

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

FILED

OCT 26 1998

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
EJ Deputy

STATE OF ALASKA,)
)
 Plaintiff,)
)
 vs.)
)
 DAVID B. HARRISON, et al.,)
)
 Defendants.)

No. A94-0464-CV (HRH)

O R D E R

Motion for Partial Summary Judgment

Plaintiff, the State of Alaska, moves for partial summary judgment establishing that the State of Alaska holds a highway right-of-way on Chickaloon River Road where it crosses the allotment held by the defendants, David B. Harrison, Penny L. Harrison, Timothy E. Harrison, Gary D. Harrison, Bruce A. Harrison, and Donald R. Harrison ("Harrison defendants").¹ The Chickaloon Native Village is also a defendant. This motion is opposed. Oral argument was not requested and is deemed unnecessary.

FACTS

Plaintiff, State of Alaska, seeks to condemn a right-of-way across Native Allotment 53702² which was granted to Louis R.

¹ Clerk's Docket No. 122.

² This allotment is comprised of the southwest one-quarter of Section 25, Township 20 North, Range 5 East, Seward Meridian.

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Harrison, now deceased. Defendants are Harrison's heirs and the Chickaloon Native Village.

The property at issue was designated as a railroad townsite by President Woodrow Wilson in 1917 by Executive Order 2538.³ Railroad tracks were laid down to service coal fields. During the 1930's, however, the railroad was no longer needed, and the tracks were removed and the railroad bed began to be used as a roadway ("Chickaloon River Road").

In 1949, the Department of the Interior, through Public Land Order 601, reserved a portion of the land now owned by the Harrison defendants for highway purposes.⁴ It reserved 100 feet of land for "local roads." Public Land Order 601 was expressly "[s]ubject to valid existing rights and to existing surveys and withdrawals for other than highway purposes,"⁵ e.g., the railroad townsite withdrawal. This reservation was converted to a right-of-way in 1951 by Secretary of the Interior Department Order 2665.⁶ In 1955, the Department of the Interior, by Public Land Order No. 1093, revoked the 1917 railroad townsite withdrawal.

In 1956, Louis R. Harrison applied to the Department of the Interior, Bureau of Land Management, for a homestead entry upon the lands in question. The application stated that the lands

³ Clerk's Docket No. 122, Excerpt of Record, page 1.

⁴ Id., Excerpt of Record, page 39.

⁵ Id., Excerpt of Record, page 39.

⁶ Id., Excerpt of Record, page 40.

applied for were "traversed by a roadway constructed or maintained by the Alaska Road Commission."⁷ The entry was granted "[s]ubject to Local Road Right-of-way 50' each side of the centerline."⁸

In 1959, the United States Secretary of Commerce quit-claimed to the State of Alaska "all rights, title, and interest of the Department of Commerce" to Chickaloon River Road. Alaska Omnibus Act, 48 U.S.C. § 21.

In 1961, Harrison relinquished his homestead application and simultaneously applied for the same land as a Native allotment. In his Native allotment application, Harrison represented that he had occupied the land since November 11, 1956.⁹ A certificate of allotment was issued to Harrison on November 6, 1962. The certificate makes no mention of the Chickaloon River Road.¹⁰

Louis Harrison died in 1969. His children, the Harrison defendants, succeeded to ownership of the allotment land in question.¹¹

In 1981, the State of Alaska undertook substantial improvements to the Chickaloon River Road. This undertaking precipitated a series of confrontations which continue down to the

⁷ Id., Excerpt of Record, page 45.

⁸ Clerk's Docket No. 60, Exhibit 11.

⁹ Clerk's Docket No. 122, Excerpt of Record, page 48.

¹⁰ Id., Excerpt of Record, page 49-a.

¹¹ Id., Excerpt of Record, pages 50-51.

present with respect to the location and use of the Chickaloon River Road.

In 1983, the regional solicitor for the Department of the Interior rendered a formal opinion on the issue, concluding that the Alaska Road Commission and its successor, the Bureau of Public Roads, had a valid right-of-way across the allotment lands prior to Louis Harrison's occupancy, even though the right-of-way was not mentioned in the allotment. The solicitor concluded:

[S]ince the road right-of-way was conveyed to the State prior to the issuance of the Certificate of Allotment to Harrison, the Certificate could not convey the road. Failure to note the prior conveyance can in no way defeat the State's interest.¹²

The parties disagree over who has maintained the road over the years. The State of Alaska asserts that it maintained the road, while the Harrisons assert that any maintenance of the road was done by the Harrison family and that the only maintenance done by the State was the construction of two bridges. The parties agree, however, that the centerline of the road bed was never surveyed, the road has not been staked and no plat was ever filed.

DISCUSSION

The State of Alaska moves for partial summary judgment and urges the court to find that the Harrison allotment is subject to the state's right-of-way as a matter of law even though Louis

¹² Id., Excerpt of Record, pages 4-5.

Harrison's certificate of allotment does not expressly mention the right-of-way.

The parties agree that a roadway, Chickaloon River Road, exists across the Harrison allotment. In order for the court to grant the State's motion, the court must determine that: (1) a right-of-way for the State of Alaska's benefit was created for Chickaloon River Road; (2) such right-of-way was neither extinguished nor abandoned; and (3) the absence of mention of the right-of-way in Louis Harrison's certificate of allotment does not affect the existence of the right-of-way.

Existence of the Right-of-Way

The State of Alaska asserts that it possesses a right-of-way for Chickaloon River Road. According to the State of Alaska, this right-of-way was first created for the benefit of the United States in 1949 by Public Land Order 601 which withdrew and reserved fifty feet on each side of the centerline of all "local roads" including the Chickaloon River Road. The United States then quit-claimed the right-of-way to the State of Alaska in 1959 as part of the Alaska Omnibus Act.

The Harrison defendants contend that the reservation under Public Land Order 601 did not apply to Chickaloon River Road because the land which it traverses was land withdrawn from public domain as part of the 1917 railroad townsite withdrawal. Thus it could not also be reserved as a "local road" under Public Land Order 601.

There is no inconsistency or conflict between the railroad townsite withdrawal and Public Land Order 601. The latter was expressly made subject to the former. When, in 1955, the Department of the Interior revoked the 1917 railroad townsite withdrawal, the Department of Interior did so without purporting to affect the right-of-way created by Public Land Order 601. The Department of the Interior reaffirmed the continuing existence of the right-of-way when Department Order No. 2665 was issued in 1951 converting the reservation to a right-of-way. An easement for the road thus existed well before any entry on the land by Louis Harrison. None of these facts is disputed. Therefore, the court finds that a right-of-way for Chickaloon River Road was first created for the benefit of the United States in 1949 and was later quitclaimed to the State of Alaska in 1959. There is no dispute about the fact that the roadway had been conveyed away by the Department of the Interior before Louis R. Harrison's Native allotment entry.

Extinction of the Right-of-Way

The Harrison defendants posit that even if a right-of-way was created, certain actions or inactions culminated in the extinction or abandonment of the right-of-way. First, the Harrison defendants assert that "[u]nless the State of Alaska can show that there was a valid road surveyed, staked and constructed, then no road existed"¹³ because Department Order 2665 required that roads

¹³ Clerk's Docket No. 127 at 3.

be surveyed and staked. Section 3(c) of Department Order 2665 provided:

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. [14]

The argument set forth by the Harrison defendants fails to recognize that the Chickaloon River Road was already in existence at the time Department Order 2665 was entered; and, since the staking requirements of Department Order 2665 applied only to new construction, they were inapplicable to Chickaloon River Road. This conclusion is further supported by the Alaska Supreme Court's interpretation of Department Order 2665 where the court stated:

[t]he history of the promulgation of DO 2665 ... demonstrates that the staking requirement applies only to new construction, not existing roads.

State v. Alaska Land Title Ass'n, 667 P.2d at 714, 722 (Alaska 1983), cert. denied, 464 U.S. 1040 (1984). Thus, the fact that Chickaloon River Road was never staked does not effect the existence of the right-of-way for the State of Alaska's benefit.

Second, the Harrison defendants assert that they are the ones who maintained the Chickaloon River Road and that no public use of the road occurred while the allotment was occupied by Louis R.

¹⁴ Clerk's Docket No. 122, Excerpt of Record, page 40.

Harrison; therefore, the right-of-way was either abandoned or extinguished. The only evidence put forth by the defendants is an affidavit from one of the Harrison defendants, Gary D. Harrison, who attests that "any clearing up or maintenance of the road was done ... by my father and his family."¹⁵ Harrison does not, however, have any personal knowledge of whether the state maintained the road prior to the Harrisons' entry onto the land and the state has put forth ample evidence--through the affidavits proffered by Peter J. Bagoy, Sr.,¹⁶ and David C. Kepler¹⁷--to support its claim that it had maintained the Chickaloon River Road. More importantly, the extent of maintenance by the State of Alaska after creation of the right-of-way is irrelevant. Once the state acquired ownership of a road easement, the right-of-way could not be lost by lack of maintenance or abandonment without the state's vacation of the right-of-way by the state.¹⁸ Even before statehood, Alaska law has precluded the extinguishment of public road rights-of-way through adverse possession. AS 38.95.010.¹⁹ Therefore, the State of Alaska cannot be deemed to have lost the right-of-way; and the fact that the Harrisons may have participated in the maintenance of the

¹⁵ Clerk's Docket No. 128, ¶ 3.

¹⁶ Clerk's Docket No. 122, Excerpt of Record, pages 9-15.

¹⁷ Id., Excerpt of Record, pages 16-21.

¹⁸ Id., Excerpt of Record, page 54.

¹⁹ Formerly § 47-21 ACLA (1955).

Chickaloon River Road after the creation of the right-of-way for the state's benefit does not extinguish the right-of-way.

Lack of Mention of the Right-of-Way
in the Harrison Certificate of Allotment

The Harrison defendants contend that because Louis Harrison's certificate of allotment did not mention the Chickaloon River Road right-of-way, the state is precluded from asserting any claim because the Harrison defendants did not have recorded notice of the right-of-way. There is no room for dispute that Louis Harrison did have notice of the right-of-way when he filed his homestead application. The Chickaloon River Road right-of-way was first established in 1949 prior to Louis Harrison's initial entry onto the property. He had to have seen it. His homestead application acknowledged the existence of the road. All of this took place before Louis Harrison applied for or was granted an allotment in 1962.

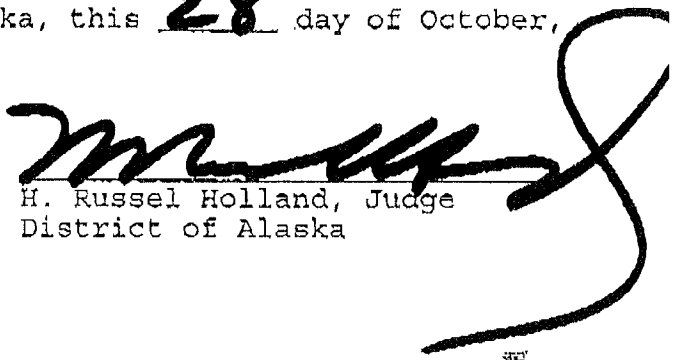
Where a right-of-way is created prior to the establishment of an interest in an allotment, the allotment is subject to the right-of-way. Bird Bear v. McLean County, 513 F.2d 190 (9th Cir. 1975). Moreover, a native allotment certificate is in the nature of a quitclaim deed and can convey only the interest held by the United States. Beard v. Federy, 70 U.S. 478, 479 (1865); see also Alaska Land Title Ass'n, 667 P.2d at 727 (the absence of an express reservation for a Public Land Order right-of-way in a patent does not defeat the existence of the right-of-way). Therefore, since the United States had quitclaimed to the State of Alaska the Chickaloon

River Road right-of-way in 1959 as part of the Alaska Omnibus Act, it could in 1962, only convey its interest in the land subject to the right-of-way it had previously deeded to the state. The absence of any mention of the Chickaloon River Road in the Harrison certificate of allotment does not affect the Chickaloon River Road right-of-way for the benefit of the State of Alaska.

CONCLUSION

Based upon the foregoing, the State of Alaska's motion for partial summary judgment establishing that the Harrison defendants' allotment is traversed by a right-of-way for Chickaloon River Road is granted. This ruling does not address or resolve the question of whether the State of Alaska has or has not relocated any part of the Chickaloon River Road outside the easement which the state owns.

DATED at Anchorage, Alaska, this 28 day of October, 1998.


 H. Russel Holland, Judge
 District of Alaska

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OCT 29 1998

Department of Law
 Office of Attorney General
 3rd Judicial District
 Anchorage, Alaska

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B. LANDON (ADSA)
 J. BAKER (AG-STR-200)
 S. JUAREZ