

United States Court of Appeals, Ninth Circuit.

SHULTZ v. DEPARTMENT OF ARMY

96 F.3d 1222 (9th Cir. 1996)

PAUL G. SHULTZ, Plaintiff-Appellant, v. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant-Appellee.

Nos. 92-35197, 92-35580

United States Court of Appeals, Ninth Circuit.

Argued and Submitted August 3, 1993 — Anchorage, Alaska

Opinion filed November 30, 1993

Reargued December 15, 1994 — San Francisco, California Withdrawn from Submission March 15, 1995 Resubmitted September 12, 1996 Opinion Withdrawn September 20, 1996

Filed September 20, 1996

Joseph W. Sheehan, Fairbanks, Alaska, for plaintiff-appellant.

William B. Lazarus, United States Department of Justice, Environment Natural Resources Division, Washington, D.C., for defendant-appellee.

Sheri L. Hazeltine, Fairbanks, Alaska, for Amicus, the Tanana Chiefs Conference, Inc.

Robin L. Rivett, Pacific Legal Foundation, Sacramento, California, for amicus, Pacific Legal Foundation, Resource Development Council for Alaska, and Alaska Miners Association.

Cheri C. Jacobus, Assistant Attorney General, Anchorage, Alaska, for amicus, State of Alaska.

Steven F. Alder, Assistant Attorney General, Salt Lake City, Utah, for Amicus, the State of Utah and the Utah Association of Counties.

Eric P. Jorgensen, Sierra Club Legal Defense Fund, Inc., Juneau, Alaska, for Amici National Parks and Conservation Association, *1223 The Wilderness Society, The Audubon Society, Southern Utah Wilderness Alliance, Sierra Club and Northern Alaska Environmental Center.

Appeals from the United States District Court for the District of Alaska.

D.C. No. CV-86-30-AJK

Andrew J. Kleinfeld, District Judge, Presiding

Before: Mary M. Schroeder, Betty B. Fletcher and Arthur L. Alarcon, Circuit Judges.

The opinion dated November 30, 1993 is withdrawn.

OPINION

PER CURIAM:

The government's petition for rehearing is granted, the opinion of November 30, 1993 at [10 F.3d 649](#) is withdrawn, and the following opinion is substituted in its place.

[1] Paul G. Shultz appeals the district court's judgment in favor of the government in his quiet title action under [28 U.S.C. § 2409a](#). Shultz argued that he has a right-of-way across Fort Wainwright to get back and forth between Fairbanks and his property under either R.S. 2477, 43 U.S.C. § 932, or Alaska common law, or both. Because we ultimately agree with the district court that Shultz has not sustained his burden to factually establish a continuous R.S. 2477 route or a right-of-way under Alaska common law, we affirm the district court. We do not reach Shultz's argument that the district court erred by holding that his action was time-barred by [28 U.S.C. § 2409a\(g\)](#).

AFFIRMED.

[6] ALARCON, Circuit Judge, dissenting:

I respectfully dissent.

I would deny the petition for a rehearing and reverse the district court's judgment for the reasons set forth in Judge Fletcher's scholarly opinion in *Shultz v. Department of the Army*, [10 F.3d 649](#) (9th Cir. 1993).
