, Seward Meridian, Alaska, examined and approved by the U. S. Surveyor General's Office in Juneau, Alaska on June 12, 1923, and further subject to the reservation of a 50 foot wide perpetual public access easement to the aforementioned lineal public easement along the above bodies of water. Said public access easement shall be identified by the Grantee and shall be subject to the covenant that no development or conveyance shall occur on the Land conveyed by this patent until the Grantee has platted such easements and formally notified the Grantor of the location of such public access easements.
>
> (Exc. 469, emphasis added.)

There is no evidence in the record that the Borough ever complied with this provision by identifying and platting any 50 foot wide easement in Section 36.

The superior court interpreted State Patent 5124 as reserving a public access easement which "was the most specific easement identified in Patent 5124." (Exc. 357.) It concluded that "the State conveyed title to the Borough subject to the public access easement that was properly reserved under statutory authority." Exc. 357.) This was a clear error of law unsupported by any language of the patent. The express reservation concerning access to Cook Inlet applied to all of Section 36, not any particular parcels within the section. The reservation was an executory obligation providing no specific location for any easement until the Borough "identified and platted" such an easement. Until those future actions of the Borough occurred, no specific location for the easement within Section 36 can be determined let alone be imposed on specific parts of OSK's lands.

The patent calls for the Borough to "plat" the easement. The platting authority within the Kenai Peninsula Borough is the Borough itself.[60] It is speculative to assume what access would have been required if a plat had been submitted to the platting authority.[61] It was not lawful for the superior court under the guise of a declaratory judgment to substitute its own judgment for that of whatever might have resulted from the exercise of authority by the platting authority.

B. AS 38.05.127 Did Not Authorize The Superior Court To Declare An Easement Through OSK's Lands To The Shore Of Cook Inlet.

The superior court cited AS 38.05.127 as the authority for the State to "properly reserve the public access easement when it issued Patent 5124." (Exc. 356.)[62] That statute provided in part at the time of the patent:

> **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, . . .
>
> (3) under regulations, determine if the body of water or waterway is navigable water, public water, or neither;
> (4) 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 regulating or limiting access is necessary for other beneficial uses or public purposes.

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[60] The Borough was exercising platting authority at least by 1981. *See, Kenai Peninsula Borough v. Kenai Peninsula Board of Realtors*, 652 P.2d 471, 472 n. 1 (Alaska 1982).
[61] *Laughlin v. Everhart*, 678 P.2d 926, 930 (Alaska 1984).
[62] The superior court also cited Alaska Constitution, Article VIII, Section 14 as support for its decision to declare an easement. (Exc. 358.) Shortly after the superior court's decision, this court decided *State v. Alaska Riverways, Inc.*, 232 P.3d 1203 (Alaska 2010) which holds that that section incorporates the public trust doctrine applicable to tidelands and submerged lands. The access claimed here is over uplands. Section 14 therefore has no application to this case.

(b) The Department of Natural Resources shall adopt regulations implementing this section.
(c) Nothing in this section affects valid existing rights.

(Emphasis added.)

The superior then declared a fifty foot easement through OSK's lands to the shore of Cook Inlet. (Exc. 359.)

This was an extraordinary and unlawful assertion of judicial authority in a matter expressly delegated to an administrative agency. The statute does not require an easement to the shore on every upland parcel abutting navigable waters. The statute also provides that access to such a shoreline may be limited if necessary for "other beneficial uses." And nothing in the section is to affect "valid existing rights" such as the leaseholds held by Wade. The discretion to implement these criteria is granted to the Department of Natural Resources.

As noted above, the state patent here did not specify an easement but instead required the Borough to identify and plat one. Neither the State nor the Borough ever asserted that this resolution of the access issue was unlawful or contrary to law. This would have essentially been an attack on the validity of the patent to which they were both parties. Such an attack was not raised by the pleadings of the State and Borough which actually relied on the validity of the patent. (Exc. 6, 72.) And the superior court at no point found or concluded that DNR acted improperly in issuing the patent without a specific reservation for an access easement. The superior court was certainly in no position to second guess determinations of the Department of Resources made 29 years earlier.

For purposes of this case, it is sufficient that a rational basis for not imposing a specific easement through the W ½ of Lot 1 and the North ½ of Lot 3 appears on the record. That basis is the preservation of an industrial site of great potential and the avoidance of interfering with an existing leaseholder with rights of compensation if his improvements are simply declared to be within public easements. Indeed, the two parcels were already "developed" within the meaning of the "indentify and plat" provision itself. The industrial potential of the site was more than realized when OSK came along just six years after the patent issued and invested over $2 million in redeveloping the site. (Exc. 483.)

The superior court had no authority to simply declare an easement over OSK lands pursuant to AS 38.05.127.

IV. Enforcement Of The Reservation In Patent 5124 Or The Judicial Declaration Of An Access Easement On OSK's Lands Is Barred By The Doctrine Of Laches.[63]

Laches bars equitable relief when the party seeking an injunction unreasonably delays in bringing the action and the party sought to be enjoined will suffer unreasonable harm or prejudice.[64] Application of the laches doctrine requires "balancing the length of a plaintiff's delay in bringing suit against the severity of the prejudice resulting to the

[63] OSK raised laches as a defense to enforcement of the reservation in its motion for summary judgment (Exc. 121) and in its trial brief. (Exc. 304.) It raised laches in relation to declaratory relief in closing argument. (Tr. 1419-1420.)
[64] *Breck v. City and Borough of Juneau,* 706 P.2d 313, 315 (Alaska 1985).

defendant.",[65] Where there is a long delay, there is a lesser degree of prejudice required.[66]

OSK sought summary judgment that a decree requiring OSK to "indentify and plat" the easement required by the reservation in State Patent 5124 was barred by the doctrine of laches. (Exc. 121.) The superior court denied summary judgment leaving the issue for trial. (Exc. 294-5.) At the commencement of trial, counsel for the Borough stipulated that a) OSK did not have to perform the Borough's obligation under the reservation in the patent (Tr. 8) and b) that the Borough could not plat an easement pursuant to the patent on lands it had conveyed to OSK. (Tr. 14.) Counsel for the State agreed that it was not requesting either the Borough or OSK to plat anything. (Tr. 13.) OSK sought judgment quieting its title to any right of the Borough to plat an easement on OSK's lands pursuant to the patent. (Exc. 371, 376.) The superior court declined. (Exc. 379-381.)

In an effort to avoid obvious laches problems, the State and Borough contended that the superior court should simply declare that an easement existed and define its boundaries. (Tr. 13.) OSK contended that this attempted "end around" was improper citing *Laverty v. Alaska Railroad Corp.*[67] (Tr. 1419-1420.) The superior court never addressed this issue.

Laverty involved a citizen's suit contending that a contract to remove gravel from railroad lands was invalid for failure to comply with the public notice provisions for land

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[65] *Pavlik v. State*, 637 P.2d 1045, 1047-8 (Alaska 1981).
[66] *Id.* at 1048.
[67] 13 P.3d 725 (Alaska 2000).

disposals of the Alaska Constitution.[68] The superior court found that laches barred injunctive relief but not declaratory relief.[69] This court affirmed holding that laches could bar declaratory relief but did not in that case because the simple declaration of a constitutional violation would not prejudice either of the defendants.[70]

Application of *Laverty* here requires a different result. The declaration awarded here provides an easement right through business premises of OSK in which it has invested in excess of $2 million. (Exc. 483.) It made that investment at a time when its leases entitled it to compensation for damages to improvements subjected to a grant of an easement. (Exc. 421, 451, 454.) The superior court's declaration imposes a public easement on the dock access road constructed at a significant portion of the $1.6 which OSK invested in the dock and road reconstruction. Moreover, the declaration prejudices OSK's purchase of the lands from the Borough and violates the clause of the patent reservation itself, that an easement would be identified before property was conveyed. The purchase price was set by the Borough tax assessor whose map clearly shows Nikishka Beach Road ending short of the W1/2 of Lot 1 and the North ½ of Lot 3. (Exc. 487.) Finally, the declaration imposes an easement on roads which OSK paved at its own expense and maintained at its own expense for 22 years prior to the commencement of this case. Here there is both extreme delay and extreme prejudice. Declaratory relief was barred here by laches and the superior erred it not so holding.

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[68] *Id.* at 727.
[69] *Id.* at 729.
[70] *Id.* at 730-1.

V. The Claims Of The State Were Barred By The Doctrine Of Estoppel.[71]

Quasi-estoppel precludes a party from taking a position inconsistent with one previously taken where circumstances render assertion of the second position unconscionable.[72] In applying the doctrine, the court considers whether the party asserting the inconsistent position has gained 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.[73]

Here the State produced a right of way map (Exc. 435.) which was provided to the Department of Natural Resources as part of an application for a right-of-way permit (Exc. 445.). It was thereafter incorporated in DNR's title status plats (R.. Exh. 3077, 3088, 3099) available to the public. In addition monuments were placed on the ground which correspond to the map. (Exc. 459.) These were recovered by OSK's surveyor prior to its 1986 construction project. (Exc. 476) and by a later surveyor (R. Exh. 3079.). The map and its monuments represented a continuing representation of the end of the right-of-way of Nikiski Beach Road. The superior court rejected the estoppel defense but made no mention of the map or monuments. (Exc. 361-362.)

The state also sent letters in 1980 at the time of the State patent to the Kenai Peninsula Borough (Exc. 470-471) to then leaseholder Jesse Wade. Those letters each

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[71] OSK raised estoppel in its Trial Brief (Exc. 304) and in a post-trial supplement to closing argument allowed by the court. (R. 900.)

[72] *Safeway v. State*, 34 P.3d 336, 341 (Alaska 2001); *Keener v. State*, 889 P.2d 1063, 1067 (Alaska 1995).

[73] *Id.*

state that that conveyance "includes all of the Grantor's rights, title, and interest in and to the surface estate."

OSK has been prejudiced by constructing substantial improvements to lands now claimed by the State. (Exc. 483.) These include the original road bed in the N1/2 of Lot 3 and paving of both that road and some of the surface within the W1/2 of Lot 1. (Exc. 493-495.)

Conceding that the defense was rejected in both *Keener* and *Safeway*, both cases are distinguishable. Unlike in both *Keener* and *Safeway*, the right-of-way map and the letters were produced at a time when the State would have had full knowledge of its rights-of-way. Unlike in both cases, OSK been prejudiced by the construction of substantial improvements in the now claimed right-of-way as well as a dock complex which relies on the claimed area as a private road.

VI. The Superior Court Erred In Holding That Easements Through OSK's Lands Were Established By Prescription.[74]

As an alternative to its declaration of an easement on OSK lands, the superior court found that an easement by prescription arose on the same areas. (Exc. 359.) A prescriptive right cannot exist where the use is authorized by an easement.[75] The superior court apparently made this alternative finding in anticipation of an appeal. OSK is entitled to dismissal of the prescriptive claim if this court sustains the declaration of an express easement.

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[74] OSK argued the lack of the requirements for prescription in its Trial Brief (Exc. 307-309 and argued in closing (Tr. 1423.)

[75] *Restatement (3d) of Property (Servitudes)* §2.16, comment f.

To establish a public easement by prescription, the claimant must show that the use was continuous and uninterrupted for the prescriptive period, here ten years, was made adversely and not with the permission of the record owner, and was reasonably visible to the record owner.[76] All elements must be established by clear and convincing evidence.[77] There is a presumption that the use is made with the permission of the record owner.[78] The presumption is overcome only by the distinct and positive assertion of a right hostile to the owner.[79] Use alone even with the knowledge of the owner does not establish prescription.[80]

Other states follow different rules as to the presumption of adversity but even those states which presume adversity recognize that use of a road constructed and used by the record owner cannot be adverse.[81] The fact that the roads over which a prescriptive claim is asserted here were constructed and used by OSK for its own purposes distinguishes this case from several Alaska cases where the pathway was constructed by the prescriptive user and was not used by the record owner.[82] Courts have also held that

not exactly since road was constructed b/f OSK

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[76] *Weidner v. State, Department of Transportation and Public Facilities*, 860 P.2d 1205, 1209 (Alaska 1993) *citing*, *McGill v. Wahl*, 839 P.2d 393, 397 (Alaska 1992).
[77] *McDonald v. Harris*, 978 P. 2d 81, 83 (Alaska 1999).
[78] *Id. See, also, Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 416 (Alaska 1993).
[79] *Dillingham, supra, quoting Hamerly v. Denton*, 359 P.2d 121, 126 (Alaska 1961).
[80] *Id.*
[81] *Stone v. Henry Enterprises, Inc.*, 768 P.2d 945 (Idaho 1989); *Gerberding v. Schnakenberg*, 343 N.W.2d 62 (Nebraska 1984); See, *also*, cases collected in *Restatement 3d of Property, Servitudes* §2.16, page 249-50 (2000).
[82] *See, McDonald v. Harris*, 978 P.2d 81, 85 (Alaska 1999); *McGill v. Wahl*, 839 P.2d 393, 397-8 (Alaska 1992); *Weidner, supra*, 860 P.2d at 1210.

use of semi-public property which has been designedly left open and unenclosed is generally regarded as permissive and not adverse to the interest of its owner.[83]

An underlying policy of adverse possession to which prescription is similar is that society will benefit from someone's making use of land which the owner leaves idle.[84] That policy does not justify awarding rights on land which the record owner has put to productive use and, but for such efforts, would not have permitted the prescriptive use. Applied in that way, the doctrine actually burdens and discourages improvement to the land by the record owner.

The critical facts[85] concerning prescription here are that OSK constructed, used and maintained the roads for which prescriptive right were claimed. Also, critical is the fact that the dock access road was regularly closed by OSK for its operations[86] and the north access road was annually closed by OSK by its snow plowing. (Tr. 514, 519, 927.) Also, critical is OSK's pavement of most of the areas claimed.[87] Finally, none of public uses ever interfered or conflicted with OSK's uses. (Tr. 523-4, 542, 555, 610, 668, 686.)

The superior court's finding of prescription references none of these facts. (Exc. 360-361.) It was either an erroneous application of law to undisputed facts or a clearly erroneous factual finding. OSK was entitled to a judgment quieting its title to its lands free of a public prescriptive easement.

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[83] *Bob's Ready to Wear, Inc. v. Weaver*, 569 S.W.2d 715, 718 (Ky. Ct. App. 1978).
[84] *Alaska National Bank v. Linck*, 559 P.2d 1049, 1054 (Alaska 1977).
[85] *See*, Facts, *supra*, 20-23.
[86] *Id.* at 22.
[87] *Id.* at 23.

VII. OSK Was Entitled To A Judgment Quieting Its Title To The Three Parcels At Issue Here.[88]

OSK counterclaimed against the State and Borough to quiet its title pursuant to AS 09.45.010 from the claims of both. As discussed in previous sections, the claims relied upon a complex series of instruments and theories. The court declared the existence of certain easements in its order (Exc. 362) but its judgments are silent concerning the effect of which of the various instruments its declaration resolved. The result is that OSK is potentially subject to having to relitigate claims under one or more of these instruments.

In addition, even if the superior court committed no other error on the substance, OSK was entitled to a judgment quieting its title from certain claims which were resolved in OSK's favor:

> a. Claims based on RS 2477 which was raised by the State's second claim for relief and was found to be without merit by the superior court. (Exc. 348.),
> b. Imposition of an easement by the Borough pursuant to the identify and plat provision of the State patent concerning which the parties stipulated. (Tr. 8-14.),
> c. Imposition on OSK of an obligation pursuant to the identify and plat provision of the State patent concerning which the parties stipulated. (Tr. 8-14.), and
> d. Claims that easements were ascertainable by physical inspection within the meaning of the Borough quitclaim deeds which were pled by the Borough (Exc. 73) but for which there was no evidence.

Finally, the superior court dismissed certain claims of OSK without prejudice regarding the shoreline easement imposed by the patent. (Exc. 343.) This dismissal should have been reflected in the judgment. The generic judgments of the superior court were

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[88] OSK raised this issue by its partial opposition to the State and Borough motions for judgment (Exc. 371) and its submittal of a proposed judgment. (Exc. 374.)

erroneous in this respect and the court should be directed to enter a new judgment on remand.

VIII. The Award Of Attorneys Fees To The Borough Was Erroneous.[89]

A. The Borough Was Not A Prevailing Party For Purposes Of An Award Of Attorney's Fees.

The Borough was permitted to intervene by the superior court "only for the purpose of asserting its own interests in real property of OSK, not the interests presently asserted by the State." (Exc. 68.) As noted previously, the Borough stipulated that it did not have the right under the State Patent to "identify and plat" an easement on lands which it had conveyed to OSK nor could it require OSK to perform these acts. (Tr. 8-12.) There was no evidence to support the Borough's allegation (Exc. 73.) that there were easements "ascertainable by physical inspection" at the time of the 1990 Borough deeds. Thus, it was OSK which was entitled to relief against the Borough not vice versa.

The superior court concluded that the Borough prevailed on the issue "that the public access easement described in the State's patent survived the conveyance from the Borough to OSK." (Exc. 399.) But OSK never argued the contrary. OSK argued that no easement was reserved and that the Borough deeds extinguished the lease covenant.

The Borough stated that it "consistently maintained that the easements were for the benefit of the public and under state control." (R. 1249.) This is consistent with the common law which holds that the public has the right of use of a public easement but

[89] OSK raised these issues by its opposition to the Borough's motion for fees. (Exc. 389.)

"control rights must be vested in an entity capable of exercising them."[90] Control rights are vested in the State absent contrary intent in the instrument creating the servitude or a statue delegating the State's rights to another level of government.[91] Control rights include the right to transfer, terminate, and otherwise dispose of the servitude benefit as well as the rights to manage it.[92] The Borough therefore had no interest in the "public access" easement under any theory.

Alaska Center for the Environment v. State[93], cited by the superior court (Exc. 400, note 1) is not helpful. There was no question raised there that the intervenor was pursuing claims asserted by someone already a party. The superior court either erred in applying the law concerning the fee award or abused its discretion in concluding that the Borough was a prevailing party for purposes of Rule 82 of the Alaska Rules of Civil Procedure.

B. The Borough's Fees Were Unnecessary And Duplicative.

Despite the limited basis for its intervention, counsel for the Borough throughout the case ranged over all of the issues. The Borough's 42 page memorandum on summary judgment (Exc. 158) addressed every issue addressed by the State and OSK objected. (Esc. 203.) The superior court stated that it would not consider Borough arguments "which go beyond the subject matter of its complaint." (Exc. 289, note 58.) OSK also sought to limit the role of counsel for the Borough at the start of the trial. (Tr. 8.)

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[90] *Restatement (3d) of Property, Servitudes*, §2.18, comment b.
[91] *Id.*
[92] *Id.*
[93] 940 P.2d 916 (Alaska 1997).

Nevertheless, counsel for the Borough examined even state employees (Tr. 230, 431) and his closing argument ranged over the entire history of Section 36. (Tr. 1364-1391.)

Litigation concerning a servitude is an exercise of control or management. Here, it was the State, not the Borough, who controlled and managed the litigation concerning the "public easements" to which the superior court pointed. If the Borough was unhappy with or not confident in the Attorney General's office prosecution of the State's claims, that does not justify awarding the Borough's fees against OSK. There is no authority under Rule 82 that a party can obtain attorney's fees for assisting another party in the assertion of that other party's claims. Neither the Borough nor the Court attempted to reduce the requested fees by any amount but instead simply requested and awarded 30% of all of the fees incurred. (Exc. 386.) The Borough's fees were both unnecessary and duplicative and the superior court's award was an abuse of discretion.

CONCLUSION

The judgments of the superior court should be reversed. OSK should on remand be awarded judgment quieting its title to the North ½ of Lot 3, the West ½ of Lot 1 and the NW ¼, NW ¼, SE ¼ of Section 36 free of any interest of the State and Borough under a) Public Land Order 601, b) the Quitclaim Deed of 1959, c) the 1966 leases, d) State Patent 5124 (other than the ADL right-of-way permit), e) any right of the Borough to indentify and plat an easement to the shore within the meaning of the State Patent, f) any obligation of OSK or its successors to identify and plat an easement to the shore, g) the 1990 deed provision concerning easements ascertainable by physical inspection, and

h) any public right of access by prescription. The award of attorney's fees and costs to the Borough should be reversed and fees and costs awarded to OSK against the Borough. The award of fees and costs to the State should be vacated and reconsidered if the superior court's judgments on the merits are reversed in whole or in part.

CERTIFICATE OF TYPEFACE

Counsel, whose signature appears on the first page of this brief, certifies that the foregoing brief uses Times New Roman, 13 point, typeface.