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

REPLY BRIEF OF APPELLANT OFFSHORE SYSTEMS – KENAI

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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.

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 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.

. . . .

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. Public Land Order 601 Did Not Apply To Lands Reserved For School Purposes Pursuant To The Act of March 4, 1915, 38 Stat. 1214.

In its opening brief, appellant, Offshore Systems – Kenai ("OSK"), explained that Section 36 had been reserved as school land prior to the issuance of Public Land Order 601 and cited the general rule of federal land law 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. Appellee, State, Department of Transportation and Public Facilities ("State") and appellee, Kenai Peninsula Borough ("Borough") here advance an argument not made to the superior court. They argue that because the Act of March 4, 1915 only reserved the lands to which it applied from "sale or settlement", Public Land Order 601 and its related successor, Departmental Order 2665, were effective to create road easements on those lands.

This new argument misconstrues the federal rule at issue and overlooks a threshold question: did the Secretary of Interior intend to assert the authority the State and Borough contend he had. The withdrawal in Public Land Order 601 concerned thousands of miles of roadways in the State. The number of sections of school lands through which the withdrawn roads passed and the extent of intrusion into those sections was largely unknown in 1949 when the order was issued. This is illustrated by Section 36, here, where the road was not surveyed until 1965. (Exc. 436-7.) There is no way the

Secretary could have known the specific impact on school lands of the roads he was addressing. By 1949, reservation of school lands by Congress had a long history and the Secretary would be expected to proceed cautiously and carefully with respect to such lands. But there is no provision at all in either order addressing school lands specifically. The federal rule is a rule of construction which is based on the simple reason that even Congress will not be presumed to interfere with lands already set aside for one purpose unless it expressly so provides. Here Public Land Order 601 instead states that its withdrawals are "subject to . . . existing surveys and withdrawals for other than highway purposes." Neither the State nor the Borough explains why this explicit language should not be construed to include lands surveyed for public schools.

The State argues that Public Land Order 601 should be applied to school lands because creating a road through school land increases its value. The State's argument requires this court to conclude, and assume the Secretary concluded, that in every instance where a public road mentioned in Public Land Order 601 passes through school lands, the value of those lands is enhanced. This assumption has been specifically rejected by the United State Supreme Court in *Lassen v. Arizona State Highway Department*.[1] In that case the Arizona Department of Highways sought a declaration that it did not have to compensate the State school trust for schools lands taken for highway projects. The Arizona Supreme Court held that it could be conclusively presumed that highways constructed across school trust lands always enhanced the value of the adjacent

[1] 385 U.S. 458 (1967).

school lands in excess of the value of the land taken for the highway.[2] The Supreme Court rejected that assumption holding that:

> The conclusive presumption of enhancement which the Arizona Supreme Court found does not in our view adequately assure fulfillment of . . . [the purpose of the school lands act], particularly in the context of lands that are as variegated and far-flung as those comprised in this grant. And we think that the more particularized showing of enhancement advocated by the United States, resting as it largely would upon the forecasts of experts which by nature are subject to the imponderables and hazards of the future, also falls short of assuring accomplishment of the basic intendment of Congress. Acceptance of either of these courses for reimbursing the trust in these circumstances might well result in diminishing the benefits conferred by Congress and in effect deflecting a portion of them to the State's highway program.[3]

Thus even if Public Land Order 601 was intended to apply to school lands, the premise for doing so would be irrational and the order could not be enforced to that extent.[4]

As OSK observed in its opening brief, the Bureau of Land Management, charged by statute with specifying in patents to school lands easements to which the lands are subject,[5] made no reference in the patent to Section 36 to any easement for Nikishka Beach Road. (Exc. 416.) The State and Borough respond with confusion concerning the chronology of the passage of title to the section. Title to Section 36 vested in the State of Alaska as of January 3, 1959,[6] the date Alaska was admitted into the Union.[7] This was before June 30, 1959 when the Secretary of Commerce executed the Quitclaim Deed.

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[2] *Id.* at 460.
[3] *Id.* at 468-9.
[4] *See, also, Wessells v. State, Department of Highways*, 562 P.2d 1042, 1045 (Alaska 1977) where the Department of Natural Resources was paid $585,700 by the Department of Highways for a right-of-way across school lands.
[5] Act of June 21, 1934, 48 Stat. 1185.
[6] Alaska Statehood Act, Public Law 85-508, 72 Stat. 339, Sec. 6(k) (1958).
[7] Proclamation No. 3269. 24 Fed. Reg. 81 (January 6, 1959).

Thus, if something was reserved to the Secretary for conveyance under the Quitclaim Deed, it had to have been reserved by January 3, 1959. The patent to Section 36 was not issued until April 2, 1962 but specifically states that title passed on January 3, 1959 and makes no mention of a reservation for Nikishka Beach Road. (Exc. 416.) Thus, the patent here evidences that the view of BLM was that Public Land Order 601 did not apply to school lands. The other administrative materials cited by the State and Borough are not persuasive to the contrary.[8]

Only the Borough[9] mentions the superior court's reliance on Section 2, Chapter 182, Session Laws of Alaska 1978, for the proposition that that law "eliminate[ed] any problems associated with the use of school lands for other purposes." (Exc. 347.) But

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[8] The Memorandum of the Acting Solicitor of the Department of the Interior dated February 8, 1955 (Exc. 524-530) is principally concerned with whether the Secretary, with the consent of and payment to the Territory of Alaska, could make specific withdrawals of school lands for other federal purposes. The Solicitor does not address the general rule of interpretation at issue here except to note that the words "public lands" "ordinarily are used to designate such lands as are subject to sale or disposal under the general land laws. . . ." and cite *Newhall v. Sanger*, 92 U.S. 761, 763 (1875) for that proposition. (Exc. 528.) Similarly, the 1980 opinion of the Attorney General is concerned with a specific withdrawal for which it concludes the University would have the right to claim substitute lands. (Exc. 552.) The letter of the right-of-way agent of the Department of Transportation and Public Facilities dated July 9, 1992 doesn't even mention that the land in question was school land. (Exc. 561-562.) It does appear that the Department of Highways, in preparing the application for the right-of-way permit in 1966, asserted that there was "existing right-of-way" for the road (Exc. 448) despite the opinion of the Attorney General's office that such right-of-way did not exist. (Exc. 433-4.)

[9] Brief of Appellee Borough, 18.

the Borough makes no response to the four reasons advanced by OSK for why that reliance was misplaced.[10]

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.

The foregoing analysis also disposes of any claim, if made by the Borough or State, that the Quitclaim Deed of June 30, 1959 constituted an independent source of an easement for Nikishka Beach Road. As a quitclaim, that deed does not assert or warrant title to any of the lands referenced in the document but simply transfers such interest as the grantor has.[11] The State does argue that under Section 6(k) of the Alaska Statehood Act,[12] the transfer of school lands at statehood did not affect any "outstanding lease,

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[10] The Borough, but not the superior court, also attempts to support reliance on Chapter 182 with the alleged expert testimony of the Department's northern region right-of-way chief, John Bennett. OSK moved to strike Mr. Bennett's proposed expert "opinion" on the legal questions raised by Public Land Order 601 and the Quitclaim Deed. (Exc. 263, 275). OSK also objected and was granted a continuing objection to his testimony at trial. (Tr. 97, 98, 110, 111) and moved to strike it at the conclusion. (Tr. 235.) The superior court said that it would it would consider whether it would rely on any of testimony in its findings at the end of the case. (Tr. 240.) The superior court in its decision did not purport on this point to rely on this testimony so OSK did not address its objections to it in its opening brief. The court's rulings about it are listed as points on appeal numbers 18 and 19 in OSK's Statement of Points on Appeal dated September 2, 2010. The interpretation of laws and legal instruments is for the court, not for experts. *Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 901 (7th Cir. 1994); *Marx & Co., Inc. v. Diner's Club, Inc.*, 550 F. 2d 505, 509 (2d Cir. 1977).

[11] *Ellingstad v. State, Department of Natural Resources*, 979 P.2d 1000, 1005 (Ak. 1999).

[12] Alaska Statehood Act, Public Law 85-508, 72 Stat. 339, Sec. 6(k).

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. . . ." But the reference to "section 1" is to section 1 of the Act of 1915 which provided for rights arising prior to the Act and authorized leasing by the Territory.[13] These activities have nothing to do with actions by the Secretary after the Act was passed. OSK was entitled to a decree quieting its title to its lands free of any claim based on the 1959 Quitclaim Deed.

C. Posting of Notice Under Departmental Order 2665 Is In Addition To The Staking Requirement Under That Order.

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.
> (Emphasis added.)

Despite the express dual requirement of staking and posting, State and Borough argue that posting is not required citing *State v. Alaska Land Title Association.*[14] There is simply no language in that case which holds that the posting requirement is excused for construction after the date of the order. As a matter of law, no easement arose under Departmental Order 2665.

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[13] Act of March 4, 1915, 38 Stat. 1214, Section 1.
[14] 667 P.2d 714 (Alaska 1983).

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.

In its opening brief, OSK pointed to the distinction between real property "owned, held, administered, or used by the Department of Commerce . . .in connection with the activities of the Bureau of Public Roads" and land on which homesteaders such as Mazzie McGahan were active. Only the former is relevant to what was transferred by the 1959 Quitclaim Deed. The superior court, led by the State and Borough, failed to make the distinction. Here despite pages of briefing by the State and Borough, neither point to evidence of activity by the Department other than the vague testimony of Dale McGahan (Tr. 446-447), the cryptic reference in 1954 to staking (Exc. 521), and the Bureau's January 1957, small-scale (two inches equal 1 mile) map. (Exc. 408.) The State and Borough point to the reference in the 1954 report to staking to "Sta. 45+00." But there was no evidence concerning the Bureau's pre-statehood stationing system as distinct from the State's 1965 system which was along a different route. (R. Exh. 19, p. 1.)

Moreover, neither the State nor the Borough have attempted to reconcile the radically different final approaches to the Beach depicted 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). Not only do these different alignments make the reference to "Station 45+00" unreliable as an indicator of a location, but they call into question whether the Bureau was actually "using" McGahan's road all the way to the beach. Unlike homesteader road alignments which might vary over time, the Bureau could be expected to select an

alignment and adhere to it such that its location would be clear particularly for maintenance activities.[15]

OSK argued in its opening brief that the actions of the Department of Highways and Department of Natural Resources in 1965 and 1966 evidence a construction of the 1959 Quitclaim Deed that Nikishki Beach Road ended short of the West ½ of Lot 1. While both the State and the Borough rely on the State's right of way map showing "Existing R/W" (Exc. 29, 438), neither they nor the superior court offered any other explanation for why that right-of-way stops where it was shown.[16] The Borough points to the reference in the 1962 lease of the W ½ of Lot 1 "that the Lessee shall not prevent the public from using the Nikishka Beach Road." (Exc. 538.) But the subsequent 1966 lease of the same parcel contains no such reference nor any to the 100 foot right-of-way allegedly provided by Public Land Order 601. In the interim between the making of the two leases, the State surveyed the road. The inference is clear: after surveying the road the State concluded that "Nikishka Beach Road" did not extend into the West ½ of Lot 1.

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[15] This difference distinguishes *Shultz v. United States*, 10 F.3d 649 (9th Cir. 1993) cited by the Borough. There the court was concerned with right-of-ways created under RS 2477 based on activities of homesteaders. *Id.* at 653. Here, the superior court ruled and there has been no cross-appeal that RS 2477 does not apply to school lands. (Exc. 348, n. 9.)

[16] The State cites to hearsay testimony of Dale McGahan, admitted over objection from OSK based on hearsay and lack of foundation, about a conversation that the paving stopped where it did as an accommodation to Jim Arness. (Exc. 457-460). This does not explain the State's mapping of the "existing" right-of-way. The superior court did not rely on this alleged conversation in its ruling. The superior court also excluded speculation by the State's witness, John Bennett, that the survey ended where it did because that was the extent of the project. (Exc. 154-156.) Even if that testimony is considered, it begs the question: why did the project stop short of the beach if the State had a right-of-way all the way to it.

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.

In its opening brief, OSK pointed out that the superior court found that "Nikishka Beach Road" does not include that portion of Dock Access Road that continues west from the "Y" intersection." (Exc. 355-356.) OSK also noted that some potentially contrary analysis in the superior court's decision was erroneous.[17] In response, the State has not claimed that the right-of-way under Public Land Order 601 and the 1959 Quitclaim Deed extended through the North ½ of Government Lot 3, the location of the dock road.[18] The Borough, however, does make this claim.[19] Assuming without conceding that the Borough can make this claim when neither it nor the State has cross-appealed from the judgment of the superior court, the Borough's analysis asserts that a landowner can without the consent of the State shift the location of a right-of-way specified by Public Land Order 601 and the Quitclaim Deed. The Borough does not dispute that the roads which are the subject of the land orders and the Quitclaim Deed are part of the state highway system. "Control" of that system has since statehood been vested in the Department and its predecessor.[20] Any common law rule concerning moving private easements does not apply.

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[17] The Borough contends that OSK never requested this relief but the judgment that OSK submitted would have limited the State to a 50 foot right-of-way on Lot 3, not the 100 foot right-of-way provided by Public Land Order 601. (Exc. 375, paragraph 2.)
[18] Brief of State, 36-38.
[19] Brief of Borough, 25-28.
[20] AS 19.05.010.

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. No Obligation Concerning The Road to the East Existed After That Road Ceased to Exist.

The State and the Borough argue that the covenant in the Leases of 1966 pertaining to "existing roads to the beach" survives as an easement of the State to the present. The State quibbles that the physical road to which this covenant originally applied, the so-called "north" or "east" access, did not "cease to exist" even though it was not used as a road and was over-grown with alders and vegetation. The testimony of Ivan Every, a long-time fisherman, was unambiguous that in 1969 there was "no road . . . no trail" to the east as you approached the bluff. (Tr. 1239.) The testimony of another fisherman, Leon Marcinkoski, was equally unambiguous that there was "no road to the beach" to the east when he started fishing in 1974. (Tr. 1250-1.) And there was nothing indicating a road to the east to OSK's surveyor, Scott McLane, when he began mapping the area in 1985 in anticipation of OSK's building project. (Tr. 1034-1036. R. Exh. 3053.) Critically, neither the State nor the Borough point to any evidence that a tenant under the State leases could identify the location of the original "north" access after 1969. And neither the State nor the Borough explain how that information would not be essential to a tenant attempting to locate its own improvements within the leasehold. Finally, neither the State nor the Borough disputes that under Paragraph 6 of the Leases, the tenant was entitled to notice of new easements claimed by the landlord so that the

tenant could make any claim for compensation for damage to its improvements that the tenant might have.[21]

The State and Borough next argue that the obligation concerning "existing roads to the beach" in the 1966 leases jumped out of those leases and into an entirely different lease made in 1964 ("ADL 01391" Exc. 419) pertaining to different land and lacking any such provision. The argument is essentially that the actions of a third party, members of the public, amended the 1964 lease by using a tenant installed improvement, the road to the dock, located within those lease premises. As a matter of law, this cannot be a fair reading of the 1964 lease.[22] And the extrinsic evidence does not support the conclusion that Arness thought his dock road was a public one. The letter dated May 16, 1967 from F.J. Keenan, State Lands Officer, to Arness expressly in reference to ADL 01391 (Exc. 456) refers to the road on those lease premises as "your existing road." There is no evidence that Arness hindered or obstructed the "existing road to the beach" within his other leased premises. He simply built a better road of his own to the beach for his own purposes. Contrary to the Borough's claim, the State did not maintain Arness' road.[23] The evidence that Arness kept "the beach open" by clearing an area immediately in front

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[21] *See*, *Wessells v. State, Department of Highways*, 562 P.2d 1042 (Alaska 1977)(tenant under state land lease entitled to compensation under same clause at issue here).

[22] Both the State and Borough rely on *Restatement (3d) of Property, Servitudes* §4.8, comment f (2000). But lease servitudes are excluded from the scope of that restatement. *Id.* Introductory Note.

[23] Tr. 337-8, 627. The Borough cites the testimony of Larry Miller who was not working in the area until 1990. Tr. 344.

of the dock (Tr. 507 ,509), concerns access along the shore which was not addressed in this case,[24] not to the shore which was.

The Borough points to the continuing use of the "existing roads to the beach" phrase in the seriatim assignments of the 1966 leases. The phrase continued to have some meaning after the north access ceased to exist because access through the two parcels governed by the 1966 leases was necessary to get from the highway in the ADL Permit to Arness' dock road, the other original "existing road to the beach." While the 1964 lease and the 1966 leases always had the same tenant and the parcels were much more useful and valuable together, there was no requirement that they pass to the same tenant. The provision insured that the tenant of the 1966 leases could not block the tenant of the 1964 lease. Beyond that, the copying of the legal description verbatim from the original lease into the subsequent assignments evidences little more than scrivener's caution or even mere convenience.

B. The State Did Not Retain The Right To Enforce The Lease Covenant After It Transferred All Interests In The Leases To The Borough.

The State and Borough continue to assert that the phrase "[s]ubject to valid existing trails, roads and easements" in State Patent 5124 reserved to the State the right to enforce a single provision of each of the 1966 leases. The phrase "subject to valid

[24] OSK originally sought to resolve the location of access along the shore in relation to the docks in this case. (Exc. 63, 309-311). At trial, the State moved to dismiss claims relating to the easement along the shore as " not justiciable" due to pending discussions between OSK and the Department of Natural Resources. (Tr. 1312-13.) OSK eventually consented. (Tr. 1325.) After trial, the superior court entered an order dismissing any claims concerning the easement along the shore without prejudice. (Exc. 343.)

existing" is widely used in public land disposal statutes and administrative actions.[25] In that context, the phrase universally refers to preserving private interests in the public lands from any adverse impact of the public disposal action.[26] The grantee of the public lands succeeds to the interests of the grantor under those arrangements with private interests.[27] With an express reservation provision in this patent and specific references to the leases of 1966, there is no reason here to embark on a perilous exception to this typical interpretation of "subject to valid existing" with unknown consequences for all of the instances in which that phrase might be used in public land actions in Alaska.[28]

The only mention of the 60 foot right-of-way here appears in leases. The general rule of long-standing is that when land is transferred subject to a lease, all of the interests of the landlord pass to the grantee unless there is specific language to the contrary.[29] No such language of exception appearing here, the right to enforce the right-of-way restriction passed with the patent to the Borough.

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[25] See, e.g., *Stupak-Thrall v. U.S.*, 89 F.3d 1269, 1270 (6th Cir. 1996); *Cape Fox Corp. v. United States*, 456 F. Supp. 784, 806 (D. Alaska 1978); *Leisnoi, Inc. v. Stratman*, 960 P.2d 14, 17 (Alaska 1998); *Ellis v. State, Department of Natural Resources*, 944 P.2d 491, 495 (Alaska 1997).

[26] *See, e.g., Stupak-Thrall, supra* (provision prevents the government from effecting a taking of private interests); *Cape Fox, supra* (timber contract, reserving function distinct from preserving private rights); *Ellis, supra* (mineral rights); *Leisnoi, supra* (grazing lease).

[27] See, Department of Interior Memorandum, Valid Existing Rights under the Alaska Native Claims Settlement Act, 85 Interior (December 1, 1977) cited in trial court opinion cited in *Capener v. Tanagusix Corp.* 884 P.2d 1060, 1065 (Alaska 1994).

[28] This court should be aware and take judicial notice that the phrase appears in virtually every state patent. The State, here, produced no testimony from a representative of the Department of Natural Resources supporting its interpretation of the clause.

[29] *See, e.g., Eldredge v. Jensen*, 404 P.2d 624 (Id. 1965); *Matter of O'Donnell*, 147 N.E. 541 (Ct. App. N.Y. 1925); *MHW, Ltd. Family Partnership v. Farrokhi*, 693 N.W.2d 66 (S.D. 2005).

It is also important that when the Department of Natural Resources intended to transfer an interest to the Department of Highways, it did so here by means of a "Right-of-Way Permit," ADL No. 32264. (Exc. 439.) The practice was still followed even where a lease with paragraph 6 was already in place as illustrated in *Wessells v. State, Department of Highways*,[30] decided in 1977. There the court stressed the separate distinct sources of authority for the two agencies. The lack of a permit from the Department of Natural Resources to the Department of Highways referencing the "60 foot right-of-way for existing roads" disposes of the Borough's argument that the lease right-of-way became part of the state highway system under the control of the Department of Highways pursuant to AS 19.05.010.

C. The Lease Covenant Was Extinguished Under The Doctrine Of Merger When OSK Acquired The Fee Simple Estate From The Borough.

In response to OSK's opening argument concerning merger, both the State and Borough argue that merger could not occur when the Borough sold the land to OSK because the State reserved in State Patent 5194 enforcement of the lease covenant. OSK has responded to the reservation argument, above. Both the State and Borough, however, concede that if the State did not reserve enforcement of the lease covenant in the patent, then that covenant was merged when the Borough sold the land. Except for in its amended complaint, the Borough has consistently maintained that it has no interest in OSK's property.

[30] 562 P.2d 1042, 1045 (Alaska 1977).

In citing in its opening brief to the *Restatement 3d of Property (Servitudes)*[31], OSK should have made clear that that section applies only by analogy if the lease covenant is treated like an easement. Servitudes in leases are not within the scope of the *Restatement*.[32] The argument of the State and Borough concerning separation of the right of use from the right of control[33] as basis for preventing merger has no corollary in the leasing context. No case establishes that merely because a landlord reserves a right of access in a lease, the landlord by that instrument alone grants or dedicates an easement to third parties or the public.

III. If An Easement From The End Of The Right-Of-Way Permit To The Shore of Cook Inlet Already Existed in 1980, the Express Provision In State Patent 5124 Requiring The Borough To Identify And Plat An Easement To The Shore Of Cook Inlet Would Have Been Superfluous.

Both the State and Borough argue that an easement for access to the beach existed as of 1980 when State Patent 5124 was issued and that the patent simply excluded the existing easement from transfer to the Borough. If such an easement existed, the express provisions of the patent requiring the Borough to "identify and plat" an easement to the shore were superfluous contrary to a settled rule of construction of this court.[34]

In 1980, there were only two possible sources for such an existing easement: the 100 foot wide easement of the public land orders and the 60 foot wide right-of-way of the lease covenant. But if either of these existed as of 1980 when the patent was issued, the

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[31] *Restatement 3d of Property (Servitudes)* (2000).
[32] *Id.* Introductory Note.
[33] In any event, the *Restatement* defines "control" to include "terminate." *Restatement, supra*, §2.18, comment b.
[34] *Rockstad v. Global Finance and Investment Co.*, 41 P.3d 583, 586 (Alaska 2002)

express requirement of the patent concerning a 50 foot wide easement is completely redundant.

Similarly, if the location of either of these allegedly existing easements was clear either from actual public use and evidence on the ground or because it was obvious from the Final Decision of the Department of Natural Resources pertaining to some 3,000 acres spread across the Kenai Peninsula (Exc, 462-467), there was no point in requiring the Borough to "identify" the easement. Instead, the most the patent would have required is for the Borough to survey and map whatever existed.

Finally, if both the width and location of the easement were already established, there was little point in requiring the Borough to "plat" it. The Borough does not dispute OSK's point in its opening brief that "plat" in the patent was intended to require the public platting process, not the more narrow meaning of simply creating a map. That public process would have been with at least public notice if not specific notice to the tenant under the leases, would have focused on all of Section 36 not just properties of the tenant, and would have invoked the expertise and discretion of the local platting board.

The common law rule cited by the State relating to the location of indefinite easements, even if applicable to negate the express requirements in State Patent 5124 on the Borough to "identify and plat" an easement, doesn't require a different result. The rule is that if the location is indefinite, the owner of the servient estate must identify a route "when requested to do so."[35] The Borough was the owner of the servient estate in 1980. OSK's predecessor was a tenant. And the Borough stipulated at trial that its

[35] *Restatement, supra*, §4.8, comment b.

obligations to identify and plat an easement did not devolve upon OSK with the execution of the quitclaim deeds. (Tr. 8.) Even if they did, there is no evidence of a request by the State to OSK to locate the easement reserved in the patent. The Borough was the party with the obligation to locate the easement.

IV. Judicial Declaration Of An Access Easement On OSK's Lands Was Barred By The Doctrine Of Laches.

The State and Borough argue that there is no laches defense here because the superior court was simply being asked to declare the existence of certain easements, presumably either the 100 foot wide right-of-way of the land orders or the 60 foot wide right-of-way of the lease covenant, both citing *Keener v. State*.[36] OSK concedes that if despite the reasons advanced in sections I of this brief and its opening brief a 100 foot right-of-way extended across specific OSK lands to the beach, laches would not bar its assertion under that case. OSK also concedes that if despite the reasons advanced in sections II of this brief and its opening brief the 60 foot lease right-of-way still burdened a path to the beach, laches would not bar assertion of that right-of-way here under an extension of the reasoning in *Keener*.

But the superior court urged on by the State and Borough also declared 50 foot wide easements over both of OSK's roads to the beach. (Exc. 359, 404-406.) These were based on the Alaska Constitution, Article VIII, Section 14[37], AS 38.04.050, and

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[36] 889 P.2d 1063 (Alaska 1995).

[37] The State has not argued that this constitutional provision has any relevance to this case. The Borough cited the provision but has not responded to OSK's argument that under *State v. Alaska Riverways, Inc.*, 232 P.3d 1203 (Alaska 2010), the provision has

State Patent 5124. (Exc. 358-9.) The patent was issued in 1980 when OSK's lands were already under lease to its predecessor with a lease provision that required notice to the tenant of new easements. Unlike Davis Road which had a definite location on the private owner's property in *Keener*, the reservation here could have applied anywhere to the shore of Cook Inlet within Section 36, large portions of which were not leased to OSK's predecessor. Pending some act by the Borough designating the leased lands as the situs of the easement, the tenant was entitled to quiet enjoyment of the leased premises including development thereon. The laches period on a State suit to have the superior court do the Borough's job, therefore, began running in 1980. Neither the State nor Borough disputes that from that date there has been unreasonable delay and prejudice to OSK. Laches therefore bars the declaration of the 50 foot wide easements under *Laverty v. Alaska Railroad Corp.*[38].

V. The Claims Of The State Were Barred By The Doctrine Of Estoppel.

The State argues that quasi-estoppel based on the State's right-of-way map and monument is not a defense here because the map shows only the right-of-way within the scope of the project and two "routes" extend from beyond the project heading down to the beach. The map (Exc. 438) has two arrows: one labeled "End of Project Construction" and the second pointing to an area closer to Cook Inlet labeled "End of R/W." The second arrow points to where the shaded area labeled on previous pages (Esc.

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been construed to incorporate the public trust doctrine applicable to tidelands and submerged lands, not uplands.

[38] 13 P.3d 725 (Alaska 2000).

436-437) as "Existing R/W" ends. The as-built plans based on the same drawing expressly state "End Nikishka Beach Road Station 41+00.0." The two "routes" to which the State refers are not labeled as "R/W." There is simply no way to interpret these as possible additional rights-of-way.

The State also argues that its letters to the tenant of the leases were not representations that it was relinquishing any rights-of-way that it had under the patent. OSK's argument was not so broad. The language clearly negatives any notion that the State would be enforcing rights under the leases. It cannot be reconciled with the notion now advanced by the State that it reserved the right to enforce a single covenant in those leases relating to "right-of-way for existing roads to the beach." In planning its improvements under the lease, OSK reasonably dealt only with its landlord the Borough. (Exc. 473.) And the Borough later conveyed its interest under the leases to OSK.

The State does not dispute that the map and the letters were made with full knowledge of the facts thus distinguishing these representations from those addressed in previous decisions of this court.[39]

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

The State does not dispute that the roads over which the superior court imposed public prescriptive easements were constructed, used and maintained by OSK for its own purposes. The State also does not claim there is evidence in the record that the casual uses of the public interfered with OSK's uses of the roads. The State implies that a

[39] *Keener*, *supra*, 889 P.2d at 1068; *Safeway v. State*, 34 P.3d 336, 340 (Alaska 2001).

prescriptive claim can be established despite these facts but cites no case containing them where the result is a prescriptive easement. The State also fails to identify any policy served by imposing public use rights on improvements installed, used and maintained by a private record owner for its own purposes. One who uses another's lands by means of an improvement constructed, used and maintained by the other is not using land as if she is the owner, the essence of the adversity requirement.[40] The beliefs of the public users and OSK's crane operator (Tr. 624)[41] about the right of access are irrelevant to this objective test of adversity.[42]

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

The State and Borough both defend the superior court's refusal to enter anything but the generic judgments it did. Neither dispute that OSK clearly pled a request to quiet title. (Exc. 63, 107.) The purpose of a quiet title judgment is to provide clarity and finality to a disputed parcel of property.[43] When recorded, it should provide permanent

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[40] These facts require reversal of the prescription conclusion or finding without resolving an apparent conflict in this court's cases about the permission requirement. *Dillingham Commercial Co. v. City Dillingham*, 705 P.2d 410,417 (Alaska 1985), citing *Hamerly v. Denton*, 359 P.2d 121, 126 (Alaska 1961) states that "use alone . . . even with knowledge of the owner would not establish an easement." *Tenala Ltd. v. Fowler*, 921 P.2d 1114, 1120 (Alaska 1996) citing *Swift v. Kniffen*, 706 P.2d 296, 304 (Alaska 1985) states that "if the true owners merely acquiesce, and do not intend to permit a use, the claimant's use is hostile." *Dillingham* is the only public prescriptive right case in this group.

[41] OSK's manager, Mike Peek, testified that the company policy was to accommodate such uses as a good neighbor. (Tr. 946-7.)

[42] *McDonald v. Harris*, 978 P.2d 81, 88 (Alaska 1999) *citing, Nome 2000 v. Fagerstrom*, 799 P.2d 304, 310 (Alaska 1990).

[43] *Farmers Union Oil Co. v. Smetana*, 764 N.W.2d 665, 674 (North Dakota 2009).

guidance concerning the property included.[44] When specific claims to title have been found meritless, they should be referenced in the form of judgment.[45] Here, the judgments of the superior court don't even contain a legal description of the property at issue. (Exc. 379, 381.) Neither does the post-trial decision of the court. (Exc. 345.) OSK is entitled to a reasonably concise judgment which when recorded will give notice of what has been decided and what has not.

The fact that both the State and Borough eventually abandoned or conceded some issues in the case does not mean that those matters should not have been addressed in the judgment. The State's complaint attached a lengthy memorandum of Marcus Mueller which the complaint asserted was true. (Exc. 7, 17.) The fact that the State later distanced itself from some of the assertions in that memorandum does not mean they were not at issue in the case. Both the State and Borough complaints attach State Patent 5194. (Exc. 15, 90.) OSK was entitled to have stipulations about the meaning of that patent made in open court reflected in the court's final judgment. The superior court erred in not entering more than the generic judgments it did.

VIII. The Award Of Attorneys Fees To The Borough Was Erroneous.

The Borough concedes that it established no right of its own in OSK's property. It also concedes that the State controls the public access easements here for all purposes including the conduct of litigation. The Borough points to no case where a party is entitled to fees for asserting claims of another. It does not attempt to justify the superior

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[44] *Id.*

[45] *Holland v. Hattaway*, 438 So.2d 456, 470 (D. Ct. App. Florida 1983).

court's reliance on *Alaska Center for the Environment v. State*[46] which OSK explained in its opening brief was erroneous. The superior court's determination that the Borough was a prevailing party was erroneous.

The Borough responds to OSK's argument concerning the duplication of effort of the Borough's attorney by arguing the OSK should have argued other bases under Rule 82 of the Alaska Rules of Civil Procedure for reducing the fee. Rule 82 requires that fees awarded be "necessarily incurred." Duplicative fees are not necessary. The fee award to the Borough should be reduced or eliminated entirely.

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 and DO 2665, 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

[46] 940 P.2d 916 (Alaska 1997).

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.