

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities
Statewide Design & Engineering Services Division
Central Region – Right of Way Section

TO: James H. Sharp, PLS
ADOT&PF Central Region
ROW Engineering Chief

DATE: August 1, 2002

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FROM: Michael H. Schoder, PLS *MHS*
Right of Way, Engineering Assistant

SUBJECT: Birch Road ROW Rights

Jim,

As per your request I have gathered information concerning the Right of Way width rights of Birch Road between Huffman and Abbott Roads for your meeting with Kim Rice and Jim Cantor.

The latest issue about our ROW rights along Birch Road arose around an enforcement action where Mrs. Diane Stefan, an adjoining landowner (Lot 2, Block 1 Spring Forest Subd.) to our ROW, requested guidance as to the ROW width of Birch Road so that they could construct a fence. Presently the DOT&PF have a ROW plan set showing a 100' ROW (50' each side of section line), and the landowner's subdivision plat shows a dedication of 35' from centerline. The Plot Plan prepared by surveyor Gastaldi which the landowner relied upon for building permit application showed only the 35' from section line ROW, and also showed the MOA bike path encroaching on the landowners lot.

The issue of the State's rights to a 100' ROW, centered on the section line resulted in prior litigation (Wyatt, Wright, et al. v. Municipality et al., Case No. 83-525 Civ., filed in District Court) in 1983, which was dismissed from the Alaska District Federal Court in December 1984 on 11th Amendment grounds. This case was re-filed in Alaska State Superior Court as Wyatt, Wright et al. v. State of Alaska and Municipality of Anchorage (3AN-85-8739).

On May 18th, 1987 Judge Katz issued an order to deny the Motion for Partial Summary Judgment noting "except that the plaintiffs are **granted** partial summary judgment to the effect that **PLO 601 did not grant the federal government/state a 50' one-side of centerline right-of-way nor did it establish a standard for ROWs taken pursuant to the**

1947 Act". On October 8, 1987, prior to trial on the other issues in the case, the State entered into a Settlement Agreement with Prejudice with the Plaintiffs. This settlement required the State to execute Quit Claim Deeds to the State's rights beyond 33' from the Section Line for the four plaintiffs. Copies of some of the items that I have researched (Plaintiff's Reply Brief, Court's Action, Settlement Agreement, selected depositions, etc.) from this litigation are included herewith this memo.

The following is a chronological history of pertinent facts to our current issue. I have indexed copies of documents that support this chronology with the numbering listed herein with circles and orange highlighter. These documents are:

1. 8/17/1917 - U.S. GLO Rectangular Survey of Section 14/15 boundary approved.
2. 7/24/1947 - Effective date of 47' Act.
3. 6/27/1949 - Claimed use and occupancy of land by Grant Forsythe prior to filing of homestead application. There is a deposition of Mr. Forsythe taken during the mentioned Wright v. State litigation, which states his recollection of actual entry on the lands in the summer of 1949. In the GLO case file determination of Homestead Act requirements, the GLO examiner took a statement from Mr. Forsythe that he had continuously occupied the land since 6/27/1949.
4. 8/10/1949 - Effective date of PLO 601.
5. 1/30/1950 - Date of Entry in GLO records for Sec. 14, T. 12 R. 3 W. Note that actual entry date shown in record is 1/30/52, but entry number and sequence order is prior to next entry date in Section 14 of 6/6/50, so I make an assumption of typographical error, and concur that the entry date year is actually 1950.
6. 2/07/1950 - Date of Homestead Act application with the GLO by Grant Forsythe according to BLM ALIS and Case File ledger. Date of application make land subject to 33' Section Line Easement, 47' Act, and PLO 601.
7. 1949 - ARC designates funding for Anchorage Farm Roads improvements, which include O'Malley, Huffman and Birch Roads. See ARC report. *south of O'Malley*
8. Summer season of 1950 - Clearing and grubbing with some construction of Birch Road south of O'Malley Road. See ARC 1950 Report on ARC activities, and 1952 ARC map of Anchorage roads. Also depositions from Wister (Pug) Williams (attached) and Van Zanten taken during Wright v. State litigation concur with work for Birch Road being done by ARC first in 1950, then again in 1956.
9. 7/12/1951 - U.S. GLO Rectangular Survey of remainder of Section 14 approved.
10. 4/10/1952 - Forsythe homestead claim proofs verified and accepted by GLO.
11. 10/2/1952 - Patent 1136555 issued to Grant Forsythe that includes SW1/4SW1/4 Section 14. Patent issued subject to 47' Act.
12. Summer of 1956 - Construction of Birch Road north of O'Malley Road as per testimony of ARC employees Williams and Van Zanten, concurred with by deposition of Grant Forsythe.
13. 02/02/1976 - Preparation date of the State Department of Highways ROW plan set for Huffman & Birch Road OS-1(009). Plan set shows 150' ROW for O'Malley

Road and 100' ROW for Birch Road, centered on the Section Lines. Plans also show Spring Forest Subdivision (P 76-231) dedication of 30' of ROW for Birch Road filed by owner Grant Forsythe. Deposition of LaVerne Buller in Wright v. State states the DOT has no records of rights used to prepare this plan set, but he believes it was the 47' Act as it would apply to date of entry and road construction.

14. 9/21/1976 - File date of Spring Forest Subdivision as Plat 76-231. Plat dedicates 30' of ROW for Birch Road, and creates Tracts A, B1, B2 and C of Forsythe property north of O'Malley Road.
15. 3/3/1977 - Letter from Donald Beitnger, Central Region ROW Agent, to Grant Forsythe asserting DOT&PF's rights to 100' ROW for Birch Road in accordance with the 47' Act as defined by PLO 601 Local Road width. Letter also advised Forsythe that DOT did not get opportunity to comment on his recent subdivision plat, and if they had DOT would of requested dedication of 50' from centerline for Birch Road.
16. 1/7/1983 - File date of Spring Forest Subdivision Lots 1-15, Block 1 and Lots 1-15, Block 2, a re-subdivision of Tracts B1 and C of Spring Forest subdivision submitted by Forsythe. Plat dedicates an additional 5' of ROW along Birch Road to meet Municipality of Anchorage (MOA) requirements for a collector road (now 35' total from Section Line), but not the 50' requested by DOT in Betinger's 3/3/1997 letter.
17. 6/15/1983 - MOA prepares plans for Birch Road Bike Trail, showing Birch Road ROW at 100' wide, 50' each side of Section Line.
18. 6/30/1983 - Letter from James Sandberg, DOT/PF ROW Chief to Ray Mann of MOA Public Works asserting State's claim to 100' ROW based on 47' Act and PLO 601 and offering MOA to use such ROW for Bike Trail project.
19. Summer of 1984 - MOA constructs Bike Trail along Birch Road in ROW between 35' to 50' in area of current dispute along Lots 1 & 2, Block 1 of Spring Forest Subdivision.
20. 7/6/84 - ADOT&PF prepares Intersection Plan for O'Malley Road and Birch Road intersection. Plan shows 100' ROW for Birch Road, and "Municipal Bike Trail ~~under~~ Currently under Construction" in area between 35' and 50' from Section Line.
21. 7/24/1984 - MOA drawing revision of Birch Road Bike Trail showing asbuilt.
22. Sometime in 1984 - Wyatt, Wright, Bergt, and Eaton bring suit against the Municipality of Anchorage and State of Alaska in Federal District Court as Civil complaint No. 83-525 as a result of the Municipality's construction of a bike path along the east side of Birch Road. At issue is the right of the Municipality of Anchorage to use 50' of ROW from centerline of Birch Road without compensation for ROW to the plaintiffs.
23. 12/23/1984, or there about - Federal court dismisses case without judgment on 11th Amendment grounds.

24. 12/25/1984 - Forsythe conveys Lot 2, Block 1 Spring Forest Subdivision to Alaska Pacific University.
25. 6/15/1985 - Wyatt, Wright, et al. re-file case against Municipality of Anchorage and the State of Alaska as Civil Complaint No. 3AN-85-8739.
26. March-October 1986 - Depositions taken from John Dannehy, Grant Forsythe, Wister Williams, LaVerne Buller.
27. 8/26/1986 - Plaintiffs file motion with Superior Court for partial summary judgment. The motion was for the purposes of determining whether Plaintiffs' interests in the real property involved in the litigation was free and clear of any right of the State or MOA to a 50' ROW.
28. State files an Opposition to Plaintiffs' Motion.
29. 3/25/1987 - Plaintiffs file reply brief to the opposition of the State to the Plaintiffs' motion for partial summary judgment asking that the partial summary judgment be granted in favor of the Plaintiffs, limiting the State's rights to ROW to those shown in the subdivision plat dedications.
30. 5/18/1987 - Judge Katz Orders that the Plaintiffs' Motion for Partial Summary Judgment is DENIED, except the issue about the State's rights to claim a 50' ROW from centerline, which she UPHELD. On 8/8/1987 a Settlement Agreement & Stipulations to Dismiss Claim with prejudice executed by the Plaintiffs and State prior to trial. State agrees to provide plaintiffs Quit Claim Deed for any rights the State may have beyond 33' from the Section Line.
31. 9/9/1987 - State dismisses cross-claim against MOA.
32. 2/14/1988 - State issues QCD to Wyatt to ROW rights beyond 33' (B1699, P714 ARD).
33. 3/3/1988 - State issues QCD to Bergts assigns to ROW rights beyond 33' (B1709,P882 ARD).
34. 6/11/1998 - Alaska Pacific University conveys Lot 2, Block 1 to building contractor John Hagmeier.
35. 4/5/1999 - Jeff Gastaldi, RLS prepares Plot Plan for Hagmeier MOA building permit. Plot plan shows 35' of ROW for Birch Road, and encroachment of MOA bike trail onto Lot 2. Building setbacks are based on 35' ROW fro Birch Road.
36. Summer 2000 - Hagmeier constructs House on Lot 2, Block 1.
37. 2/18/2000 - Hagmier sell house and conveys title to Glenn & Diane Stefan.
38. 7/15/2002 - Diane Stefan contacts DOT&PF about ROW for Birch Road due to confusion about apparent location of bike path on Lot 2, and her need to build fence along Birch Road to comply with Spring Forest Homeowners Association bylaws.
39. 7/30/2002 - DOT/PF issues letter to Stefan asserting our 50' ROW along Birch Road.

In determining the right to use the 47' Act for the portion of Birch Road related to east side of the road within the Forsythe lands, it must be determined if the State utilized the rights of the 47' Act in gaining right-of-way for O'Malley road prior to claiming use of the 47' Act as a second claim for Birch Road. Item "D." of the Plaintiff's reply brief (starting at page 17) to the State's Opposition to the Plaintiff's Motion for Partial Summary Judgment discusses this issue in detail. Some additional facts pertaining to the right of way claims for O'Malley road within the Forsythe lands are:

40. Forsythe's entry was prior to survey of the rectangular net for Section 14, T. 12 N., R. 3 W., and so no Section Line easement exists for O'Malley Road on the south boundary of Forsythe's property.
41. ARC constructed O'Malley road east of Birch Road in the summer of 1950, prior to the construction of Birch Road between O'Malley and Abbott Roads, and after entry by Forsythe.
42. The Federal Government (ARC) listed O'Malley Road as a 'local road' taking under the 47' Act. A Notice of Utilization was recorded on May 2, 1961 for 75' from the Section Line for O'Malley Road under 47' Act privileges and procedures.
43. The State Department of Highways prepared ROW maps for O'Malley Road in January 1970, and these plats were recorded as Plat 76-197, ARD on August 12, 1976. An interesting fact is that these plans show the ROW width for Birch Road north of O'Malley as being 33' each side of the Section Line.

The facts to the utilization of 47' Act for O'Malley Road on Forsythe's land preclude our rights to use it a second time for Birch Road. It is my opinion that prior statements by the State of use of 47' Act rights for a 50' ROW for Birch Road north of O'Malley Road within the Forsythe entry are not strong. I would highly suggest we re-visit all of our ROW rights to Birch Road in respect to the findings and issues raised in the Wright et al. v. State litigation, and for now make no claims beyond 33' from the Section Line unless there is a subsequent Plat dedication of greater extent.

If after review of this Memo you decide that you need any additional research, please let me know and I will try to acquire it for you.

MS

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This issue of 1 utilization is law, thus it is too bad we had to go through all of this litigation. However, the issue of PLO 601 creating a utilization (1st utilization) under the 47 Act remains to be explained. JS 2/5/02