findings establish that a trail was established in the early days of Nissen's residency. The district court acknowledged the presence of a significant number of homesteaders along the Chena River (DCF 12) all of whom presumably made their way back and forth between each others' properties and town.13 It acknowledged the existence of a footbridge on Nissen's property suggesting a foot trail (DCF 35) leading west to Fairbanks. Tr. III at 10-11. Indeed, in the face of numerous affidavits noting frequent travel,14 the district court found that Nissen used Wiest Road (DCF 36); he just thought it inadequate use occurring too late. The district court never found that no trail or road existed during the critical time.15 What it did find--that Nissen used

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13 The government's own witness drew an apt inference while testifying regarding the existence of trails. "No surprise there," he observed, "wherever we see buildings, we see a trail coming." Tr. III at 153.

14 The judge questioned counsel for the Army on this point. The answer he received supported the affidavits as to both overland travel and public use.

> Court: What do you make of the testimony by Sabin that he frequently saw Nissen coming and going?
>
> Mr. Landon: I don't doubt that. And, I would say that he likely, and not necessarily all that infrequently, went to town . . . . [I]t's not impossible that he walked to town, the distance isn't that great . . . . [H]e could have easily ridden to town . . . . [or] mushed [by dogsled] to town.

Tr. V at 70.

15 Everything in the record supports the fact there was a trail and that the trail Nissen allegedly used was passable year-round. Tr. II at 90. Nothing is inconsistent with it. At the very least the Columbia slough could be swum in summer, the ice traversed in winter (DCF 31). The finding that no bridge could be detected in the 1938 aerial photographs (DCF 29) is not inconsistent with Shultz's assertion that one likely existed prior to Nissen's departure in 1918. Parts of the record created by the Army establish that bridges can be washed out. Defendant's Exhibit DV

the river to transport his crops and that he did not use one of the roads until 1918--has no foundation in the record. All the evidence points to the existence of a publicly used land route between the Nissen homestead and town.

Our analysis, however, cannot end simply with the conclusion that the publicly used route existed. To qualify as an RS 2477 the route must have crossed public land, not withdrawn or reserved prior to its establishment.16 The court found that the territorial schools reservation of 1915 and Wiest's filing of a homestead application in 1914 withdrew from the public domain a segment of the land through which the trail passed. DCF 43, 44. These findings do not preclude an RS 2477 right of way from earlier vesting or affect the existence of other parts of an RS 2477 along other parts of the trail. Specifically, they do not preclude a determination that Nissen made sufficient use of the

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(noting bridge washed out in the spring). The settler who swam his horses across the slough testified to doing so after 1918 (DCF 31). If a bridge did afford convenient passage across the slough with a wagon (DCF 33), no other finding precludes the possibility that such travel occurred. It may be true that no evidence of a "clear" wagon road was visible on the 1938 aerial photograph, but nothing in the record precludes this finding.

The judge did find that "[i]f a trail or road had existed to Nissen's homestead in 1911, it is unlikely that the section line calls of the survey . . . would have missed it." (DCF 38). However, the very witness testifying to the reliability of call lines acknowledged that a "minor footpath . . . that was very hard to see, it's possible to miss." Tr. III at 141-42. He only assured the judge that "major roads" would unlikely go unnoticed by surveyors walking the section lines. Id. at 141. As Shultz pointed out, the call notes missed other established routes. TR. V at 145.

16 Under Hamerly and Dillingham, a claimant has a limited time frame in which to prove use. Hamerly, 359 P.2d at 123-25 (analyzing "gaps in the possession of the land"); see also Dillingham, 705 P.2d at 414 (applying Hamerly analysis).

overland trail in the window of time available to him to establish an RS 2477 superior (because prior in time) to either the territorial schools' reservation or Wiest's homesteading rights.17

We do not suggest that every segment of the trail qualified for RS 2477 status, either because a homesteading claim clearly displaced that portion of the claimed RS 2477 right of way,18 or because there might be homesteading rights that would trump an RS 2477 claim.19 But that concession does not justify the district court's blanket finding that no RS 2477 existed across present day Fort Wainwright.

B. Other Easements

For Shultz to prove that the Army took possession of Fort Wainwright subject to other existing property rights, does not

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17 The district court's findings suggest that the gap closed no later than 1914 when Wiest filed his homesteading claim. Under Alaska law, land is withdrawn from the public domain when a homesteader enters his homestead, not when he files his claim or receives the patent. Hamerly, 359 P.2d at 123 ("[w]hen a citizen has made a valid entry under the homestead laws, the portion covered by the entry is then segregated from the public domain"); Dillingham, 705 P.2d at 414 (citing Hamerly rule); see also Alaska Land Title, 667 P.2d at 723 ("the homestead entry of [a claimant's] predecessor . . . fixes the date from which the property rights of the owners of the parcel are to be measured") (rule applied to fixing of private property rights, not consideration of RS 2477 withdrawal from public domain). Since Nissen came on the land in 1907, and Wiest entered in 1910, Nissen had at least three years in which to establish an RS 2477 trail over that segment of the route crossing Wiest's land. See Defendant's Exhibit DH, Supp. ER-DH (showing Nissen's entry in 1907, Wiest's in 1910, and Sabin's in 1911).

18 For example, Nissen did not establish an RS 2477 over the land entered by homesteader Adelman prior to Nissen's arrival.

19 There may be prior homestead entries in the section to which we have no map of homestead rights. Also, the entry dates noted on Exhibit J and recited by the judge in his findings, DCF 42-44, may not reflect all the entrymen with superior claims.

require him to prove that the right of way he asserts against the Army is wholly based on one property law theory or another. See Dillingham, 705 P.2d at 413. All he was obliged to show was that the homesteaders to the east of Fairbanks used as a matter of right some road, trail or footpath to cross the land before it was acquired by the Army.

Shultz offered a number of common law theories to support his position that the Army took land burdened by preexisting rights. In response on formulating his ultimate legal conclusions the district court determined that Shultz had "failed to prove the existence of any RS 2477 right-of-way or other right-of-way across Fort Wainwright which either alone or in combination with other rights-of-way provide access to [his] property." DCF 91 (emphasis added). As to other possible bases for a right of way, this finding amounts to little more than a declaration. We can identify no factual finding, for example, that would support the conclusion that no public prescriptive easement was established by 1937.[20] All the evidence is to the contrary.

Under Alaska law "public easements may be acquired by prescription." Dillingham, 705 P.2d at 416 (citing 2 J. Grimes, Thompson on Real Property 342, at 209 (1980)). "To establish a prescriptive easement a party must prove that (1) the use of the easement was continuous and uninterrupted; (2) the user acted as

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20 Shultz does not suggest that he has a prescriptive easement against the government based on use occurring after the Army acquired the Fort Wainwright land. See 3 Powell on Property 413 at 34-136-8 to 34-137 (describing theoretical difficulty); 28 U.S.C. 2409a(n) (Quiet Title Act not to be construed to permit suits based on adverse possession).

if he or she were the owner and not merely one acting with the permission of the owner; and (3) the use was reasonably visible to the record owner." McGill v. Wahl, 839 P.2d 393, 397 (Alaska 1992) (citing Swift v. Kniffen, 706 P.2d 296, 302 (Alaska 1985)). "[A] claimant must show essentially the same elements as for adverse possession." Swift, 706 P.2d at 302.[21] He must overcome the presumption that "[w]hen [he] enters into possession or use of another's property, there is a presumption that he does so with the owner's permission and in subordination to his title." Hamerly, 359 P.2d at 129; see also McGill, 839 P.2d at 397. "Use alone for the statutory period" is insufficient. Hamerly, 359 P.2d at 129. "The use must be open, notorious, adverse, hostile, and continuous." Dillingham, 705 P.2d at 416. The purpose of these requirements is "to put the record owner on notice of the existence of an adverse claimant." Swift, 706 P.2d at 302. In some cases, a private permissive easement may become prescriptive if it "was for many years the only means of passage [through] the dominant estate." McGill, 839 P.2d at 398. The fact that the easement is shared does not defeat the claim because "[i]t would not be expected that an easement holder would object to traffic on or use of that part of a roadway which did not interfere with its [sic] [the easement holder's] use." Id.

At the time Nissen and other homesteaders fanned out along the Chena River east of Fairbanks, the trail roughly following the

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21 Public prescriptive easements involve the public "use, not possession of land." Jesse Dukeminier & James E. Krier, Property 860 (2d ed. 1988), see also Dillingham, 705 P.2d at 4145 (discussing distinction between use and possession).

river22 appears to have been one of the few routes passable year-round. The affidavits in support of Nissen's homesteading claim make it clear that these residents often travelled between homesteads. The Army seizes on the neighborly nature of the visits to dispute Shultz's proof of prescriptive use. It suggests that Shultz has not overcome the presumption that the routes were used by permission. The Army misunderstands the adversity criterion. To assert a public easement by prescription, the public need only act "as if [it] were claiming a permanent right to the easement." Swift, 706 P.2d 296. Since overland travel to Fairbanks from the homesteads east of the base clearly required some kind of right of way, all interested parties were on notice that an easement was being established. See id.; McGill, 839 P.2d at 398. Moreover, the public nature of the route, and its shared use, reinforce Shultz's claim that at the very least an easement by prescription took hold. The route was there. The homesteaders used it. No one challenged their right.

III.

Statute of Limitations

In addition to finding that no right of way existed, the district court held Shultz's action barred under 28 U.S.C. 2409a(g). DCF 20, 60, 75, 78. Even though a public right of way across Fort Wainwright existed in 1937, the right is subject to defeat by the statute of limitations provision of the Quiet Title Act.

22 See supra note 4.

Quiet title claims against the United States are subject to a 12-year statute of limitations from the date on which the claimant "knew or should have known of the claim of the United States." 28 U.S.C. 2409a(g). A statute of limitations defense in this context is jurisdictional. Park County v. United States, 626 F.2d 718, 720 (9th Cir. 1980). The limitation must be strictly construed in favor of the government. Shultz, 886 F.2d at 1159. Federal law applies. Hawaii v. United States, 866 F.2d 313 (9th Cir. 1989).

A quiet title action will "be deemed to have accrued" at the time a claimant received or had actual or constructive notice of the United States' claim on the land. D.C. Transit System, Inc. v. United States, 531 F. Supp. 808, 810-11 (D. D.C. 1982), aff'd, 790 F.2d 964 (D.C. Cir. 1986). "The existence of one uncontroverted instance of notice suffices to trigger the limitations period." Nevada v. United States, 721 F.2d 633, 635 (9th Cir. 1984). Any action sufficient to "excite attention and put the party on guard" provides adequate notice. D.C. Transit System, 531 F. Supp. at 812. Nevertheless, "when the United States' claim is vague and ambiguous," the limitations period does not begin to run. Shultz, 886 F.2d at 1160. In addition, "[i]f the government . . . apparently abandon[s] any claim it once asserted, and then . . . reasserts a claim, the later assertion is a new claim and the statute of limitations for an action based on that claim accrues when it is asserted." Id. at 1161. We apply a reasonableness test. Id. at 1160.

Shultz filed his complaint in 1986. Unless the government apparently abandoned an interest in the right of way he seeks, he is barred from asserting a claim to roads as to which he received notice of the Army's claim of right to restrict access prior to 1974. We limit our consideration of Shultz's right to maintain his action to the easement he seeks across the Homestead, River and Tank Roads, the route currently used by the public to cross the base. The district court found that a section of Wiest Road, which formed part of the historical route taken by homesteaders, had been obstructed by the Fort Wainwright landfill, thus barring Shultz's claim to the roadway. Shultz responds that whatever obstruction to the historical route this landfill represents, it does not in fact obstruct the modern right of way across the base. One continuous route exists. Apart from the restrictions imposed by the permitting system initiated in 1981, the route has always provided unobstructed through passage across the base to the public.

We agree with Shultz's analysis. When a modern route is open, the fact that an Army facility is placed over an historical route, one no longer forming part of the network of roads that link Fairbanks with the communities east of the base, is insufficient to "excite attention" or put civilians "on guard" that their right to cross the military installation has been challenged. It would not be reasonable to require civilians to monitor the Army's obstruction of historical routes in order to preserve the right to use the modern throughway. Shultz, 886 F.2d at 1160. Only when present day patterns of travel across the base

are interfered with is it proper to charge individuals with the knowledge of the government's claim over that route. Prior to 1981, it appears no "uncontroverted instance[] of notice," Nevada, 731 F.2d at 635, served to alert civilians that their right of passage, preserved by the proviso to the Army's acquisition of the land, was in jeopardy.

In other circumstances, we have found the "mere[] assert[ion] [of] some federal authority over a backroad" enough to bar a quiet title action because it constituted sufficient public notice. Nevada, 731 F.2d at 635 (discussing Park County, 626 F.2d at 720-21 ("single sign" adequate notice)). We cannot apply the same reasoning here. Those crossing the base subject themselves to federal authority simply by entering the installation. That the Army occupies Fort Wainwright and maintains its roads is not enough "warning" that it has displaced the rights expressly reserved for the public in its title. We conclude that Shultz is not barred from bringing his quiet title action.

VI.

We agree with the district court that this case turns on a simple inquiry: "to see that [a] road was in existence before the dedication for Fort Wainwright, and that it wasn't blocked until the 1981 period." Tr. I at 89.23 A homesteaders access trail--their right of way--was in existence within the meaning of Alaska law before the army took possession of the base. The early homesteaders' route became the road now known as Homestead Road.

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23 Shultz filed his complaint in 1986. The statute of limitations is triggered by notice given prior to 1974. 28 U.S.C. 2409a(g) (12 years).

This is the same route Shultz and his neighbors travelled without obstruction before the Army instituted the system of permits.[24] Left with the definite impression that a mistake has been made, we reverse. We hold that Shultz established that a right of way existed prior to the Army's withdrawal of the land and that it has not been obstructed at a time or in any manner that triggered the applicable statute of limitations provision.

The Army took possession of its Fort Wainwright landholding burdened by the rights of local homesteaders to use of a right-of-way that connected the lots to the east of the base with Fairbanks. It cannot now claim that the users of the modern day roadways cross "merely with [its] permission." Cf. McGill, 839 P.2d at 398.[25]

REVERSED.

The appeal relating to costs, No. 92-35580, is dismissed as moot.

DISMISSED.

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24 To require a permit, for example, for identification or proof of competence to operate a vehicle is not necessarily to obstruct passage. It may constitute regulation perfectly consistent with the public's essential right of passage. See infra note 25.

25 Shultz has not argued, nor do we suggest, that the Army may not regulate the "manner of [his] use" of a roadway. United States v. Vogler, 859 F.2d 638, 642 (9th Cir. 1988). Rather he insists that the critical question posed by this case is whether the Army may restrict his access to a roadway, whether it may, as a matter of discretion or of right, exclude him altogether from its network of roads traversing the base. Having found that Shultz is entitled to cross Fort Wainwright, we note, however, that the Army may reasonably regulate his passage. See Adams v. United States, No. 91-16762, slip op. at 9366 n.1 (9th Cir. Aug. 31, 1993) (easement under RS 2477 no bar to reasonable Forest Service regulations).

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

AUG 5 1991

PAUL G. SHULTZ, Plaintiff, v. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Case No. F86-030 Civil NOTICE OF LODGING OF PROPOSED FINDINGS OF FACT

Pursuant to this court's order of July 12, 1991, defendant gives notice of the lodging herewith of the proposed Findings of Fact.

RESPECTFULLY SUBMITTED this 1st day of August, 1991 from Anchorage, Alaska.

Bruce M. Landon

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, v. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Case No. F86-030 Civil FINDINGS OF FACT

I. FINDINGS RELATING TO PLAINTIFF AND HIS PROPERTY.

1. Plaintiff owns land east of Fort Wainwright.

2. The only existing road access between Fairbanks and plaintiff's property is through Fort Wainwright.

3. Plaintiff's southern property line is the north bank of the Chena River.

4. The closest public highway to plaintiff's property is Badger Road which is on the south side of the Chena River.

5. There is no bridge across the Chena River in the vicinity of plaintiff's property.

6. Plaintiff and other property owners obtain road access to their property through Fort Wainwright generally using a route consisting of Trainer Road, River Road and Homestead Road.

7. The Trainer Road/River Road/ Homestead Road route does not correspond to routes which plaintiff claims pre-dated the creation of Fort Wainwright.

8. The Department of Army issues decals to civilian property owners east of Fort Wainwright allowing them to traverse Fort Wainwright.

9. Plaintiff is currently barred from Fort Wainwright pursuant to a probation order filed October 16, 1990.

10. The Fairbanks NorthStar Borough will not permit plaintiff to subdivide his property unless he has unrestricted legal access to his property constructed to Borough standards.

II. FINDINGS RELATING TO THE GENERAL HISTORY OF FAIRBANKS AND FORT WAINWRIGHT.

11. Fairbanks came into existence around the turn of the century.

12. During the period 1902-1920, a significant number of agriculture homesteads developed along the Chena River.

13. During the period 1902-1920, there was traffic to other mining settlements east of Fairbanks including Smallwood Creek.

14. Firewood was the dominant form of heating in Fairbanks in the early part of the twentieth century and numerous wood roads existed throughout the Fairbanks area.

15. Fort Wainwright (previously also known as Ladd Field and Ladd Air Force Base) is a military installation established through a series of land orders and land acquisition actions, the first of which was Executive Order (EO) 7596 dated March 31, 1937. The land orders and acquisitions were made subject to valid existing rights.

16. Many trails and roads came into existence prior to the creation of Fort Wainwright.

III. FINDINGS RELATING TO WIEST ROAD.

17. A road commonly called Wiest Road existed prior to the establishment of Fort Wainwright.

18. Wiest Road terminated at the Wiest Homestead (S 1/2 of NW 1/4 and SW 1/4 Sec. 9, and lots 4 and 5 of Sec. 16, T1S, R1E, Fairbanks Meridian) inside what is now Fort Wainwright and to the west of plaintiff's property. Wiest Road does not reach plaintiff's property.

19. Wiest Road has been obstructed by the Fort Wainwright sanitary landfill since a time prior to 1974 and continuously thereafter.

20. By virtue of the landfill obstruction, plaintiff and his predecessors in title knew or should have known of the government's claim, and if Wiest Road ever was an RS 2477 right-of-way, the statute of limitations in 28 U.S.C. § 2409a(g) bars its adjudication.

21. The appearance of Wiest Road on aerial photos dated 1979 indicates that Wiest Road had fallen into disuse long prior to 1974.

22. The disuse does not establish abandonment but is circumstantial evidence which leads the court to infer that Wiest Road had been blocked by the military for a period beginning prior to twelve years before the filing of the complaint in this action.

23. Homestead Road does not overlap Wiest Road.

24. Wiest Road does not correspond to the location of River Road (also known as Tank Road). At points, the routes overlap, but particularly west of the Fort Wainwright sanitary landfill the two routes diverge markedly.

IV. FINDINGS RELATING TO HOMESTEAD ROAD AND ACCESS TO NISSEN HOMESTEAD.

25. Plaintiff's earliest predecesor in interest was George Nissen whose homestead (SE 1/4 of SW 1/4 Sec. 3 and SW 1/4 of SE 1/4 Sec. 3 and E 1/2 of N 1/4 and W 1/2 of NE 1/4 and Lots 2 and 3 of Sec. 10, T1S, R1E, Fairbanks Meridian) is on the north

bank of the Chena River approximately 2 miles upriver (east) of the Wiest homestead.

26. George Nissen raised a substantial vegetable crop.

27. The size of the Nissen crop far exceeds that needed for personal consumption and was produced for sale in Fairbanks.

28. Nissen built his cabin on the Chena River. The court infers from this circumstantial evidence that Nissen used the Chena River to get his crops to market.

29. If Nissen had taken his crops to market by wagon overland, a clear road should have been visible on the 1938 aerial photos, but was not.

30. There is no bridge or other crossing of Columbia Slough visible on aerial photos taken in 1938.

31. During the 1920's, Mr. Buzby swam horses across Columbia Slough.

32. Columbia Slough flows from north to south into the Chena River at a point between the Wiest and Nissen homesteads.

33. It would not be possible for a wagon to cross Columbia Slough without a bridge or fill.

34. Some individuals went to the vicinity of Nissen's property in the winter from the Fairbanks Chena Hotsprings Winter Sled Road by travelling along Columbia Slough when frozen.

35. A trail and foot bridge identified by Professor Mendenhall on a 1938 aerial photo were built on land that was at one time part of Nissen's homestead and do not constitute an RS

2477 right-of-way extension from the Wiest homestead to Nissen's homestead.

36. By 1918, Nissen sometimes used Wiest Road to get to Fairbanks, but not for regular transport of his crops. By 1918, Wiest and a number of other homesteaders along Wiest Road had already taken up their homesteads.

37. In approximately 1949, a Mr. Whipple, whose homestead was on the north bank of the Chena River just east of the Nissen homestead, had an automobile on his property. Mr. Whipple did not enter his homestead until 1947, by which time Fort Wainwright and a number of homesteads prevented the creation of any RS-2477 right-of-way to Whipple's property. Mr. Whipple's access was on roads and/or power line clearings created by the military.

38. If a trail or road had existed to Nissen's homestead in 1911, it is unlikely that the section line calls of the survey of T1S, R1E, Fairbanks Meridian (accepted in 1913), would have missed it.

39. Prior to the establishment of Fort Wainwright, no route susceptible to wagon or motor vehicle use existed between the Wiest and Nissen homesteads.

40. Nissen used the Chena River to get his crop to town.

41. Homestead Road was constructed at some time between 1938 and 1948.

42. Within Fort Wainwright, Homestead Road traverses Lots 3, 4, 5 of Sec. 16, T1S, R1E, Fairbanks Meridian.

43. Lot 3 of Sec. 16, T1S, R1E, Fairbanks Meridian was withdrawn for territorial school purposes in 1915 and has been in a withdrawn status continuously up to the present.

44. James Wiest filed a homestead application with the General Land Office on July 23, 1914 which includes Lots 4 and 5, Sec. 16, T1S, R1E, Fairbanks Meridian and those lots have been continuously out of public domain status since at least that date.

45. No public highway easement exists for that portion of Homestead Road on Fort Wainwright under RS 2477 or otherwise.

V. FINDINGS RELATING TO ACCESS TO THE VICINITY OF CORTNEY RANCH.

46. There was no established trail of fixed location from the Fairbanks Chena Hotsprings Winter Sled Road, LaZelle Road or Wiest Road to the vicinity of Cortney Ranch (SE 1/4 of SW 1/4 and Lots 4, 5, 6 of Sec. 6, T1S, R2E, Fairbanks Meridian) prior to the time that portions of the intervening land now within Fort Wainwright had been taken up by homestead entries or acquired by the military.

47. Overland travel to Cortney Ranch from Fairbanks traversed swamp land and wooded areas with numerous wood roads. Consequently, it was not necessary to establish a definite route to Cortney Ranch.

48. A summer road to Cortney Ranch was infeasible because of the swamp land.

49. No summer road appeared in the vicinity of Cortney Ranch on the 1938 aerial photos. If a summer road had existed in 1938, it would have been clearly visible.

50. Travel in winter to Cortney Ranch occurred opportunistically anywhere across the frozen, treeless swamp.

51. No individual route to Cortney Ranch ever experienced sufficient use to create an RS 2477 right-of-way by public users.

52. During the 1920's, Mr. Buzby travelled to Cortney Ranch, at which time the whole area was criss-crossed with wood trails.

53. Wood haulers moved wood using Wiest Road and other roads and then took off to the east along wood trails on various changing routes.

54. The 1938 aerial photos indicate trail fragments to the vicinity of Cortney Ranch which traverse the northernmost portion of the Nissen homestead. Nissen did not use that route to get to Fairbanks.

55. In the 1938 aerial photos, the Fairbanks Chena Hotsprings Winter Sled Road is cleared to a width of 12' to 16'; Wiest Road is 10' to 12' wide, while the fragments of trails leading to the vicinity of Cortney Ranch are considerably thinner and less distinct.

56. By the time Mr. Wigger observed regular traffic on the trail to the vicinity of Cortney Ranch, the military reservation had already come into existence.

57. No right-of-way under RS 2477 or otherwise exists across Fort Wainwright to the vicinity of Cortney Ranch.

VI. FINDINGS RELATING TO LAZELLE ROAD.

58. LaZelle Road has been continuously blocked by a locked gate and fence surrounding the Fort Wainwright oil tank farm and by the tank farm itself at a point on the western boundary of Fort Wainwright for a period of time exceeding twelve years prior to the institution of this action.

59. LaZelle Road has been blocked by a ski tow cable at the Fort Wainwright ski area for a period in excess of twelve years prior to the institution of this action.

60. By virtue of these blockages, plaintiff and his predecessors knew or should have known of the military's claim, and adjudication of LaZelle Road is barred by the statute of limitations in 28 U.S.C. § 2409a(g).

61. LaZelle Road was built in stages. An extension of LaZelle Road in Sections 3 and 4, T1S, R1E, Fairbanks Meridian was constructed by the military in 1950 or 1951 after most of the land in the extension was unavailable for the creation of an RS 2477 right-of-way either because it had been withdrawn or acquired by the military, or because it had been taken up by homesteads.

62. LaZelle Road does not overlap the Fairbanks Chena Hotsprings Winter Sled Road and is located in excess of 100' from the sled road.

63. In Sections 3 and 4, T1S, R1E, Fairbanks Meridian, Lazelle Road is cut into the hillside.

64. The cut does not appear on aerial photos until after 1949.

65. Mr. Kalen confirmed with a tape measure, by measuring from LaZelle Road to the Fairbanks Chena Hotsprings Winter Sled Road, that the latter is in the flats more than 100' from LaZelle Road.

66. A sled trail could not have existed in the location of LaZelle Road in the absence of a cut because the natural slope is such that sleds could not stay on a trail without the cut.

67. Neither LaZelle Road nor the Fairbanks Chena Hotsprings Winter Sled Road went to plaintiff's property.

68. In order for there to be an RS 2477 right-of-way to plaintiff's property, plaintiff would have to establish the existence of an RS 2477 right-of-way from LaZelle Road or the Fairbanks Chena Hotsprings Winter Sled Road to plaintiff's property.

69. There was no trail or road right-of-way from LaZelle Road or Fairbanks Chena Hotsprings Winter Sled Road to plaintiff's property established under RS 2477 or otherwise.

VII. FINDINGS RELATING TO FAIRBANKS CHENA HOTSPRINGS WINTER SLED ROAD.

70. A "sled road" is a winter trail wide enough to accommodate a large horse drawn bob sled such as might be used to haul wood or passengers.

71. Fairbanks Chena Winter Sled Road acquired its present location in approximately 1923.

72. Tree ring counts indicate that the Fairbanks Chena Hotsprings Winter Sled Road has not been used since approximately 1950-1951. This is circumstantial evidence from which the court infers blockage of the winter sled road for a period in excess of twelve years prior to the filing of the complaint in this case.

73. Fairbanks Chena Hotsprings Winter Sled Road has been continuously blocked for several hundred feet by the Fort Wainwright sanitary landfill for a period of time in excess of twelve years prior to the filing of the complaint in this action.

74. By virtue of this blockage, plaintiff and his predecessors in interest knew or should have known that the government claimed the right to restrict access along the Fairbanks Chena Hotsprings Winter Sled Road for a period in excess of twelve years prior to the filing of the complaint in this action.

75. Adjudication of the Fairbanks Chena Hotsprings Winter Sled Road is barred by the statute of limitations in 28 U.S.C. § 2409a(g).

VIII. FINDINGS RELATING TO FAIRBANKS SMALLWOOD ROAD.

76. Fairbanks Smallwood Road has been continuously blocked by a fence near the western boundary of Fort Wainwright for a period in excess of twelve years prior to the filing of the complaint in this action.

77. The Fairbanks Smallwood Road does not overlap or come within 100' of the Trainer Road/River Road/Homestead Road route used by plaintiff to access his property.

78. By virtue of the blockage by the fence, plaintiff and his predecessors in interest knew or should have known of the government's claim and adjudication of the Fairbanks Smallwood Road is, therefore, barred by the statute of limitations in 28 U.S.C. § 2409a(g).

IX. FINDINGS RELATING TO SAGE HILL ROAD.

79. Sage Hill Road is a road running in a northeasterly direction from River Road in Sec. 8, T1S, R1E, Fairbanks Meridian to LaZelle Road in Sec. 4, T1S, R1E, Fairbanks Meridian.

80. Sage Hill Road was built by the military after the military had acquired the land traversed thereby and is not a public right-of-way established under RS 2477 or otherwise.

81. Aerial photos taken in 1938 reveal a number of trail fragments in the vicinity of the present location of Sage Hill Road. None of the trail fragments constitute an established route of travel with sufficient use to establish an RS 2477 right-of-way.

X. FINDINGS RELATING TO TRAINER ROAD.

82. Government control of Trainer Gate during the period from 1974-76 was intermittent and insufficient to put plaintiff or his predecessors in interest on notice that the United States claimed an interest in controlling access on the road.

83. During the period from 1974-76, security measures by Alyeska at Trainer Gate were designed to protect Alyeska's private property kept on Fort Wainwright.

84. During the period 1974-1976, there existed long periods of time when one could drive through an open gate with no guards and an apparently boarded up guard house.

85. Trainer Road was built by the military after acquisition of the land traversed.

86. Trainer Road does not appear on the 1938 aerial photos of Fort Wainwright.

87. Trainer Road is neither congruent with nor within 100' of the location of roads or trails pre-existing the creation of Fort Wainwright.

88. In 1944, the military blocked a number of routes across Fort Wainwright and suggested two alternate routes to Steele Creek and vicinity. One of those alternate routes included the present location of Trainer Road.

89. In rerouting traffic along the alternate routes, the military neither dedicated the alternate routes as public

rights-of-way nor offered to create a public right-of-way along either of the alternate routes.

90. Trainer Road is not a public right-of-way under RS 2477 or otherwise.

XI. GENERAL FINDINGS.

91. Plaintiff has failed to prove the existence of any RS 2477 right-of-way or other right-of-way across Fort Wainwright which either alone or in combination with other rights-of-way provide access to plaintiff's property east of Fort Wainwright.

92. In the alternative, the interest claimed by plaintiff to use public highways to his property is not an interest within the scope of 28 U.S.C. § 2409a(g), and this court is without jurisdiction under the Tenth Circuit's holding in Kinscherff v. United States, 586 F.2d 159 (10th Cir. 1978).

DATED this ____ day of _____, 1991.

_____
ANDREW J. KLEINFELD
United States District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August, 1991 a copy of the foregoing NOTICE OF LODGING OF PROPOSED FINDINGS OF FACT with (proposed) FINDINGS OF FACT was served by United States mail, first class, postage paid, to the following counsel of record:

Joseph W. Sheehan
P.O. Box 906
Fairbanks, AK 99707

Bonita R. Dotter
BONITA R. DOTTER
Paralegal Specialist
Department of Justice
Environment & Natural
Resources Division
Anchorage, Alaska

FORT WAINWRIGHT ACCESS
ISSUE ANALYSIS

Analyst: Jerry Rafson
January 3, 1984

ISSUE

Access for private and State property east of Fort Wainwright is provided on a restricted basis via roads on the military reservation. The Fairbanks North Star Borough does not permit subdivision and banks will not finance these properties with this access arrangement. Future access through Ft. Wainwright is not guaranteed. Dedicated public access is desired. A chronology of events is included as Appendix D to this report.

BACKGROUND

Documentation of dedicated public access and the expenditure of public funds on access to this area from the Steese Highway dates back to 1914. Although these roads are not marked on the DOT&PF Trails Inventory, access is marked through Fort Wainwright on roads south of the Chena River (see Appendix F). Regardless, access north of the river can still be claimed under Revised Statute 2477 (73 U.S.C. 932), a federal law dating to 1866. Although this statute was repealed in 1976 by Public Law 94-579 sec. 706 (90 stat. 2793), those rights-of-way previously established remain valid. RS 2477 is discussed in more detail in Appendix C. A listing of DOT&PF documentation of the rights-of-way is included in Appendix E.

The Army claims that any rights-of-way which may have existed reverted to the U.S. government through a series of condemnations and land acquisistions between 1947 and 1953 in which the lands surrounding the roads in question were acquired to complete expansion of the Ladd Army Airfield (now Ft. Wainwright) boundaries. They claim there is no evidence of continual public use of the roads in question after this time. Whether these rights-of-way were ever legally reverted remains in dispute.

Military restrictions on public access to these rights-of-way have varied ranging from requirement of visitor passes and various gate closures to virtually unlimited access at times during the seventies. However, until about 1979, the public's right to access through the military reservation to the affected lands was never openly questioned. Access was never completely denied, in spite of the inconvenience caused by restricted access.

In 1979 Paul Shultz was prevented by the Fairbanks North Star Borough from subdividing his property east of Fort Wainwright because the Army would not give assurance of continued public access through the military reservation. Commercial banks have reportedly refused to finance land or improvements in this area.

Mr. Shultz attempted to gain relief through the auspices of U.S. Senator Stevens, who appealed to the BLM, but to no avail. The State of Alaska was drawn into

the controversy when the Department of Natural Resources (DNR) indicated in its land disposal plans for the area that access through the military reservation was available. It was shortly after this that the Army announced it was again closing free public access through Ft. Wainwright, effective June 15, 1981.

The military also announced a policy of limiting access passes to existing property owners and further aggravated the situation by causing occasional delays of private deliveries of building materials to the area.

The Department of Transportation & Public Facilities (DOT&PF) immediately advised the Army in a letter to Ernest L. Woods, Jr., Chief, Real Estate Division, Corps of Engineers, that our documentation indicated Lazelle Road and Trainor Gate Road were public roads, and that we opposed to any restrictions being placed on them. This documentation was furnished the Corps at their request, however the Corps disassociated themselves from the issue by deferring further response to the Army Commander.

The impact of the Army's actions soon led to meetings between Borough officials, DNR, DOT&PF and the U.S. Army to consider solutions to the problems. The affected property owners have also been involved in several of the meetings.

The Army's legitimate and primary concern seems to be security. While they are continuing to allow limited private access to property owners through the issuance of passes, they have been opposed to the issuance of passes to additional new property owners. It should be noted that continued public access continues to be required and granted for non-military purposes, such as access to the BLM district office.

While the Army has been opposed to any solution which would open up public access through the military reservation, they have, in the past, agreed to a compromise solution which would entail construction of an alternative access. A meeting was held on September 14, 1982 between Commissioner of the Department of Natural Resources, John Katz, and Brigadier General Nathan Vail, Commander of the 172nd Infantry Brigade (Alaska). At that time General Vail made a commitment to "offer every possible assistance, including use of engineer troops to assist in the construction, and if approved by Department of the Army, the temporary construction of a bailey bridge across the Chena River until such time as the State Department of Transportation could acquire funds from the State Legislature for construction of a permanent bridge." This commitment is stated in the memorandum for record prepared by the Army after this meeting.

General Vail assured Commissioner Katz that this promise would be carried out by him or his successor. The new Commander, General Bethke, apparently does not feel he can legally authorize the construction and has raised a concern over the liability which might be incurred by the construction of a one-lane bridge. Originally authority for bridge construction was to be accomplished under the Civilian Aid Program.

AGENCY INVOLVEMENT

DOT&PF became involved in the issue because of the question of legality of the closure of an established public right-of-way and because of the agencys'

expertise in developing and implementing possible alternative solutions which might require construction of new facilities.

The Department has been contacted repeatedly by Mr. Shultz for assistance in resolving this issue, most recently in a letter to Commissioner Casey containing an 18 signature petition and in a number of calls and meetings with regional personnel.

The cost of DOT&PF involvement to this point is conservatively estimated at $12,000. This does not include the cost of two written opinions received from the State Attorney General's office or the considerable effort expended with meetings and letters by other agencies.

DNR has been heavily involved in negotiations for a solution because of its interest in disposing of lands in the affected area and because of the leverage they are able to exert on the military through the permitting of military use of State lands. It was through the efforts of DNR that a series of meetings were arranged which led to the September 14th compromise.

The Office of the Governor became involved in the controversy after the following events: access was restricted in 1981; the Army refused to negotiate at the meeting held June 25, 1981; and the Army consented only to grant a limited number of temporary passes until such time as alternate access could be constructed.

September 30, 1981, Governor Jay S. Hammond wrote General Vail stating that the [Army's] suggestion that the public find a route around Ft. Wainwright was unacceptable, and that the State would press the legal issue if the established traditional means of access were subjected to continual arbitrary closing.

The Citizen Advisory Commission on Federal Areas was also contacted by Mr. Shultz in an effort to resolve the issues. The Commission staff have met with Army officials and have corresponded with the State Attorney General's office. Unable to reach a satisfactory solution the Advisory Commission referred the issue back to DOT&PF in a letter to DOT&PF Commissioner Daniel Casey on February 23, 1983.

State Representative Bob Bettisworth has requested DOT&PF to take action to resolve this issue. In a letter dated October 20, 1983 He has requested a full factual analysis of the situation. Consistent with Governor Hammond's and previous DNR and DOT&PF positions, he would like to see full public access from the Steese Highway restored.

On September 25, 1979, Senator Ted Stevens wrote Curtis McVee, Alaska State Director of the Bureau of Land Management (BLM) to determine what valid existing access rights may exist. BLM responded that the homestead patents did not specifically mention access rights. Senator Stevens was again involved in June 1981 after the Army reintroduced access restrictions on Ft. Wainwright. He noted that there were additional reasons for allowing public access to the Post for non-military matters, such as visiting the BLM office there. He advocated investigating alternative solutions to the Army's security concerns other than public access closure. Most recently, Senator Stevens has indicated that the military's security concerns must be a high priority.

The Fairbanks North Star Borough has been involved in this controversy from the time it erupted in 1979. They required Mr. Shultz to obtain an affidavit from the military guaranteeing public access prior to their approval of his subdivision request. The Borough also objected to State disposal of lands to be accessed through the military reservation.

John Carlson, Borough Mayor at the time, and James Nordale, Borough Attorney, were present at several critical meetings where compromise alternatives requiring bridge construction were worked out. An estimate was provided to the Borough by DOT&PF for the cost of constructing a Chena River Crossing from Badger Road. This was to be considered for the Borough's Capital Improvement funding request to the State, but it was never included in any formal funding requests.

It should be noted that although the newly developed Borough Comprehensive Plan classifies this area as outskirts, improved access could bring it into the perimeter area and encourage more intense development. More recently, Borough Mayor B.B. Allen has taken an active interest in the issue and has contacted Acting Deputy Commissioner William McMullen to review attempts to coordinate a satisfactory solution to the problem.

ALTERNATIVES

A number of alternative solutions are listed and discussed below. A matrix comparing these alternatives is included as Appendix A.

1. Continue restricted access through Fort Wainwright.

2. Secure free public access via existing rights-of-way.

3. Construct new alternate access around the military reservation.

1. Continued access through Ft. Wainwright via issuance of necessary passes by the Army could form the basis for a compromise if there were some guarantee that this policy were not subject to unilateral change by the Army, and that permission would be granted on a non-prejudicial basis. If in the future traffic generated by development of this area increased to the point where security could no longer be controlled or street capacity becomes a factor, alternate solutions could then be implemented.

   This would by far be the lowest cost and most expeditious solution. The Army may object because of security reasons, but the Military could also increase security at sensitive military areas. This action must now certainly be required given continued public access to BLM offices, which are sure to generate more traffic than any forseeable development in the area in question.

   Property owners may not be entirely satisfied, because they will continue to have essentially the same restricted access. However, they should be able to subdivide and secure bank loans.

2. A preferable solution to the property owners would be to secure unrestricted free public access over existing roads.

   Three routes have been identified for this purpose and are shown in Appendix B:

Route 2A - FROM STEESE EXPRESSWAY

This route follows existing Lazelle Road from the Steese Expressway until connecting with River Road. River Road eventually extends beyond the Military Reservation.

Route 2B - FROM TRAINOR GATE ROAD

This route enters the Military Reservation at Trainor Gate Road and immediately intersects River Road.

Route 2C - FROM MONTGOMERY ROAD

This route following Montgomery west from Badger Road to the first intersection which leads to the east Chena River Bridge and onto River Road. This would allow public access without compromising security to existing facilities, except perhaps the golf course.

There are basically two options for approaching this.

Negotiation: Efforts have to date not proven fruitful. The Army's position is unlikely to be favorable to this solution which would reduce their security. DNR could conceivably become involved as a landowner in the area. DNR could also use its negotiating leverage to achieve the same end.

Litigation: The next logical option. This could cost hundreds of thousands of dollars, and could take years to resolve. The responsible party to make this legal challenge would also have to identified. This action would take place in Federal Court.

The outcome would by no means be certain and an unfavorable decision could have negative future repercussions for the State of Alaska.

At best, a decision against the Army could result in damages awarded to property owners and possibly force the Army to construct alternative access or condemn the affected property. Closure of the existing roads is likely to remain in effect as long as the Army believes it is in their best security interest. This could possibly make this the most expensive alternative overall. A lawsuit would certainly make it the most time consuming alternative. Should the Army win the lawsuit, it is likely the Army would force alternative access to be used. Some entity would have to fund this construction in any circumstance and the possibility exists that existing access could be jeopardized in the interim.

While DOT&PF involvement in a lawsuit would be complicated by the fact that this route is not on the designated State Highway System, Lazelle Road once provided access to Chena Hot Springs Road. This access is now provided by

a direct connection between Chena Hot Springs Road and the Steese Expressway. Designation would entail a commitment for maintenance.

3. Construction of new alternative public access is probably the best long term solution to the problem, however, it is also among the most expensive. Three primary options have been identified.

Route 3A - BRIDGE THE CHENA RIVER

The possibility of constructing a new bridge across the Chena River at Dennis Road was studied in 1981. At that time the cost of the bridge was estimated at $2,885,000 for a structure and approaches meeting secondary highways standards. Adding inflation and the approximate 0.8 mile of new road which would be required brings the cost estimate for construction of this route to $3,335,000.

While such a bridge may be the best long-term solution to the access problem, the cost seems excessive in view of the current traffic volumes of an estimated 25 trips per day.

A more acceptable version of option 3A may be to install a lower cost temporary bridge structure that could be replaced when development north of the river warranted a permanent bridge.

Route 3B - FROM CHENA HOT SPRINGS ROAD

Route 3B begins at 3 mile Chena Hot Springs Road and runs south along a section line easement for the first mile. The proposal would then enter Military lands and would bend to the east to provide clearance from Ft. Wainwright's ammunition storage area. Ft. Wainwright officials have indicated that the Military would grant an easement for the new road. As drawn on the map, the route may not be quite as far from the ammunition storage area as the Military would like. However, shifting the route any farther to the east would place it on the extremely poor foundations that prevail along Columbia Creek. Even as drawn, portions of the route encounter less than favorable foundation conditions.

From the Fairbanks Base Line, Route 3B runs south along the boundary of Ft. Wainwright and then bends back to the west to terminate at the 1/4 corner between Section 9 and 10.

Except for a short cut section at Sage Hill, Route 3B would be all overlay construction. This would entail 3.8 miles of new roadway. The cost of constructing a minimum standard 20 ft. road along the Route 3B is estimated at $825,000. Given potential for development of this area, it is questionable whether a 20 ft. road width would meet long range needs.

Route 3C - FROM NORDALE ROAD

There is an existing road running west from Nordale Road through the center of

Section 6. This road was originally built to provide access to the large gravel pits in the southeast corner of Section 1. The road has since been extended 1/4 mile beyond the gravel pits. Route 3C would extend this road westward along the north side of the river to connect to an existing road that runs east-west across Section 10.

The new segment of road would be 1.5 miles long and would require acquisition of private property. The cost of a minimum standard roadway for Route 3C is estimated at $550,000, including approximately $250,000 for right-of-way. This route would also include 2 creek crossings and one crossing of the Alyeska pipeline, however, it is assumed these costs would be covered in the estimate. This estimate is also based on a 20 ft road width.

One of these options would no doubt be the preferred solution from the Army's perspective, as it would not impact security.

This solution would be less satisfactory to the property owners than free public access over existing roads, because any of the new alternative access options would add to the travel distance to the city center. The bridge option may however be preferable over the prospect of continual restricted access.

Through the history of past negotiations it would seem that this solution, and in particular the option of crossing the Chena River near Badger Road, would be an acceptable compromise. It seems that the sticking point is the matter of who would pay the cost, which, according to DOT&PF estimates, could run to $3 million for construction phases and an additional amount for maintenance.

Each agency involved must weigh the benefits of such a project against its other identified priorities.

The Army had offered in the past to construct a temporary bridge until such time as funding for a permanent structure could be secured. DNR, as a property owner in the area, also stands to gain and has, in fact, used its leverage to negotiate this solution.

It is unknown how the other property owners in the area would react, however, they might be expected to be progressively more negative toward solutions requiring large capital outlays by them, or increase their travel distance and lower property values.

Any solution meant to be long term should be acceptable to the majority of the parties involved, therefore, it is necessary to compare the costs and financing of the new alternative access.

Development of the area will be somewhat dependent on distance to the job market. Were Routes 3B or 3C constructed, the land would remain in the outskirt area and the 20 year projection would be for less than 140 dwelling units in the area, generating up to 900 trips per day. Constructing the bridge Route 3A would presumably move this area into the perimeter zone, thus doubling the allowable density.

The affect on property values is unknown, but, using an average vehicle operating cost of $0.20 per vehicle mile traveled, it can be seen that the difference in user costs between the longest option, 3C, and the shortest option, 3A, could amount to $2000 per day 20 years from now. At the present, with at least four

dwelling units located in the area, the increased user cost would amount to approximately $20,000 annually.

Road maintenance costs are primarily related to the additional length of road to be maintained. Route 3C, from Nordale Road and Route 3B, from Chena Hot Springs Road, would each require approximately 4 miles of additional road maintenance, which at an annual maintenance cost of $6,000 per mile, would cost approximately $24,000 per year.

Route 3A would require approximately 1 mile of additional road maintenance to reach the same point.

It should be noted that property owners in the area are now providing maintenance for approximately 1 mile of roads in the area, and the Military provides the remainder. New construction cost comparisons have been made, which show construction of a permanent bridge per Route 3A to have by far the highest capital cost, which probably could not be compensated for in maintenance cost but may be justified when user costs are added.

Route 3B from Chena Hot Springs Road would create user savings (assuming the majority of user trips are to the Fairbanks City Center) which over a short period of time could more than compensate for the construction cost difference of $325,000 between it and the Nordale Road Option, which is the lowest capital cost, highest user cost alternative. It would also provide better direct access to State land disposal areas. The Army has indicated a willingness to work with the State in providing right-of-way for this route.

Route 3C to Nordale Road has two other complications worth mentioning, a possible pipeline crossing conflict and uncertain right-of-way status for several miles of existing road which must be traversed. This route would, however, provide access to additional prime development lands lying north of the Chena River and between Fort Wainwright and Nordale Road.

FINANCING ALTERNATIVES

As stated earlier, the method of financing the costs for these options will be a prime factor in their acceptability.

Under all alternatives user costs will no doubt continue to be financed by individuals. Changes in property values either positive or negative will also no doubt accrue to individuals and also possibly to DNR.

Construction costs could be born by the Army, the State, private developers and/or by a service area. The Borough has in the past been the recipient of block grants for service areas and also receives funding through the Local Service Roads and Trails (LSR&T) program which could be used for this purpose.

The service area option should also be given careful consideration as a mechanism for road maintenance. Of course, formation of a service area would require a service area election.

The affected property owners would likely oppose financing of any sort of loan, however, a State Service Area Grant might be accepted.

DOT&PF financing of either construction or maintenance is not consistent with stated departmental priorities, as this road is for local use. DOT&PF interests in this case apparently lie in its role as protector of public access.

SUMMARY

1. Previous efforts by State officials have not been fruitful.

2. Continued negotiations might be undertaken from a Commissioner level to General Bethke. The negotiating strategy is to press for public access through Fort Wainwright along Lazelle or Trainor Gate and River Roads on the basis of RS 2477. Fencing and other security measures should be re-explored.

3. An option of public access through Badger Gate could be presented (Route 2C in the attached figure). Public access could be allowed along Montgomery Road to a point approximately 4/10 of a mile west of Badger Road, where a local street connects with the East Chena River Bridge. The Badger Gate could be relocated beyond this point. Public traffic would skirt the golf course, cross the east Chena River Bridge and head east along the existing route to the non-military lands. Property owners should be consulted before his option is pursued.

4. Another approach would be to pursue the Military's offer of construction assistance through General Bethke and possibly higher. Senator Stevens office might be of assistance in pursuing this.

UNRESOLVED QUESTIONS AND ISSUES

The analysis to date does not resolve a number of important questions and issues which might be better understood through a comprehensive planning effort, as would normally be done by the Department. It has not included a comprehensive public involvement process or in-depth research to verify many of the facts contained in the files.

Some of the additional questions and issues which should be pursued are:

1. Research access rights established at the time the property involved was first acquired.

2. Research any subsequent transfer of these rights.

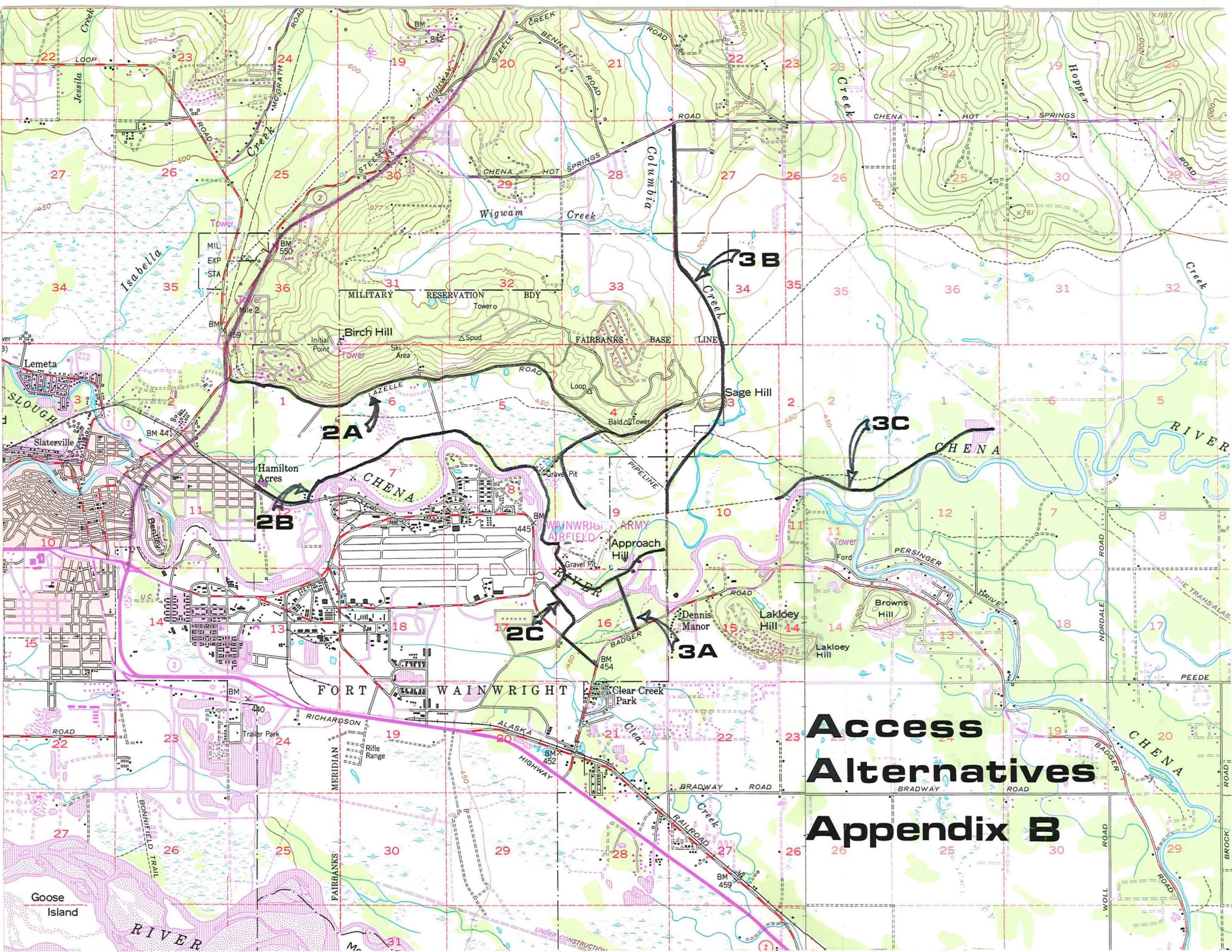
3. The property owners are requesting pursuit of one specific course of action. These persons should be consulted prior to initiation of contrary action by the State.

4. Responsibility for and funding required for further action must be determined. If this matter is to be pursued by the State with public funds, it is felt that a broader perspective must be achieved, including identification of benefits to be achieved for the public at large, rather than a specific group of property owners.

5. The cost of additional security measures, such as guards, fencing, illumination, and electronic surveillance should be evaluated.
conducted.

APPENDIX A
COMPARISON OF ALTERNATIVES

	Security Risk	Distance to Downtown PO (miles)	New Const. Reqd./Cost	Legal Action Req'd.	New ROW Reqd.	Add'l. Maint. Reqd.	Comments
Alternative 1 Continued Restricted Access	Controlled Risk	6.8	Additional security measures/ cost unknown	No	None	0	Considered a short term solution
Alternative 2 Free public access on existing roads	Maximum Risk Exposure	Alt. 2A 6.7 Alt. 2B 7.0 Alt. 2C 9.0	Additional security measures/ cost unknown	Very Likely	None	0	Could lead directly to necessity to construct a new access option or condemnation of property -would establish damages and fund alternatives were the Army to lose. Property owners could lose existing access rights if the Army wins litigation.
Alternative 3							
Route A - Bridge Chena River	Minimum Risk Exposure	8.5	0.8 mi of road & new bridge $3,335,000 Temporary bridge?	No	Yes Military Cost Unknown	0.8 mile $5000/yr	Military participation could be pursued.
Route B - Access from Chena Hot Springs	Minimum Risk Exposure	10.6	3.8 miles of road/825,000	No	Military & State	3.8 miles $23,000/yr	Minimum standard 20 ft wide road.
Route C - Access from Nordale	Minimum Risk Exposure	18.8	1.5 miles of new road $550,000	No	Approx 4 miles State & private	Approx 4 miles $24,000/yr	Minimum standard 20 ft width requires 2 stream crossings. Pipeline Crossing permit may also be required. Existing roads may require additional improvement.


2A
2B
2C
3A
3B
3C
Access Alternatives
Appendix B
Birch Hill
Sage Hill
Lemeta
Slaterville
Hamilton Acres
Approach Hill
Lakloey Hill
Browns Hill
Dennis Manor
Clear Creek Park
Rifle Range
Trailer Park
Goose Island
FORT WAINWRIGHT
FAIRBANKS BASE LINE
MILITARY RESERVATION
Wigwam Creek
Isabella Creek
Columbia Creek
Hopper Creek
CHENA HOT SPRINGS ROAD
RICHARDSON HIGHWAY
ALASKA HIGHWAY
CHENA RIVER
SLOUGH
PIPELINE
RAILROAD
BRADWAY ROAD
PERSINGER DRIVE
BADGER ROAD
NORDALE ROAD
PEEDE
WOLL ROAD
BROCK ROAD
BONNIFIELD TRAIL
MERIDIAN
FAIRBANKS
THE TRANSALAS

APPENDIX C - REVISED STATUTE 2477

The full text of Revised Statute 2477 reads as follows:

> Sec. 2477, R.S. The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted (U.S.C., title 43, sec. 932.)

Revised Statue 2477 forms the basis for claim for a large number of public rights-of-way in several states including Alaska, which were never formally applied for or designated. It provided a blanket authority for rights-of-way for the construction of highways over pubic lands not previously reserved for public uses but did not establish a criteria for documenting this acquisition.

If a claimed RS 2477 right of way is challenged, the law does not specifify whether the claim must be proved or disproved, nor does it specifiy what constitutes legal proof.

There is also no requirement in the law to show continued public use after a right-of-way is established in order for it to remain valid.

Although RS 2477 was repealed in 1976 by Public Law 94-579 sec. 706 (90 stat. 2793), those rights-of-way previously established remain valid.

This whole process is now in the courts to resolve disputes between various federal agencies and several states. The Division of Planning and the Office of the Attorney General have not researched cases which present legal precedents for this issue. The Office of the Attorney General has, however, reviewed the situation and provided a written summary of their findings (memo from Norman Gorsuch to Stephen Sisk dated April 13, 1983.

Although some BLM Fairbanks District Office personnel have conceded that claims must be disproved, it seems that to be safe the State must be prepared to provide documentation in the form of maps, surveys, old aerial photos, historical accounts, depositions of users and other evidence which may be available.

Since RS 2477 was written briefly and in a non-specific manner, it does not establish criteria for determining the exact location and width of the right-of-way. Therefore, with the exception of a few major roads specified through public land orders and secretarial orders, the location is established by the land physically occupied by the roadway.

APPENDIX D
CHRONOLOGY OF EVENTS - SUMMARY OF DOT&PF FILE

September 25, 1979	Letter, Senator Stevens to Curtis McVee, BLM requesting research into Mr. Shultz's valid existing rights
November 7, 1979	Letter, Curtis McVee to Senator Stevens stating patents for Mr. Shultz's land do not mention access
November 26, 1979	Letter, Chris Whittlock, BLM to Senator Stevens responding to letters of November 7 and September 25
April 28, 1980	Letter, Mayor Carlson FNSB to Claude Hoffman, DNR objecting to Potlatch Ponds disposal on basis of lack of adequate access
March 28, 1980	Letter, Claude Hoffman, DNR to Phil Berrian, FNSB Planning Director re: Two Rivers/Potlatch Ponds asserting legal access exists on section lines
March 28, 1980	Letter, Paul Schutt, DNR to Carl Johnson BLM stating DNR research indicates Lazelle Road is legal access, requesting documentation if BLM believes this to be contrary
May 28, 1980	Memo, Chris Guinn, DNR to Ted Smith DNR outlining Borough's problems with access to a disposal
October 8, 1980	Paul Shultz obtains cost estimate for ACROW bridge
November 12, 1980	Letter, Joseph Darnell of Sen. Steven's office to Curtis McVee, BLM re: follow up inquiry on BLM research of issue
December 4, 1980	Letter, Curtis McVee, State Director BLM to Senator Stevens stating Shultz response was low priority
February 23, 1981	Letter, Paul Shultz to Ernest Woods Jr., Corps of Engineers requesting and sending $440.00 payment for recovery of documents pertaining to Ft. Wainwright lands and access
March 13, 1981	Letter, Ernest Woods Jr., Chief, Real Estate Div., Corps of Engineers to Paul Shultz, property owner containing documents pertaining to Ft. Wainwright lands, also stating they could not locate any documents concerning vacations or limitations to use of access
June 5, 1981	Letter, Paul Wild, DOT&PF to Ernest Woods Jr., Corps of Engineers opposing restrictions on Lazelle and River roads, requests documentation of Army authority
June 10, 1981	Newspaper prints article reviewing Shultz's problems and complaints, documents government action

June 12, 1981	Letter, Ernest Woods Jr., Corps of Engineers to Paul Wild, DOT&PF requesting documentation of claims of public right-of-way for Lazelle and River Roads
June 15, 1981	Newspaper prints articles documenting difficulties created by access restrictions imposed that date
June 17, 1981	Memo, Steve Sisk, DOT&PF to Charles Matlock, DOT&PF Director of Highway Design & Construction enclosing documentation and correspondence covering issue
June 17, 1981	Letter, Paul Wild, DOT&PF Right of Way agent to Ernest Woods Jr., Corps of Engineers providing documentation of DOT&PF assertion of public right-of-way
June 19, 1981	Memo, Frank Mielke, DNR Chief, Land Management to DNR Deputy Commissioner Haynes re: telecon with Commissioner LeResche on status of negotiations, difficulty in setting up meeting with Army
June 19, 1981	Newspaper prints article concerning Shultz's confrontation with MP's occuring that morning
June 19, 1981	Army courier delivers to Sen. Stevens's Fairbanks office the Army's reasoning for reinstatment of access restrictions
June 22, 1981	Newspaper prints article quoting Senator Stevens position on gate closing
June 25, 1981	Meeting at Ft. Wainwright. Attendees included Paul Wild, DOT&PF, Haynes, Frechione, Copeland and Mielke from DNR, John Athens, A.G. office, 6 property owners, Mayor Carlson and James Nordale, FNSB, Col. Brown, Ft. Wainwright Commander, Maj. Shelton, and Capt. Cook, Army legal officer, Tom Ostneberg, Ft. Wainwrights Fac. Engr. and 5-10 other uniformed military. Construction of a bailey bridge was discussed, possibly under Army's Civil Action Program
July 8, 1981	Telecon, DOT&PF with Mary Staley of Senator Steven's office re: Department position
July 14, 1981	Memo, Frechione/Copeland/Smith of DNR to Geoffrey Haynes, DNR Deputy Commissioner re: June 25,1981 meeting with Army over access restrictions, break in procedure in dealing with military
Summer 1981	DOT&PF receives some legal case history on Virginia case
July 16, 1981	Letter, Lyle Carlson, private attorney to Jeff Haines, DNR Deputy Commissioner, requesting state views of Paul Shultz's complaint

June or July 1981	Fact sheet prepared by Capt. Rockwell, Ft. Wainwright describing Armys position on existing right-of-way
August 7, 1981	Letter, Col. Bernard Brown, Army HQ to FNSB Mayor Carlson follow up to June 25, 1981 meeting offering land for bridge site, offering continual temporary access to present property owners but not future purchasers
August 7, 1981	Letter, Richard Lefebvre, DNR Deputy Director to Brig. Gen. Vail requesting meeting to discuss land management issues of mutual interest
August 11, 1981	Letter, Paul Wild/Steve Sisk to Ernest Woods Jr. again requesting response from Corps of Eng.
August 20,1981	Letter, Ernest Woods Jr. Corps of Engineers to Paul Wild, DOT&PF Right of Way agent advising Woods was forwarding issue to the Army for comment.
Summer 1981	Meeting DNR, DOT&PF, Borough and State Senator Charles Parr re: investigation of bridge alternative. (Note: Apparently there was another unrecorded meeting at which Robert Ward, DOT&PF Commissioner and Henry Springer, DOT&PF Regional Planning Director agreed DOT&PF would perform approach work for temporary bridge per conversation with Steve Sisk)
September 3, 1981	Memo, Frank Mielke, DNR to Mike Whitehead, Office of Governor transmitting draft letter from Gov. to Army along with background summary
September 30,1981	Letter, Governor Hammond to General Vail seeking compromise, threatening legal action
October 3, 1981	Newspaper editorial urging military comprimise
October 6, 1981	Memo, McCaleb, DOT&PF Design Engineer to Springer DOT&PF Regional Planning Director transmitting cost est. for bridge
October 8, 1981	Letter, Henry Springer, DOT&PF Regional Planning Director to FNSB Mayor John Carlson transmitting bridge cost estimates
October 28, 1981	Meeting, arranged by DNR attended by Borough, City, a private property owner, private attorney, 3 reps from DNR, and at least 2 military representatives attempting to resolve issues. Military agreed to grant limited temporary access. DNR used military use permit leverage

November 13, 1981	Meeting record prepared by Frank Mielke, Chief, Land Managment, DNR re: October 28 meeting and follow up action
April 1982	State receives copy of legal motion drawn up for Federal court prepared Gary Vancil, attorney for property owners Paul Shultz and John Roberts stating case
May 26, 1982	Letter, Paul Wild, DOT&PF Right of Way Agent to Ernest Woods Jr., Chief Real Estate Div., Army Corps of Engineers re: reminder of request for response
September 2, 1982	Memo, by John Athens for Wilson Condon, State A.G. to Steve Sisk, DOT&PF regional Director re: State's legal position
Setember 14, 1982	Meeting, DNR Commissioner Datz with Brig. Gen. Vail, Commander 172nd Infantry and others re: military land use and Ft. Wainwright access. Commitments made by both the Army and DNR at this meeting have not been carried out. Memorandum of Record prepared September 15, 1982 by H.A. Frochle, Army Director of Engineering and Housing
September 29, 1982	Rapicom, Scribner to Sisk transmitting Army memorandum of record of September 14, 1982 Katz - Vail meeting
September 30, 1982	Memo, Steve Sisk DOT&PF regional Director to Jon Scribner, DOT&PF Deputy Commissioner of Design & Construction re: summary of Department activity and position on issues
October 1982	Meeting Robert Ward, DOT&PF Commissioner, Jon Scribner, DOT&PF Deputy Commissioner and Steve Sisk, DOT&PF regional Director with Brig. Gen. Vail pledging cooperation; bridge resolution problems surface
November 4, 1982	Memo, McCaleb DOT&PF Design Engineer to Steve Sisk DOT&PF Regional Director re: Nov. 2 meeting at Ft. Wainwright with Post Commander and 7 other Army reps. concerning access options
November 5, 1982	Letter, Dave McCaleb DOT&PF to Frank Colletta Deputy Chief of Maintenance & Operations, Ft. Wainwright transmitting meeting record.
November 5, 1982	Letter, Stan Leaphart, Citizen's Advisory Commission to Robert Price, Assistant A.G. re: State's legal position

November 8, 1982	Letter, Robin Foster, Citizen's Advisory Council to Brig. Gen. Vail, Commander, 172nd Infantry requesting Army assistance in resolving issue.
November 17, 1982	Letter, Ernest Woods Jr., Chief, Real Estate Div. Corps of Engineers to Steve Sisk, DOT&PF, re: Army's legal position desire to cooperate
November 22, 1982	Letter, Wilson Condon, State A.G. to Robin Foster, Citizen's Advisory Council re: status, need for research
January 14, 1983	Intra-office note, Sen. Steven's office noting call from Shultz on January 13, 1983
February 1, 1983	Note, Marlene Neve, Fairbanks Governor's Office to to DOT&PF Commissioner Casey, forwarding information at Shultz's request.
February 2, 1983	Letter, Col. Lewis Driver, Commander Ft. Wainwright to Paul Shultz, property owner re: Army position
February 3, 1983	Letter, Paul Shultz to DOT&PF Commissioner Casey requesting meeting and assistance
February 23, 1983	Letter, Stan Leaphart, Citizen's Advisory Commission on Federal Areas to DOT&PF Commissioner Casey re: Shultz access complaint
March 18, 1983	Memo, Jon Scribner, DOT&PF to Steve Sisk, DOT&PF re: response to Shultz
April 13, 1983	A.G. opinion, Norman Gorsuch, State Attorney General to Steve Sisk, DOT&PF re: Ft. Wainwright roads
July 25, 1983	Telecon, John Martin DOT&PF and Paul Shultz, property owner re: status
August 12, 1983	Janice Wagner, DOT&PF prepares draft overview report
September 29, 1983	Telecon, Leeta Kaye and John Martin, DOT&PF re: status of issue, offer of assistance
October 20, 1983	Letter, Rep. Bettisworth to DOT&PF Deputy Comm. Glenzer re: DOT&PF position, requests assistance in resolution.
November 2, 1983	Letter, Maj. Gen. Gordon Austin (ret.) former Commander Ladd AFB to Bettisworth re: former access status

November 3, 1983	Meeting, John Martin and Glen Glenzer, DOT&PF re: Ft. Wainwright Access strategies.
November 4, 1983	Letter, John Martin, DOT&PF to USAF re: assistance in locating Maj. Gen. Gordon Austin (ret.), Ladd AFB former Commander
November 4, 1983	Letter, Glenzer, DOT&PF to Rep. Bettisworth re: DOT&PF action, requesting strategy meeting
November 15, 1983	Letter, USAF personnel center to John Martin, DOT&PF re: location Maj. Gen Austin (ret.)
November 15, 1983	Meeting, John Martin and Janice Wagner, DOT&PF at FNSB with Richard Spitler re: coordinating action
November 16, 1983	Telecon, John Martin, DOT&PF and Mary Lou, Senator Steven's office re: Steven's position
November 17, 1983	Telecon, John Martin, DOT&PF and Maj. Gen. Gordon Austin, former Ladd AFB Commander re: former access status
November 18, 1983	Meeting, John Martin, DOT&PF, at Ft. Wainwright with Col. Lewis Driver, Post Commander and 4 other Army reps. re: Army position
November 21, 1983	Letter, Mayor Allen to Glenzer requesting coordinated effort.
December 2, 1983	Telecon, John Martin and Paul Shultz, property owner re: status of resolution
December 5, 1983	Telecon, John Martin, DOT&PF and Maj. Shelton, Ft. Wainwright re: bridge construction.
December 9, 1983	Telecon, Bill McMullen, DOT&PF and Mayor Allen, FNSB regarding issue.
December 20, 1983	Meeting, Bill McMullen, DOT&PF Acting Deputy Commissioner with Rep. Bettisworth, FNSB Mayor Bill Allen, Richard Spitler, FNSB Planning Director and Leeta Kaye re: options for issue resolutions.
December 20, 1983	Meeting, Acting DOT&PF Commissioner Glenzer and State Rep. Bob Bettisworth to discuss issue.
December 21, 1983	Memo, Danny Johnson, DOT&PF to Steve Sisk, DOT&PF regarding construction cost of alternatives

Other information in the files includes substantial documentation of the history of the access in question gathered and provided by Paul Shultz.

Missing from the file is a reputed announcement published in the News-Miner by the Army in 1981 stating future access through Ft. Wainwright would be limited and specifically mentioning the Potlatch Ponds Disposal Area.

MEMORANDUM

LISTING OF DOT&PF DOCUMENTATION

APPENDIX E

TO: Charles S. Matlock, Director
Highway Design and Construction
Juneau

DATE: June 17, 1981

FILE NO: 246I-2900

TELEPHONE NO: 452-1911, ext. 222

FROM: Stephen C. Sisk
Acting Interior Regional Engineer
Highway Design and Construction
Fairbanks

SUBJECT: Lazelle Road and Trainor Gate Road - River Road

As requested, we are enclosing copies of the following documentation regarding the closing of the above-referenced roads:

- Letter of 6/5/81 to Ernest L. Woods from Paul J. Wild
- Letter of 6/12/81 to Paul J. Wild from Ernest L. Woods
- News clipping of 6/15/81

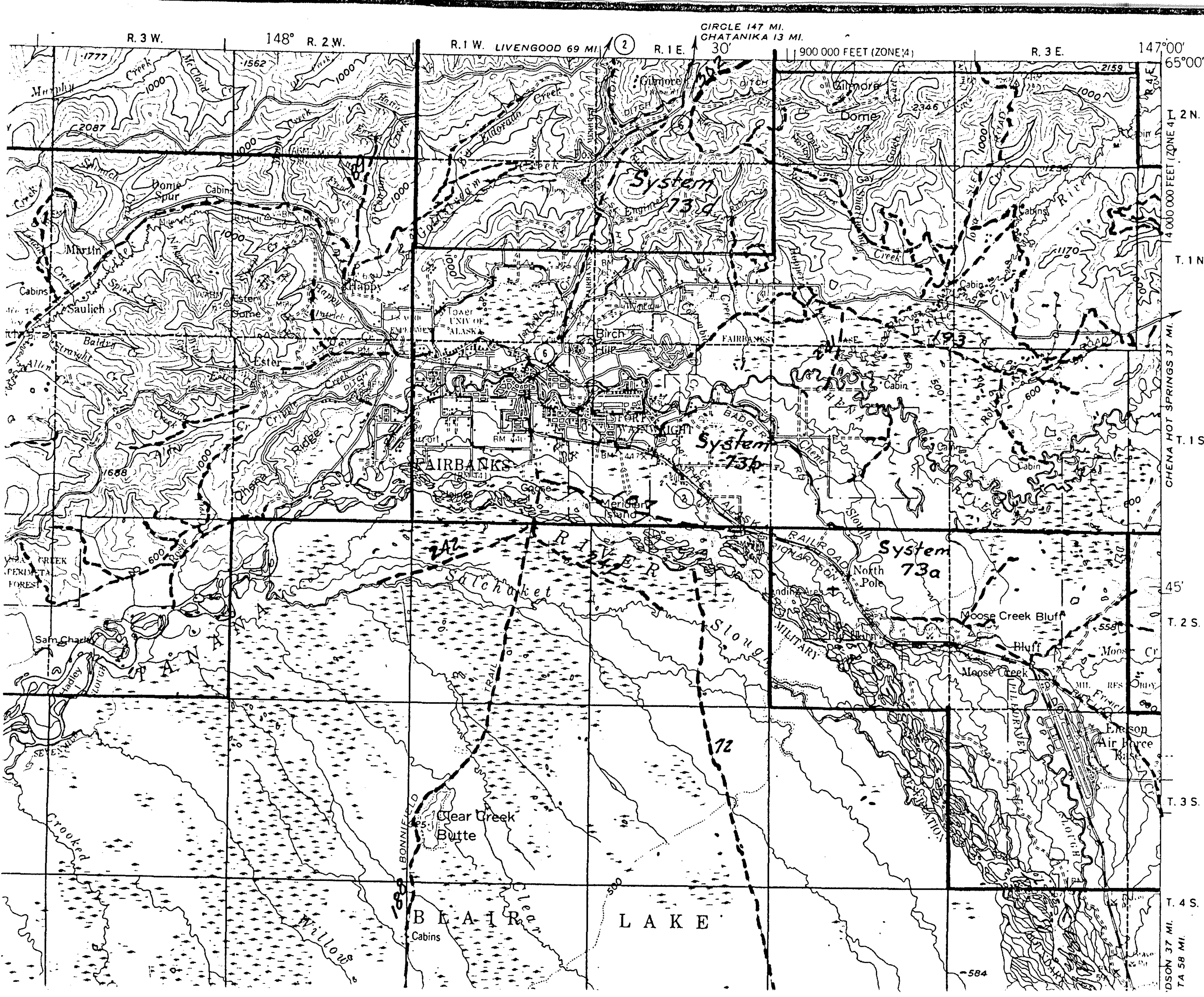
We are sending to the Corps of Engineers copies of the following maps and documents dating back as far as 1914 which indicate that Lazelle Road and Trainor Gate Road - River Road are part of the public road system.

- 5 maps and plats
- Department of the Interior General Land Office correspondence
- Department of the Interior Alaska Road Commission correspondence
- Chapter 320, Congressional Session Laws, 6/30/32 (copy)
- Public Land Orders and condemnation documents relating to Ladd Air Force Base

SCS/PJW/skh

Enclosures: as stated

3



APPENDIX F
DOT&PF TRAILS INVENTORY

Greater Fairbanks **Chamber** of Commerce

First National Center
100 Cushman Street
(907) 452-1105
P.O. Box 74446
Fairbanks, Alaska 99707

January 29, 1988

Governor Steve Cowper
Office of the Governor
Pouch AW (MS-0165)
Juneau, Alaska 99811

Dear Governor Cowper:

The property access plight of Paul Schultz (Shultz vs. U.S.) has come to the attention of the Fairbanks Chamber of Commerce. This involves access under Revised Statute 2477 (RS 2477) through Fort Wainwright to private property. We were dismayed to learn that Mr. Shultz has had to devote a substantial amount of his own resources to litigation of an issue that is of such importance to the entire state. We are also dismayed that the state has stood idly by allowing the case to be lost. Since the court's decision (regarding a 12 year statute of limitations) will have a devastating effect on Alaska's rights under RS 2477, we suggest that the State take a serious look at this case, which is now in the appeal process, and consider intervening. In light of the documentable history of access through this area prior to establishment of the military base, and considering the process by which private access has been gradually restricted, we believe a good argument for intervening could be prepared.

Further, considering representation by the State during its sale of land to Mr. Shultz, that access would be available, we believe that the State is obliged to enter the case on his behalf.

Attached is a packet of information which was furnished to us by Mr. Schultz regarding this case. We ask you to give serious consideration to this and to the possibility that we are purposely being put off on this issue by the

Federal government, in order to let time and/or the statute of limitations erode the State's ability to exercise its RS 2477 rights.

Sincerely,

Wally Cox, President
Fairbanks Chamber of Commerce

NP/js

Attachment

cc: Representative Mark Boyer, Alaska State House, Juneau
Senator John B. Coghill, Alaska State Senate, Juneau
Representative Mike Davis, Alaska State House, Juneau
Senator Bettye M. Fahrenkamp, Alaska State Senate, Juneau
Senator Ken Fanning, Alaska State Senate, Juneau
Representative Steve Frank, Alaska State House, Juneau
Representative Niilo Koponen, Alaska State House, Juneau
Representative Mike Miller, Alaska State House, Juneau
Representative Richard Shultz, Alaska State House, Juneau

Paul G. Shultz
P. O. Box 2233
Fairbanks, AK 99707
907-479-2089 452-4329
January 21, 1988

Fairbanks Chamber of Commerce
Fairbanks, AK 99701

I would like you to encourage the State of Alaska to get involved in the issue of RS2477 rights of way by intervening in the appeal of the Shultz v. U.S. to the Ninth Circuit Court of Appeals. Whether or not the State intervenes, the case will be appealed. A favorable decision from the court will give the State an advantage in its negotiations with the Federal government. If the court lets this decision stand, then the Federal government will have the advantage. To protect the interests of the public in these and other rights of way, I believe the State should invervene.

Enclosed is a copy of a memorandum from Jerry Brossia, the Northern Regional Manager of the State Department of Natural Resources, to Meg Hayes, Director, and Lynn Harnish, Northern Regional Director of the Department of Transportation and Public Facilities, and a Ft. Wainwright Access Issue Analysis prepared by DOTPF in 1984. I have also enclosed a copy of Shultz v. U.S.

In Shultz v. U.S., a Federal District Court has stated that erection of a fence and a gate served as notice that the Army was taking a public road, even though the Army continued to let the public use the road. The Public Land Orders giving the Army authority to acquire the lands were all issued "subject to valid existing rights". Therefore, according to the District Court, the taking was accomplished even though an investigation at the time the fence and gate were erected would have disclosed that the authority for taking the roads was specifically withheld from the Army by Congress and that the right of the public to use the road was not curtailed.

If, in the 1950's, I had brought suit against the Army, the judge would have asked, "Has the Army stopped you from using the road?" I would have replied, "No." The judge would then would have said, "You can not stop them from erecting a fence and a gate to define the boundary of their military reservation. If they have not prevented you from using the road, then you have no cause for civil action against the Army. Case dismissed for lack of cause." Now, more than 30 years later, the court has said my failure to take action when there was no cause for action has resulted in the running of the statute of limitations.

If this decision is not overturned, the State of Alaska may lose its right to assert RS2477 rights of way across Federal lands. The BLM has taken the position in some of its policy statements in recent years that they do not recognize RS2477 rights of way. Twelve years from the date of the earliest statements by the BLM that they will not recognize RS2477 rights of way, a Federal agent can close an RS2477 trail or road that may have been constructed and used by the public for decades and, according to Shultz v. U.S., there will be no means of compelling the Federal government to reopen the road, nor to compel them to compensate the users for loss resulting from the closure, nor to quiet title to the road.

Even posting signs along a right of way at the boundary of a national park may now be interpreted as giving notice that the government is taking the right of way even though there is no mention of the right of way on the signs and the public is allowed to continue using the road or trail. October 21, 1988 will mark twelve years since Congress repealed RS2477, and Federal agencies, emboldened by the decision in Shultz v. U.S., may even attempt to construe that date in 1976 as the date on which the Federal government gave notice that it was no longer recognizing RS2477 rights of way.

Though the State of Alaska continues to negotiate with the Federal government to establish a policy for identifying and asserting RS2477 rights of way, it would appear that the decision in Shultz v. U.S. removes from the negotiating table the issue of notice. After all, why would the U.S. make any concessions in regard to notice when it can point to a District Court case and say that it already defines notice?

I think it is very important for the State to get involved in this issue. Would you please give your support? Thank you for your consideration of this matter.

Sincerely,

Paul G. Shultz

PGS/b.jr

Enc:3

MEMORANDUM State of Alaska

DEPARTMENT OF NATURAL RESOURCES - DIV. LAND AND WATER MGMT.
TO NORTHERN REGION - 4420 AIRPORT WAY, FAIRBANKS, ALASKA 99709

Meg Hayes, Director
Lynn Harnish, Northern Regional Director, DOTPF

FILE NO 1-12-87

TELEPHONE NO. 479-2243

FROM: Jerry Brossia, Northern Regional Manager

SUBJECT: Paul Shultz access via RS2477/Ft. Wainwright

BACKGROUND

Paul Shultz purchased private land east of Ft. Wainwright in the 1970's and 80 acres of fee land from the state in 1982. Prior to that time both DNR and DOTPF took the position that RS2477s existed on Lazelle and Trainor Gate Roads. Subsequently, support for continued public access on these roads was given by Governor Jay Hammond.

After Shultz purchased his property he attempted to subdivide and was required by the North Star Borough (NSB) to show legal access. NSB disallowed Lazelle and Trainor Gate Roads as legal access to the proposed subdivision and required Shultz to acquire quiet title before the NSB would recognize these roads as public access.

Shultz made numerous contacts with the state (see chronology) to assist him in his effort to establish the above roads as 2477s. For a variety of reasons the state did not assist Mr. Shultz. The reasons given were:

1) Lack of policy
2) State felt it was not responsible for roads not within the state road system
3) State did not want to be responsible for maintenance of these roads
4) Lazelle and Trainor Gate Roads may be a poor test case because they cross military land
5) There could be adverse political ramifications if the state brought suit against the USA in a time when we are trying to get military interested in locating in Fairbanks
6) High cost of court case $25-50K
7) Shultz and another (2) dozen land owners should establish the road is public before the state commits any resources.

While these are valid concerns they do not override the state's obligation to protect a right of access. Information gathered by Shultz and others indicates to the state's satisfaction these roads are 2477s.

If the state has no time to fight for such obvious rights as access on Lazelle and Trainor Gate Roads then most all of the other 1892+ 2477 assertions are only symbolic windmills and our strength but mere Quixote's lance.

Shultz carried out a good fight to assert 2477 for Lazelle and Trainor Gate Roads, spent thousands of personal funds and lost, not on the merits of whether a 2477 existed, but on the basis of a 12 year statute of limits under the Federal Quiet Title Act, 28 U.S.C. S2409a.

The state's decision to get involved in an individual's personal actions is usually hinged on whether there is an overriding state interest. The following items are of state concern:

1) Continued public use of Lazelle and Trainor Gate Roads
2) The state has taken the position that Lazelle and Trainor Gate Roads are 2477s
3) If the federal government has "taken" the above roads we should receive compensation through a cash settlement or the construction of alternative access
4) The state as well as any citizen is subject to the 12 year statute of limits under the Federal Quiet Title Act.
5) Has the USA through BLM started the 12 year clock on "notice" by rejecting state requests for 2477s on ANCSA conveyances?
6) The date "notice" was given, and the mechanism by which it was given by the military, is the only possible issue the state can dispute

Recommendation

It is my recommendation that the state intervene in Shultz' 9th circuit court of appeals case on the basis of when and how notice was or was not given to the state and to the public. The state will have to give the USA 180 day notice pursuant to U.S.C. S2409a before filing a suit. If Shultz loses the case then the state should be compensated by the military by constructing alternate access across the Chena River.

In summary, both Shultz and the state are barred from "asserting" RS2477 status for Lazelle and Trainor Gate Roads according to Federal District Court. Shultz has done a considerable amount of research to show lands were vacant, unappropriated, and unreserved at the time the roads were constructed. He further can show use, construction, and expenditure of funds.

The state should do more to protect its access rights. There are 1.4 million acres of military withdrawals along with over 220 million acres of federal land to which this situation may apply.

Joseph W. Sheehan
A Professional Corporation
P. O. Box 906
Fairbanks, Alaska 99707
(907) 456-6090

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, vs. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	No. F86-30 Civil

NOV 17 1987

AFFIDAVIT OF MAILING

STATE OF ALASKA)
) ss
FOURTH JUDICIAL DISTRICT)

Peggy Mickelson, being first duly sworn, on oath deposes and says:

That she is over the age of eighteen years; that she is an employee of the law office of JOSEPH W. SHEEHAN, that on the 13th day of November, 1987, she did mail a full, true and correct

pm

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(907) 456-6090

Joseph W. Sheehan
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Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ,

Plaintiff,

vs.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Defendant.

No. F86-30 Civil

TRANSCRIPT

COMES NOW Paul G. Shultz, by and through his attorney, Joseph W. Sheehan, A Professional Corporation, and hereby gives notice that he does not intend to request the transcription of any proceeding with respects to this appeal. Paul G. Shultz will rely on the designated pleadings as the record for appeal.

SIGNED AND DATED this 13th day of November, 1987.

Joseph W. Sheehan
A Professional Corporation

pm

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Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, vs. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	No. F86-30 Civil

NOV 17 1987

AFFIDAVIT OF MAILING

STATE OF ALASKA)
) ss
FOURTH JUDICIAL DISTRICT)

Peggy Mickelson, being first duly sworn, on oath deposes and says:

That she is over the age of eighteen years; that she is an employee of the law office of JOSEPH W. SHEEHAN, that on the 13th day of November, 1987, she did mail a full, true and correct

pm

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FAIRBANKS, AK 99707
(907) 456-6090

copy of: TRANSCRIPT AND STATEMENT OF ISSUES ON APPEAL, filed simultaneously herewith in the above-entitled action to the following:

Stephen Cooper
Assistant United States Attorney
Federal Building & U.S. Courthouse
Room 310, Mail Box 2
101 12th Avenue
Fairbanks, Alaska 99701

CPT Richard L. Musick
Assistant Post Judge Advocate
Department of the Army
Headquarters, U.S. Army Garrison, AK
Fort Wainwright, Alaska 99703

by depositing the same in a sealed envelope in the U.S. Post Office, Fairbanks, Alaska, postage prepaid.

Peggy Nickelson

SUBSCRIBED AND SWORN to before me this 16th day of November, 1987.

(SEAL)

Robin Brandt
Notary Public in and for the State of Alaska. My commission expires: 10-27-91.

AFFIDAVIT OF MAILING
Case No. F86-30 Civ.
Page 2

pm

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Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, vs. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	No. F86-30 Civil STATEMENT OF ISSUES ON APPEAL

1. The District Court erred in the application of Civil Rule 56, particularly the legal inferences and presumptions as they relate to the non-moving party.

2. The District Court erred in concluding as a matter of law that erection of a fence and a gate is effective notice of claim of ownership over a public right-of-way.

3. The District Court erred in failing to find that notice presented a material genuine issue of fact.

pm

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4. The District Court erred in failing to find as a matter of law that uninterrupted use by the public negates any claim of notice that the United States of America, Department of Army, was asserting jurisdiction over the road in question.

5. The District Court erred in failing to hold that uninterrupted use by the public raises a genuine issue of fact.

6. The District Court erred as a matter of law in failing to find that Shultz did not have notice of the United States of America, Department of Army's claim of interest until June 19, 1981.

7. The District Court erred in determining that the statute of limitation and notice applied to Shultz through his predecessors as opposed to the public generally, and Shultz specifically.

8. The District Court erred in tacking time periods for purposes of determining the passage of time and application of the statute of limitations provided by 28 U.S.C. 2904(a)(g).

9. The District Court erred in finding that Shultz and/or the public's use of the roads in question was permissive as opposed to hostile and notorious.

10. The District Court erred in finding that the Department of Army, United States of America's claim to the road in question was hostile and notorious, as opposed to permissive.

11. The District Court erred in failing to recognize that 43 U.S.C. 932 creates an independent cause of action to

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establish a public right-of-way separate and distinct from 28 U.S.C. 2904(a)(g).

SIGNED AND DATED this 13th day of November, 1987.

Joseph W. Sheehan
A Professional Corporation

LAW OFFICES
JOSEPH W. SHEEHAN
A PROFESSIONAL CORPORATION
P. O. BOX 906
FAIRBANKS, AK 99707
(907) 456-6090

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SCHULTZ, plaintiff, vs. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, defendant.	)	F86-30 CIV. ORDER- MOTION FOR SUMMARY JUDGMENT

Plaintiff's amended complaint alleges federal question jurisdiction under 28 U.S.C. §1331 based upon 28 U.S.C. § 2409(a), 43 U.S.C. §932 and the Fifth Amendment.

Plaintiff states that he owns real estate northeast of Fort Wainwright Military Reservation; that the federal land withdrawals were "subject to valid existing rights" to public roads in use before 1943, when the withdrawals began, under 28 U.S.C. §932; that before 1974 the public was allowed unrestricted access to the land via the roads, and before 1981 the plaintiff landowner was allowed unrestricted access. The complaint alleges that a requirement of a pass, imposed by the military base in 1981, amounts to a taking. Plaintiff demands an injunction barring the Army from interfering with his or the public's access over the roads or alternatively requiring the defendant to commence a condemnation proceeding.

Defendant's motion to dismiss under Rule 12(b)(1) because of the failure of the complaint to include a statement of its jurisdictional basis as required by Rule 8(a)(1) is denied, because plaintiff's amended complaint provides such a statement. The entire motion filed by defendant August 19, 1986 is denied as moot, because it addresses the original and not the amended complaint. Defendant's motion for summary judgment filed October 9, 1986 addresses the amended complaint, ~~and~~ is treated below, and concedes the mootness of its earlier motion.

Defendant moves for summary judgment on the ground that the statute of limitations in 28 U.S.C. §2409a(g) bars the action and deprives this court of jurisdiction. The statute allows suits against the United States "to

adjudicate a disputed title to real property in which the United States claims an interest." §2409a(a). The statute provides:

> Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States. 28 U.S.C. § 2409a(g)[1]

The statute of limitations is jurisdictional. Grosz v. Andrus, 556 F.2d 972 (9th Cir. 1977).

Defendant argues that there is no genuine issue of fact regarding the proposition that plaintiff's predecessors in interest knew or should have known, more than twelve years before suit was filed, of the claim of the United States that it had a right to control use of the roads through the military base. Plaintiff argues that because the military allowed unrestricted use of the roads for a portion of the twelve year period, a new

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1. The section was formerly §2409a(f). It was renumbered (g) and the language excepting actions by states was added in 1986. The 1986 amendment overturns that portion of Block, infra, applying the twelve year statute of limitations to states, but otherwise leaves Block intact.

cause of action accrued when the military imposed a pass requirement in 1981.

The Acord affidavit. submitted by the government, says that the military controlled access using a pass system from 1943 to the early 1970's, except for a period of months just before the 1967 flood.

Plaintiff submitted three affidavits, by Henry Brockman, Bud Wiese, and himself. The Brockman affidavit says the military did not require a pass from 1942 through 1954, and that the military "fenced these roads" in the early 1950's, but "continued to allow us to use Trainor Gate Road." Wiese says there was no pass requirement during 1947-1950.

Plaintiff Paul Schultz says in his affidavit that he purchased his property in 1974, 1979, and 1983.

> At the outset, in 1974, there were no guards at the gate, the gate was left open and unattended. At times, however, there were guards at the gate, however, they required neither a pass, permit, nor even questioned why I was on Trainor Gate Road, the purpose of my business or my destination.

He says that the government closed Trainor Gate Road in 1981, but he sometimes continued to use it, and was charged with trespass.

The reference to "predecessor in interest" in §2409a(g) means that if Schultz's predecessors in interest knew or should have known of the government's claim to a right to control access along the roads, then it is immaterial whether Schultz himself knew or should have known. The statute is retroactive; although enacted in 1972, it bars actions which accrued before its enactment. This retroactivity was considered by Congress and approved by the United States Supreme Court in Block v. North Dakota, 461 U.S. 273, 75 L.Ed.2d 840, 851-853, 103 S.Ct. 1811 (1983). Likewise, addition of the phrase "should have known" was the product of debate and specific attention by Congress. Id. at 852 n.20; cf. United States v. Mottaz, 90 L.Ed.2d 841,852 (1986).

The affidavit of Richard Musick regarding his title search shows that the United States conveyed the real estate to Whipple in 1949. Ryan, Wallace, and Lee and Mattox took title in 1951, 1953 and 1958 respectively, and Lee and Mattox conveyed to Schultz in 1974. Thus if any of these people should have known at any time prior to 1974 (12 years before Schultz's lawsuit) that the United States claimed a right to restrict access along the roads, Schultz's claim is barred.

The Brockman affidavit demonstrates that the public use of the roads was permissive, not as of right, because the military fenced the roads and according to Brockman, "allow[ed] us to use" Trainor Gate Road. The Wiese affidavit does not contradict this. Schultz concedes that there was a gate, albeit unguarded, when he bought the land. Thus even without the government's affidavit, there is no genuine issue as to the permissive nature of the landowners' and public's use of the road. The fence and gate imply a government claim of a right to control access, whether exercised or not.

This is consistent with holdings under this statute that the statute of limitations began running when the government posted a sign identifying property as U.S. owned and erected a rock barrier, Park County v. United States, 626 F.2d 718 (9th Cir. 1980), cert.denied 449 U.S.1112; likewise for the painting of boundary lines, without interference with a farming operations on the government side of the lines. Howell v. United States, 519 F.Supp. 298 (N.D.Ga. 1981). It is axiomatic in an adverse possession claim that possession must be hostile and by claim of right, not permissive. The case at bar is not an adverse possession claim, but the purpose of this principle, identification of the time when a cause of action accrues, applies.

There is no genuine issue of fact as to the permissiveness rather than hostility of the use of the roads by Schultz and his predecessors in title, nor that they had reason to know of the government's claim of a right to control access to the roads. The fence, gate and guard station obviously

manifested such a claim. There is an issue of fact as to when the government imposed a pass requirement and when it did not, but this issue is not "material" for Rule 56 purposes, because it does not affect when the cause of action accrued. The pass requirements were no more, in this context, than the means by which the government regulated permissive use: the users were on notice of the government's claim of a right to control use from the fence and gate when passes were not required as well as when they were.

Plaintiff would have the court deem the government claim to have been abandoned during the period when passes were not required, so that the twelve year period would start over again in 1981. Perhaps in a hypothetical case where the government had erected a fence in the early 1950's, then had taken it down and let the property revert to a condition such that one could not reasonably be on notice of a government claim, abandonment might be a theory capable of withstanding the "or his predecessor" phrase in 28 U.S.C. 2409a(g), but that case is not before the court, so the legal question raised by this argument need not be answered. In the case at bar, a man bought property twelve years before he filed suit, when a fence and gate had stood along the road for some years; no sensible person could avoid the inference in these circumstances that the government claimed a right to control access. If Mr. Schultz's next door neighbor put a fence, gate, and guardhouse at the head of Mr. Schultz's driveway, Mr. Schultz would doubtless think that his neighbor was asserting a right to control access down the driveway, even if

the neighbor left the gate open and the guardhouse unmanned; Mr. Schultz could not delay past a statute of limitations cutoff until the neighbor locked the gate or demanded a toll, before filing suit.

The defendant's motion to dismiss the Quiet Title Act claim must accordingly be granted. No separate cause of action is created by 43 U.S.C. §932; if a claim to a right of way was created in favor of Schultz's predecessors in title pursuant to this statute before its repeal, the procedural device for quieting title to that right of way would be the Quiet Title Act, 28 U.S.C. 2409a. The demand for an injunction is likewise controlled by the statute of limitations in the Quiet Title Act. Block v. North Dakota, 461 U.S. 273, 75 L.Ed.2d 840, 853, 103 S.Ct. 1811 (1983); United States v. Mottaz, 93 L.Ed.2d 841,852 (1986).

Plaintiff argues correctly that under Block, supra, his claim to use of the roads cannot be extinguished by dismissal pursuant to the statute of limitations in the Quiet Title Act.

> [U]nlike an adverse possession provision, §2409(f) does not purport to effectuate a transfer of title. ... The title dispute remains unresolved. Block at 461 U.S. 291.

The plaintiff's inverse condemnation claim can be litigated in this court only under the Tucker Act, 28 U.S.C. §1346(a)(2). While it is a claim "founded ... upon the Constitution," as that Act requires, the complaint does not allege a claim "not exceeding $10,000." Since the damages claim has no limit, jurisdiction is in the United States Claims Court, not the United States District Court. 28 U.S.C. §1491. Annot. 60 ALR Fed. 645, 652-653 (1982); United States v. 88.28 Acres, 608 F.2d 708 (7th Cir. 1979); Bourgeois v. United States, 545 F.2d 727 (Ct.Cl. 1976); 1 Moore's Federal Practice ¶0.65[2.-3]. If there is merit to plaintiff's inverse condemnation claim, a question which this court lacks jurisdiction to decide, it may be affected by the six year statute of limitations at 28 U.S.C. §2501, so that claim is transferred to the Claims Court rather than dismissed.

Accordingly, it is hereby ordered that plaintiffs claims are dismissed for lack of jurisdiction, except that plaintiff's claim for compensation for the taking of property is transferred to the United States Claims Court. The clerk shall enter judgment for defendant, with costs, and shall transfer the case for such further proceedings as may be appropriate to the United States Claims Court.

September 29, 1987.

Andrew J. Kleinfeld, Judge

Joseph W. Sheehan
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Attorney for Plaintiff
PAUL G. SHULTZ

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, vs. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	)	Case No. _____ COMPLAINT

COMES NOW Plaintiff, Paul G. Shultz, by and through his attorney, Joseph W. Sheehan, and for his complaint against the Defendant, Department of Army, United States of America, avers and alleges as follows:

1. That Plaintiff, Paul G. Shultz, is the owner of certain real properties more particularly described as:

North One-half of the Northeast Quarter of Section 11, Township One South, Range One East of the Fairbanks Meridian.

Lot 1 and the East one-half of the Northeast Quarter of Section 10, Township One South, Range One East of the Fairbanks Meridian.

East One-Half of the Southeast Quarter of the Southwest Quarter, and the Southwest Quarter of the Southeast Quarter, Section 3, and the West One-half of the North East Quarter, and the East One-half of the Northwest Quarter, and Lots 2 and 3, Section 10, Township One South, Range One East of the Fairbanks Meridian.

Lots 1 through 14, Nissen Ranch.

2. That the Department of Army, United States of America, by Public Land Order Nos. 139, 284, 690, 748, 818 and 854 has claimed ownership, right, title and interest to an area of land commonly referred to as the Fort Wainwright Military Reservation, located at Fairbanks, Alaska.

3. Within the foregoing described military reservation there is a public road or roads reserved to the public pursuant to the provisions of 43 USC 932.

4. More particularly, the roads referred to in this complaint are specifically described as Fairbanks Chena Hot Springs Trail (also known as Lazelle Road, Fairbanks Small Wood Road, and Route 7-J), Wiest Road (also known as Wiess Road, River Road and Tank Road) and Trainer Gate Road.

5. The public's right to use these roads has never been legally vacated.

6. Despite the existence of these roads and the fact that they have never been vacated, Defendant, Department of Army, United States of America, has refused to allow the public, and more particularly, Plaintiff, Paul G. Shultz, access on the foregoing described roads.

7. Plaintiff, Paul G. Shultz, is required to have access on the foregoing described roads in order to ingress and egress his property, as is more fully described in this complaint.

8. Defendant, Department of Army, United States of America, has on occasions granted Plaintiff, Paul G. Shultz, a revocable license to use other portions of its military reservation in order to access his real property, however, Defendant, Department of Army, United States of America, has always maintained that the public roads hereinbefore described do not exist and that Plaintiff's, Paul G. Shultz, right of access across the Fort Wainwright Military Reservation is one of revocable license only, which can be subjected to restrictions that the Defendant, Department of Army, United States of America, feels appropriate and in fact restrictions have been placed on

Plaintiff's, Paul G. Shultz, use of the Fort Wainwright Military Reservation.

9. Defendant, Department of Army, United States of America, has barricaded, blocked and precluded the public and Plaintiff, Paul G. Shultz, from any and all use of the public roads described herein.

10. As a direct and proximate result of the Defendant's, Department of Army, United States of America, conduct as alleged herein, Plaintiff, Paul G. Shultz, has been precluded from subdividing and developing his property because the public's right of access has been restricted.

11. The actions of Defendant, Department of Army, United States of America, constitutes a taking and is subject to the provisions of Article V of the Amendments to the Constitution of the United States of America, in that precluding public access to Plaintiff's, Paul G. Shultz, property is tantamount to a taking of Plaintiff's, Paul G. Shultz, property since it has no value or useful purpose without public access.

12. As a direct and proximate result of Defendant's taking as hereinbefore set forth, Plaintiff, Paul G. Shultz, has suffered a loss of property without just compensation.

WHEREFORE, Plaintiff, Paul G. Shultz, requests that the Court enter an order prohibiting the Defendant, Department of Army, United States of America, from barring Plaintiff's, Paul G. Shultz, as well as the public generally from using those public roadways described herein and/or alternatively, requiring the Defendant, Department of Army, United States of America, to commence an appropriate condemnation proceeding to compensate Plaintiff, Paul G. Shultz, for the value for his real property which has effectively been taken by the Defendant's, Department of Army, United States of America, actions. In addition to the foregoing, Plaintiff, Paul G. Shultz, requests that the Court enter an order awarding costs, attorney's fees, interest and such further and additional relief as the Court may deem to be just and equitable under the circumstances.

DATED this 22nd day of April, 1986.

Joseph W. Sheehan

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AUG 20 1986

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, v. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Civil No. F86-30 MOTION TO DISMISS AND ALTERNATIVELY FOR SUMMARY JUDGMENT

COMES NOW Defendant, the United States of America, pursuant to Rules 12(b) and 56, Federal Rules of Civil Procedure, and moves this Honorable Court to dismiss the complaint and alternatively to enter summary judgment in defendant's favor.

Dismissal is required on the grounds that the complaint is defective for failure to set forth any grounds on which this Court's jurisdiction depends, in violation of Rule 8(a), Federal Rules of Civil Procedure, and that it is subject to judgment on the pleadings under Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted.

Summary judgment is required on the grounds that there is no genuine issue of material fact and this defendant is entitled to judgment as a matter of law, due to lack of this Court's jurisdiction of the subject matter of

Granted 9/12 9/5

this action, in that said action is barred by the statute of limitations which is jurisdictional.

All of the foregoing more fully appears in the attached Affidavit and Memorandum in support hereof.

DATED this 6th day of August, 1986, at Fairbanks, Alaska.

MICHAEL R. SPAAN
United States Attorney

STEPHEN COOPER
Assistant United States Attorney

1954

178 8th mtrs agnt

183 7th

Stephen Cooper
Assistant United States Attorney
101 12th Ave., Box 2
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Attorney for Defendant
United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, vs. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	AFFIDAVIT

Randall K. Acord, being first duly sworn, deposes and says:

I am Randall K. Acord, a resident of Fairbanks, Alaska, telephone number 452-2969. I came to Ladd Airfield, located adjucent to Fairbanks, Alaska, in 1943. I was assigned as a test pilot at that time. When I left the military I remained in Fairbanks, Alaska. I have resided here continuously since 1943.

When I arrived at Ladd Field in 1943 the military was controlling access to Ladd Field through a system of passes. Anyone without a pass had to make special arrangements to enter the post. These access controls continued after the war.

When I left the military I worked as a grocery distributor, and came on post often to make deliveries to the commissary. I was therefore familiar with entry procedures. With the exception of an 8 or 9 month period in the mid 1960's just before the big flood, the post, both as an Air Force Base and as Fort Wainwright, was a controlled access post at least from the time I arrived in 1943 until the early 1970's when it was opened during the Alyeska Pipeline construction era. By controlled access I mean that some kind of pass or permit was required to enter the installation, and that entry was only by permission of the Air Force or Army.

Randall K. Acord

Subscribed and sworn to before me this 21st day of July, 1986.

My Commission Expires: [illegible]

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, v. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Civil No. F86-30 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND ALTERNATIVELY FOR SUMMARY JUDGMENT

Defendant above named moves for dismissal for failure of the complaint to set forth this Court's jurisdiction and for failure of the complaint to state a claim for relief, and also moves for summary judgment on the jurisdictional ground that the action is barred by the statute of limitations.

I. THE COMPLAINT IS DEFECTIVE FOR FAILURE TO SET FORTH THIS COURT'S JURISDICTION

Rule 8(a), Federal Rules of Civil Procedure, requires that a civil complaint

> "shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends".

This the complaint herein entirely omits. It is a well settled principle of law that a sovereign can be sued only

with its consent. The general rule is stated in Hawaii v. Gordon, 373 U.S. 57 (1963):

> " ...[A] suit against the United States ..., absent its consent, cannot be maintained ..."

Id. at 58. See also Minnesota v. United States, 305 U.S. 382 (1939); Williams v. United States, 289 U.S. 553 (1933); New Mexico v. Lane, 243 U.S. 52 (1917); Kansas v. United States, 204 U.S. 331 (1907); Oregon v. Hitchcock, 202 U.S. 60 (1906).

In the present action, by his failure to set forth any jurisdictional basis for the action, plaintiff has not shown any waiver of sovereign immunity by the United States. In the absence of such a waiver, an action against the United States must be dismissed. Hawaii v. Gordon, supra, 373 U.S. 57 (1963).

The complaint is therefore defective and subject to dismissal for non-compliance with the jurisdictional pleading requirement of Rule 8(a), Federal Rules of Civil Procedure.

II. JUDGMENT ON THE PLEADINGS SHOULD BE ENTERED DISMISSING THIS ACTION BECAUSE THE COMPLAINT ON ITS FACE FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The complaint on its face fails to state a claim for relief, and is therefore subject to dismissal under Rule 12(b)(6), Federal Rules of Civil Procedure, by entry of judgment on the pleadings.

Plaintiff alleges that his only access to his private property is by way of a road across a portion of the Fort Wainwright Military Reservation. He claims the existence of a public right of way in the alleged road by virtue of 43 U.S.C. 932, which, until its repeal on October 21, 1976, formerly provided:

> "The right of way for construction
> of highways over public lands,
> not reserved for public uses, is
> hereby granted."

Pursuant to Public Law 94-579, section 706(a), this statute was repealed effective on and after October 21, 1976, but according to section 701 of P.L. 94-579, such repeal did not terminate any valid right of way existing on October 21, 1976.

Plaintiff's complaint wholly fails even to allege the existence of any fact situation within the terms of 43 U.S.C. 932: (a) it fails to allege that the purported road came into existence at a time before the lands it traverses were "reserved for public use" as part of the military reservation; and (b) it wholly fails to allege that any right of way existed either in the public or in the plaintiff or in any of plaintiff's predecessors in title, either prior to the reservation of the land for military or other public use, or prior to October 21, 1976, the effective date of repeal of 43 U.S.C. 932.

The total absence of any allegation of the existence of these facts makes the complaint fall short of stating a claim upon which relief could be granted by this Court, because even if all the allegations of the complaint were accepted as true, they do not state a claim requiring relief.

Therefore, the complaint must be dismissed for failure to state a claim for relief. Rule 12(b)(6), Federal Rules of Civil Procedure.

III. SUMMARY JUDGMENT SHOULD BE ENTERED BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION HEREIN IN THAT THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS

In that the jurisdictional defense of the statute of limitations depends on the affidavit submitted in support hereof, this attack on the subject matter jurisdiction of the Court is properly treated as a motion for summary judgment under Rule 56. Rule 12(b), Federal Rules of Civil Procedure.

Insofar as this action might be viewed as arising under 28 U.S.C. 2409a(a), relating to actions against the United States for the adjudication of title to real property in which the United States claims an interest, the action is barred by the limitations provision of subsection (f) of said section 2409a, which provides:

> "(f) Any civil action under this section shall be barred unless

> it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States."

Whether or not plaintiff could establish that he is the beneficiary of a right of way arising under the former 43 U.S.C. 932, the facts established by the attached affidavit of Randall Acord provide the answer to the controlling question here. That question is: What was "the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States"? The affidavit shows that date to have been at least as early as 1943, when the road in question was not only within lands reserved for public use but was also claimed absolutely by the United States to the exclusion of all members of the public, except pursuant to revocable permit.

The complaint itself alleges facts consistent with these facts in Randall Acord's affidavit (Complaint, pars. 8 & 9):

> "Defendant, Department of the Army, United States of America, has always maintained that the public roads hereinbefore

described do not exist"
(emphasis added).

"Defendant, Department of the Army, United States of America, has barricaded, blocked and precluded the public and Plaintiff, Paul G. Shultz, from any and all use of the public roads described herein." (Emphasis added.)

Such are the exclusion and control that have been maintained by defendant since at least 1943, and remained in effect until the open post policy of the pipeline construction days in the 1970's, with the sole exception of an 8 or 9 month period in the middle to late 1960's (just before the 1967 flood).

These actions of the United States were sufficient to place plaintiff or his predecessor in interest on notice of the government's claim, and therefore to begin the running of the statute of limitations. By requiring passes or special permission for access to the military reservation, the United States has, since at least 1943, acted in a manner openly and notoriously hostile to the plaintiff's claim of a right of way. In Park County, Montana v. United States, 626 F.2d 718, 720-721 (9th Cir. 1980), a simple rock barrier and a sign were held sufficient to place the plaintiff on notice of the claim of the United

States. A fortiori, military "blocking" and "barricades" (as plaintiff alleges), coupled with the exclusive control which the Government has "always" claimed (as plaintiff also alleges) and the requirement of a revocable permit for passage by members of the public, were more than sufficient to place plaintiff and his predecessors in title on notice of the claimed property rights of the United States. In Hatter v. United States, 402 F.Supp. 1192 (E.D. Calif. 1975), the court found that even knowledge of "some sort of equitable interest" in the disputed land was sufficient notice to start the running of the statute of limitations. Id. at 1194. The physical controls openly maintained by the United States for more than 30 years in the present case provided much better notice than this.

The insufficiency of the complaint makes it impossible to tell when the plaintiff or his earliest predecessor in interest first acquired his described lands and first used the road in question. However, notwithstanding this ambiguity, the complaint does show that the plaintiff, and also his predecessor or predecessors in title if he had any, should have been and were aware as landowners and also as members of the general public, of the Government's longstanding claim against the road and its historic and open practice of blocking and controlling the road in the manner plaintiff sets forth in his own complaint, as corroborated by Randall Acord's affidavit. Inasmuch as plaintiff or his predecessor either knew or

should have known of the Government's claim far more than 12 years before this action was commenced, the action is barred by 28 U.S.C. 2409a(f).

The fact that 28 U.S.C. 2409a became law on October 25, 1972, is of no consequence in regard to its applicability to the facts of the present case. From the time §2409a was enacted in 1972, its limitation provision in subsection (f) constituted a bar at that time to causes of action which were then more than 12 years old, thus preventing a flood of litigation over ancient and stale claims such as that of plaintiff herein. Grosz v. Andrus, 556 F.2d 972, 975 (9th Cir. 1977).

Moreover, the statute of limitations, where applicable, is jurisdictional in actions based on land rights, such as the present claim of a right of way under 43 U.S.C. 932. Park County, Montana v. United States, supra, 626 F.2d 718 (9th Cir. 1980); Grosz v. Andrus, supra, 556 F.2d 972, 975 (9th Cir. 1977).

The gravity of this jurisdictional bar is further demonstrated by the fact that in Grosz v. Andrus, supra, at p. 975, the bar was applied although the issue was noted for the first time only on appeal rather than in the trial court.

WHEREFORE, the complaint should be dismissed (a) for failure to set forth the jurisdictional grounds for this action, (b) for failure to state a claim upon which relief can be granted, and (c) for lack of subject matter

jurisdiction due to the jurisdictional bar of the statute of limitations.

Respectfully submitted this 19th day of August, 1986, at Fairbanks, Alaska.

MICHAEL R. SPAAN
United States Attorney

STEPHEN COOPER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of August, 1986, a copy of the foregoing MOTION FOR SUMMARY JUDGMENT and MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was served by first class mail, postage paid, on counsel of record at the following address:

Joseph Sheehan
Attorney at Law
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Fairbanks, AK 99707

CLAUDIA P. WILSON/Secretary

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Attorney for Plaintiff
PAUL G. SHULTZ

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, vs. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Case No. F86-30 Civil AFFIDAVIT OF HENERY BROCKMAN

STATE OF ALASKA)
) ss
FOURTH JUDICIAL DISTRICT)

My name is Henery Brockman. I homesteaded a portion of Sections 19 and 30. I made my entry for homestead in 1942, before there was a Military Reservation, and receive my final patent in 1945. I built a cabin on my property and lived there.

My property is situated northeast of Fort Wainwright on the North side of the Chena River. When I made my entry for homestead, there were roads from Fairbanks that started at the Steese Highway and ran to the homesteads of several other people

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located adjacent to mine and also extend on up to Chena Hot Springs. These roads have changed somewhat over the years, however, they have always served the same ingress and egress. These roads have been known by various names including: Fairbanks Chena Hot Springs Trail; Lazelle Road; Fairbanks Small Wood Road; Wiest Rd.; Wiess Road; River Road; Tank Road; Route 7-J and Trainor Gate Road. In addition to homesteaders in the area, the roads were used by travelers and had commercial purposes. Independent Lumber used these roads a lot in hauling logs from the upper Chena River to Fairbanks. I can remember one summer many years ago when Independent Lumber was logging the upper Chena, that a fellow by the name of George Burke parked his cat at my place for the entire summer. Other individuals that used these roads in conjunction with logging and freighting were Nels Jackson, Harry Denton, Frank Fassler, Carl Wilson, Frank Betschardt, Walter Jewel, Morris O'Leary and John Wigger. Elton Busby operated a sawmill on the river bank in Section 12 on the Old Courtney Ranch and transported his rough logs into the sawmill by the roads and then the finished product into Fairbanks over the same roads.

All of the homesteaders used these roads to access this area of the territory, since they were the only roads available. There was no Chena Hot Springs Road at that time.

Up until approximately 1950 the road entered Fairbanks at two locations, one at Graehl and the other at the foothills of

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the tank farm located on Birch Hill. In the early 1950's the Military fenced these roads, however, they continued to allow us to use Trainor Gate Road.

Walter Jewel and Morris O'Leary cut and hauled wood for many years from Chena Bluffs. There had previously been a fire burn at Chena Bluffs and Jewel and O'Leary came in afterward and cleared the burned wood.

From the time I entered my homestead, I as well as all other homesteaders, loggers and freighters used the roads which I have described up until approximately 1954, at which time my property as well as some of the others, became accessible by the new Chena Hot Springs Road. However, there were others that did not have access to the new Chena Hot Springs Road who continued to use the old roads. From 1942 through 1954 when I was using the roads which I have described, I was never required to get a permit or pass to cross what is now the Fort Wainwright Military Reservation.

FURTHER YOUR AFFIANT SAYS NOT.

Henery Brockman

Henery Brockman

SUBSCRIBED AND SWORN to before me this 12th day of September, 1986.

(SEAL)

Notary Public in and for the State of Alaska. My commission expires: April 3, 1988.

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Attorney for Plaintiff
PAUL G. SHULTZ

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, vs. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Case No. F86-30 Civil AFFIDAVIT OF PAUL G. SHULTZ

STATE OF ALASKA)
) ss
FOURTH JUDICIAL DISTRICT)

My name is Paul G. Shultz, I am the Plaintiff in the above referenced litigation and therefore competent to testify as to the following:

I own real property located in Sections 3, 10 and 11, northeast of the Fort Wainwright Military Reservation, more particularly described in my complaint. Access to this property is by those roads described in my complaint in Paragraph Four.

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I purchased my first piece of property in March of 1974. I made additional purchases of property in 1979 and 1983. Shortly after purchasing my first piece of property, I travelled to and from the property via Trainor Gate Road, then to the River Road, then to my property. No permits were required to ingress and egress at Trainor Gate Road or to use any portion of the above referenced roads which traverse the Fort Wainwright Military Reservation. From 1974 through 1981, I continued to use Trainor Gate Road and the other roads which I have described without incident. At the outset, in 1974, there were no guards at the gate, the gate was left open and unattended. At times, however, there were guards at the gate, however, they required neither a pass, permit nor even questioned why I was on Trainor Gate Road, the purpose of my business or my destination. From 1974 to 1981, I accessed my property through Fort Wainwright, probably averaging five or six times per month in the early 1970's and approximately one trip per day from 1979 to 1981. This continued until 1981 when the Government closed Trainor Gate Road. I sometimes continued to use the Trainor Gate Road even though it was closed. Subsequently, I was charged by the Government with trespassing in United States of America v. Paul G. Shultz, Docket No. F83-046 Cr. and charged with trespass pursuant to 18 USC § 1382. As opposed to litigate, I elected to plead no contest.

From 1981 until 1986 I used the Gaffney Road gate to

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access my property. Under duress I did obtain a permit for six months in 1982 to avoid being forced out of business by the Government. On February 1, 1986, I was again charged with trespass pursuant to 18 U.S.C. § 1382 and this time the matter was litigated in United States of America v. Paul G. Shultz, Docket No. F86-06 CR. The magistrate entered a judgment of acquittal because the Government could not prove ownership and exclusive right of possession of the property in question.

From my personal experience, from 1974 through 1981, Fort Wainwright was not a "controlled access" facility as described in Randall Accord's Affidavit.

Prior to filing the instant litigation, I made inquiry of several old timers to determine the historical status of the roads, particularly whether the Military required a permit or pass to cross the Military Reservation. In the course of my investigation I came across Henery Brockman and Bud Wiese who had first hand information. I also learned second hand that there were other people that probably used this road during the time frame 1942 to 1970, however, as of yet I have not had an opportunity to contact them. Names which I have been given include Roger Ferris who has since moved from the Fairbanks area and lives somewhere in Washington. The telephone number I have been given for him in Washington has been disconnected and I am attempting to trace him further. Tom Kouremetis is another past resident of Fairbanks who now lives in Washington. I have

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attempted to contact Mr. Kouremetis and have been informed that he is on a fishing boat off the coast of Alaska and cannot be contacted for several more weeks. I am sure there are other individuals in Fairbanks who could testify from personal knowledge concerning the status of the subject roads. It takes some investigation to determine the identities of these people, since the time period we are talking about extends back between forty-four and seventeen years. If the Court does not deny the Government's motions for the reasons stated in my counsel's legal memorandum, I request additional time to locate additional witnesses.

FURTHER YOUR AFFIANT SAYS NOT.

Paul G. Shultz

SUBSCRIBED AND SWORN to before me this 12th day of September, 1986.

(SEAL)

Robin Brandt
Notary Public in and for the State of Alaska. My commission expires: 10-27-87.

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Attorney for Plaintiff
PAUL G. SHULTZ

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, vs. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Case No. F86-30 Civil AFFIDAVIT OF BUD WIESE

STATE OF ALASKA)
) ss
FOURTH JUDICIAL DISTRICT)

My name is Bud Wiese, I live in Fairbanks, Alaska, and have lived in Fairbanks since 1943. I am presently part owner in Willner's Fuel, Inc. and have been involved in other business enterprises in the Fairbanks area over the years. I am familiar with the old Chena Hot Springs Road, and alternate variations which were part of the old Chena Hot Springs Road, which runs from the Steese Highway, north of the Chena River through what is now the Fort Wainwright Military Reservation. In 1947 through

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1950, I personally used this road system to hunt. During those several years when I used these roads, there was no pass or permit required by the Military or anyone else to use these roads, even though a portion of them passed through what is now the Fort Wainwright Military Reservation. I also know from personal observation that a number of other people used the roads during the same time frame, such as homesteaders, loggers and freighters.

FURTHER YOUR AFFIANT SAYS NOT.

Bud Wiese

Bud Wiese

SUBSCRIBED AND SWORN to before me this 19th day of September, 1986.

(SEAL)

Delta L. Jones

Notary Public in and for the State of Alaska. My commission expires: 9-2-88.

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Attorney for Plaintiff
PAUL G. SHULTZ

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, vs. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Case No. F86-30 Civil REQUEST FOR ORAL ARGUMENT

Joseph W. Sheehan, A Professional Corporation, attorney for Paul G. Shultz, Plaintiff herein, requests that oral argument be had in the above-captioned case on Defendant, Department of the Army, United States of America's Motion to Dismiss and Alternatively for Summary Judgment.

DATED this 12th day of September, 1986.

Joseph W. Sheehan
A Professional Corporation

JOSEPH W. SHEEHAN
ATTORNEY & COUNSELLOR AT LAW
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Attorney for Plaintiff
PAUL G. SHULTZ

SEP 12 1986

By .....

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, vs. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Case No. F86-30 Civil AFFIDAVIT OF MAILING

STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

Julie M. Mitchell, being first duly sworn, on oath deposes and says:

That she is over the age of eighteen years; that she is an employee of the law office of JOSEPH W. SHEEHAN, that on the 12th day of September, 1986, she did mail a full, true and correct copy of: First Amended Complaint, Statement of Genuine Issues, Opposition to Motion to Dismiss and Alternatively for Summary Judgment, Affidavit of Paul Shultz, Affidavit of Henry

JOSEPH W. SHEEHAN
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Brockman, Affidavit of Bud Wiese, Order, and Request for Oral Argument filed simultaneously herewith in the above-entitled action to the following: Stephen Cooper, Assistant United States Attorney, Room 310, Mail Box 2, 101 12th Avenue, Fairbanks, Alaska 99701, by depositing the same in a sealed envelope in the U.S. Post Office, Fairbanks, Alaska, postate prepaid.

Julie M. Mitchell

SUBSCRIBED AND SWORN to before me this 12th day of September, 1986.

(SEAL)

Robyn Brandt
Notary Public in and for the State of Alaska. My commission expires: 10-27-87.

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Lodged 9-12-86

SEP 1 [illegible]

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Attorney for Plaintiff
PAUL G. SHULTZ

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, vs. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Case No. F86-30 Civil ORDER

THE COURT having considered the Defendant's Motions to Dismiss for Failure to State a Cause of Action and Summary Judgment, Plaintiff's First Amended Complaint, Plaintiff's Motion in Opposition and the Supporting Affidavits;

WHEREFORE IT IS ORDERED, the Defendant's Motions are hereby denied.

Dated this _____ day of September, 1986.

_____
U.S. District Court Judge

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OCT 10 1986

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, v. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Civil No. F86-30 MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT DISMISSING FIRST AMENDED COMPLAINT

Following defendant's motion to dismiss and alternatively for summary judgment as to the original complaint herein, plaintiff simultaneously opposed the motion and filed his First Amended Complaint. The amended complaint corrects some of the defects in the original pleading. It makes a sufficient jurisdictional statement, and it recites sufficient facts to bring plaintiff generally within the statutory provisions on which his cause of action depends, except for the problem of the statute of limitations.

Thus, the amended complaint has rendered moot a substantial portion of defendant's original motion, and it presents a whole new pleading which must be addressed by defendant on all available grounds.

Accordingly, defendant now moves on the remaining ground, i.e., the jurisdictional bar of the statute of

limitations, and directs the motion at plaintiff's First Amended Complaint. Defendant's grounds are, in part, those previously presented, and in part the new affidavit and additional points and authorities set forth below. The defendant's original Motion, its supporting Affidavit of Randall K. Acord, and part III of the supporting Memorandum are therefore incorporated in this Motion and Memorandum by this reference, and are adopted and made a part hereof as though fully set forth herein, to the extent that they factually apply to plaintiff's new pleading.

I. THERE IS NO GENUINE ISSUE OF MATERIAL FACT

To resolve the question whether a genuine issue of material fact exists, one must first establish which facts are material and which are immaterial to the legal issue.

The statute of limitations applicable to this action against the United States under 28 U.S.C. 2409a(a) (for the adjudication of title to real property in which the United States claims an interest) is 28 U.S.C. 2409a(f) which provides:

> (f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor

in interest knew or should have known of the claim of the United States."

(Emphasis added.)

The emphasized portion of this statute brings out the crux of the jurisdictional issue before this Court, and serves to indicate which facts are material and which are not. Under this statute, it is immaterial what the plaintiff himself personally experienced in regard to the roads in question, or what he knew or did not know about the Government's claim of a right to control those roads, if:

(a) plaintiff had a predecessor in interest other than the Government itself, and if

(b) more than 12 years before this action was filed (April 1986) plaintiff's predecessor in interest either knew or should have known the Government claimed an interest in the roads.

It is clear, therefore, that the plaintiff's cause of action accrued whenever such predecessor was sufficiently on notice. It is equally clear from the statute that such accrual governs the limitation period, regardless of what the plaintiff himself may have experienced thereafter.

The controlling issue therefore is: When should plaintiff's predecessor in interest have known the Government claimed an interest in the roads?

The sub-issue of whether or not plaintiff had a nongovernmental predecessor or predecessors in interest is

resolved by the Affidavit of Capt. Richard L. Musick, filed in support of this Motion. It shows that the property plaintiff acquired in 1974 (referred to in plaintiff's affidavit, p. 2) was continuously in private ownership from July 15, 1949, to the time plaintiff purchased it.

Plaintiff's First Amended Complaint, like the original complaint, avoids shedding any light whatever on this history, or even on the question whether or not plaintiff had a predecessor in title, and if so, how far back in time the chain of private ownership extends. Instead, plaintiff seeks to litigate the issue as if his own experience since 1974 supplies the basis for his cause of action, regardless of his predecessors' knowledge or notice of the Government's claim.

However, under the law as quoted above, plaintiff's own experience with the road or with the Government is not in issue and is irrelevant, as long as his predecessor's knowledge or notice of the Government's claim existed more than 12 years ago.

Plaintiff's theory is that the cause of action was "rejuvenated" when in the 1970's the Army lifted controls for entry to Fort Wainwright (p. 17 of plaintiff's Opposition to Motion for Summary Judgment).

The following should be noted about this contention. It clearly implies that one or more of plaintiff's predecessors did in fact have the requisite knowledge or notice that the Government claimed an interest in the roads,

and that the cause of action did accrue on that account and became time-barred. Otherwise, there could be no claim of "rejuvenating" such cause of action.

Nevertheless, the law makes no provision for "rejuvenation", whether based on the Government's later course of dealing with the land or on any other basis. Plaintiff has alluded to no authority whatever that would support such a theory. The law of this Circuit is that this statute of limitations, 28 USC 2409a(f), must be strictly construed, and that courts have no power to create exceptions to its language for any reason. Park County, Montana v. United States, 626 F.2d 718, 720 (9th Cir. 1980).

Plaintiff's assertion of a "rejuvenation" theory, without any legal support for it, also implies that the Government had terminated its claim as to the roads in question. However, the lifting of controls on the roads by the military in the 1970's cannot be considered a termination of the Government's claim. Abandonment of government property cannot be inferred even from inactivity, neglect, oversight, or intentional conduct of government employees, since the power to dispose of government property is given to Congress by the Constitution. United States v. City of Columbus, 180 F.Supp. 775 (D.Ohio 1959). Moreover, the lifting of controls is itself consistent with an exercise of dominion and control over property, and is entirely distinct from either neglect or an intentional disposition of property.

In any event there has been no disposition, intentional or otherwise, of the Government's claim. Plaintiff has not alleged the existence of any facts in this regard beyond those which are not in dispute, i.e., that the Army lifted controls for entry onto the post in the 1970's and re-imposed those controls in 1981. The only thing plaintiff adds to these undisputed facts is his legal characterization that this effected a "rejuvenation" of his cause of action. There is no principle of law that so provides, and the statute of limitations does not permit any such exception. Park County, Montana v. United States, supra, 626 F.2d 718, 720 (9th Cir. 1980).

Plaintiff's knowledge and experience as to the roads in question are therefore a non-issue in regard to this summary judgment proceeding. The only issue is when his predecessor acquired knowledge or notice that the Government claimed an interest in the roads.

The only facts that are material are the facts relating to that issue. Those material facts are not genuinely in dispute. This is evident simply from a reading of the affidavits.

Viewing the facts in the light most favorable to the non-moving party, Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), plaintiff's witnesses show the following:

(a) the roads in question were used by the public before the military reservation came into being in the 1940's (Brockman affidavit, pp. 1-2);

(b) between 1942 and 1954 the military did not require a pass or permit for such use even though portions of the roads passed through the military reservation (Brockman affidavit, p. 3; Wiese affidavit, pp. 1-2);

(c) in the early 1950's the military fenced these roads (Brockman affidavit, p. 3); but

(d) thereafter the military continued to allow people to use Trainor Gate Road (Brockman affidavit, p. 3).

Randall Acord's affidavit shows that the post was "a controlled access post" from 1943 until the early 1970's except for 8 or 9 months just before the 1967 flood; by "controlled access" Acord means that some kind of pass or permit was required for entry, and that "entry was only by permission of the Air Force or the Army."

To the extent of any conflict, plaintiff's facts must prevail over Acord's version. However, there is no material conflict, i.e., there is no conflict as to the facts which bear on the issue now before the Court. Therefore, the controlling, material facts are these:

(a) plaintiff's predecessor in interest took title to the land which was accessed by these roads on July 15, 1949;

(b) plaintiff's witnesses reveal what happened in relation to those roads only between 1942 and 1954;

(c) in the early 1950's the military fenced the roads, but did "allow" the public to use Trainor Gate Road without getting a pass or permit;

(d) at all times from 1943 to the 1970's, entry onto the post was by permission of the military.

These are the only material facts. As to these facts there is no dispute.

II. DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

The final question for this Court is:

Do the foregoing undisputed facts show that plaintiff's predecessor or predecessors in title should have known more than 12 years ago that the Government claimed an interest in the roads in question?

If the answer to this question is Yes, plaintiff's cause of action accrued more than 12 years ago, this Court lacks jurisdiction because of the statute of limitations, 28 USC 2409a(f), and defendant is entitled to judgment as a matter of law.

In addition to Randall Acord's general statement that all through the years since 1943, access to the post has been by permission of the military, Henry Brockman (affidavit, p. 3) reveals the controlling specific fact, i.e., that

> "In the early 1950's the Military fenced these roads, however, they continued to allow us to use Trainor Gate Road."

This fact is controlling because the statement that the military fenced all but Trainor Gate Road, but that the military "continued to allow" use of Trainor Gate Road, is Mr. Brockman's acknowledgement of the fact that the military claimed the right to control all the roads in question.

Brockman, as a man precisely in the same position as plaintiff's earliest predecessor in title, reveals his knowledge of the Government's claim at least as early as 1950. It follows that plaintiff's predecessor in title either knew or should have known by 1950 the same thing Brockman did, i.e., that use of all the roads in question, except Trainor Gate Road, was prohibited by the Government, and that use of Trainor Gate Road was by permission of the Government which "continued to allow" it.

The period of time since the early 1950's is of no significance inasmuch as the requisite knowledge or notice existed at that time. But Acord shows that entry continued, as before, to be allowed "only by permission of the Air Force or the Army."

The apparent fact that, at least in the early 1950's, the military did not require or pass or permit for use of Trainor Gate Road even after it had fenced all the other roads, is not controlling. There is no requirement that access be denied in order to put others on notice of the Government's claim. The only requirement is that plaintiff's predecessor be aware of such a claim. The use

of passes or permits would only be one of many possible forms of evidence of the Government's claim. The fencing of all but one of the roads, coupled with allowing use of the one remaining open, was the fact (among other possible facts) which put the public on notice in the present case that the Government claimed the right to control or close all the roads in question.

Was the fencing of all but one road sufficient to imply that the Government claimed a right to control the remaining road (Trainor Gate Road)? The answer need not be sought in examination of detailed maps showing the relative locations of the roads in relation to where the military reservation was situated. The answer is in the affidavit sworn to by Henry Brockman: The "Military continued to allow us to use Trainor Gate Road." Thus, the fencing of all but one road coupled with the military's continued allowance of use of that one, constitutes sufficient evidence of the fact that the public, including the landowners in the position of plaintiff's predecessor, were in fact aware that the Government claimed an interest in all the roads in question, including Trainor Gate Road.

Various means of imparting notice of the Government's claim are found in the cases. In Park County, Montana v. United States, supra, 626 F.2d 718, 720 (9th Cir. 1980), plaintiffs had sued the Government on the same theory as plaintiff herein, i.e., on a claim that a right of way under 43 USC 932 had been created in a road that existed

prior to creation of a federal reservation (a primitive area) covering the area of the road. Federal authorities later put up a sign prohibiting motor vehicle traffic on the road, and erected a rock barrier. The court rejected plaintiffs' claim that the sign only gave notice as to the portion of the road behind the sign. Summary judgment was affirmed because more than 12 years had passed before the action was commenced; there was no genuine issue of material fact and the Government was entitled to judgment as a matter of law. Id., p. 721.

In Hatter v. United States, 402 F.Supp. 1192, 1193 (E.D. Cal. 1975), although notice was by a letter from the Government, it only gave notice of "some sort of equitable interest" of the Government in the plaintiff's property. The court held that the plaintiff need not know the full nature of the Government's claim of an interest in the land, and that the mere knowledge of some sort of equitable interest was sufficient to start the running of the 12-year statute of limitations. Id., pp. 1194-1195.

In the present case, regardless of the public nature of the claimed roads prior to establishment of the military reservation, plaintiff's predecessors were on notice, by at least the early 1950's, of the fact that the Government asserted a right to control and in fact did control use of those roads where they crossed the reservation.

Plaintiff's reliance on Block v. North Dakota, 461 U.S. 273, 28 S.Ct. 1811, 75 L.Ed.2d 840 (1983), is essentially a plea for an exception to the statute. That case holds that if the state's suit was filed more than 12 years after the cause of action accrued, it was barred and the court had no jurisdiction to hear it. Id., p. 292. That holding is unaffected by the fact that, as the Supreme Court also noted, the barring of such a suit does not settle the question of title. Likewise in the present case, whether or not the title question is resolved, the limitations issue is jurisdictional, and deprives the Court of the power to proceed further.

CONCLUSION

Plaintiff's cause of action accrued more than 12 years before this action was filed. The material facts on this are not in dispute. Therefore, this Court lacks subject-matter jurisdiction due to the statute of limitations, 28 USC 2409a(f), and defendant is entitled to judgment of dismissal as a matter of law.

Respectfully submitted this 7th day of October, 1986, at Fairbanks, Alaska.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, v. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Civil No. F86-30 OPPOSITION TO STATEMENT OF GENUINE ISSUES

Plaintiff's Statement of Genuine Issues has been rendered moot by his own amended complaint, his affidavits, and by defendant's new Motion for Summary Judgment as to the First Amended Complaint. The Statement of Genuine Issues therefore need not be addressed.

However, the Statement does not present genuine issues of material fact.

1. The parties do not dispute to any material degree the nature of the Government's control over the roads.

2. Plaintiff's own affidavits, particularly that of Brockman, establish the time and form of the Government's control of access until 1954. Thereafter, Acord's affidavit alone supplies the facts.

3. The effect of the Government's control of the roads on plaintiff's rights is not an issue of fact. It is a legal question.

4. Whether plaintiff's claim accrued under 28 USC 2409a since 1974 is likewise a legal issue.

5. Whether the control used by the Government was legally sufficient to constitute notice and to start the 12-year statute running is also not a fact question but a legal issue.

DATED this 9th day of October, 1986, at Fairbanks, Alaska.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

OCT 10 1986

PAUL G. SHULTZ, Plaintiff, v. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Civil No. F86-30 AFFIDAVIT

RICHARD L. MUSICK, being first duly sworn upon oath, deposes and says:

That I have researched the chain of title of the real property described as:

> Lot 1 and the East one-half of the Northeast Quarter of Section 10, Township One South, Range One East of the Fairbanks Meridian

That the records of the District Recorder revealed the following chain of title:

> March 1974 - Conveyed by Erven Lee and Norma J. Mattox to John Roberts and Paul G. Shultz
>
> 21 June 1958 - Conveyed by John T. and Lula M. Wallace to Erven Lee and Norma J. Mattox
>
> 15 August 1953 - Conveyed by Edward J. and Gail V. Ryan to John T. and Lula M. Wallace
>
> 26 July 1951 - Conveyed by Sidney J. Whipple and Edna E. Whipple to Edward J. and Gail V. Ryan
>
> 15 July 1949 - Conveyed by United States of America to Sidney J. Whipple. Patent No. 1126721 (Recorded on 9 June 1951)

Further affiant sayeth not.

Richard L. Musick

Capt. Richard L. Musick

SUBSCRIBED AND SWORN to before me this 8th day of October, 1986, at Fairbanks, Alaska.

Claudia Wilson

Claudia Wilson
Notary Public in and for Alaska
My Commission Expires: 9/10/90

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October, 1986, a copy of the foregoing MOTION FOR SUMMARY JUDGMENT DISMISSING FIRST AMENDED COMPLAINT and MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT DISMISSING FIRST AMENDED COMPLAINT and OPPOSITION TO STATEMENT OF GENUINE ISSUES and AFFIDAVIT was served by first class mail, postage paid, on counsel of record at the following address:

Joseph Sheehan
Attorney at Law
P.O. Box 906
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Claudia P. Wilson
CLAUDIA P. WILSON/Secretary

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, v. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Civil No. F86-30 MOTION FOR SUMMARY JUDGMENT DISMISSING FIRST AMENDED COMPLAINT

COMES NOW Defendant, the United States of America, pursuant to Rules 12(b) and 56, Federal Rules of Civil Procedure, and moves this Honorable Court to enter summary judgment in defendant's favor, dismissing the First Amended Complaint herein on the grounds that there is no genuine issue of material fact and this defendant is entitled to judgment as a matter of law, due to this Court's lack of jurisdiction of the subject matter of this action, in that said action is barred by the statute of limitations.

This motion is based on the Affidavit and the Memorandum filed in support hereof, and on applicable provisions of law.

DATED this 6th day of October, 1986, at Fairbanks, Alaska.

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United States Attorney

STEPHEN COOPER
Assistant United States Attorney

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Attorney for Plaintiff
PAUL G. SHULTZ

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PAUL G. SHULTZ, Plaintiff, vs. DEPARTMENT OF ARMY, UNITED STATES OF AMERICA, Defendant.	Case No. F86-30 Civil OPPOSITION TO MOTION TO DISMISS AND ALTERNATIVELY FOR SUMMARY JUDGMENT

The United States of America's (Government) Motion presents a divisible argument. One addressing the sufficiency of the Pleadings and another incorporating the affidavit of Randall K. Accord, which addresses the merits of the controversy.

I. SUBJECT MATTER JURISDICTION

The Government contends that Paul G. Shultz's (Shultz) complaint is procedurally defective, because it fails to reference the basis of the Court's jurisdiction. The Government's reliance on

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Civil Rule 8(a)(1) is misplaced. A reading of Shultz's Complaint references a right of way easement, created by 43 USC § 932, and the derogation by the Government of Shultz's right to use said easement in violation of Article V of the Amendments to the Constitution of the United States of America. See Plaintiff's Complaint, Paragraph Eleven. The Court's subject matter jurisdiction exists by reason that the right claimed exists by federal law. 28 USC § 1331 confers jurisdiction under such circumstances.

> The district court shall have original jurisdiction of all civil actions arising under the constitution, laws or treaties of the United States. See 28 USC § 1331.

Since the 1976 amendment of 28 USC § 1331, the amount in controversy no longer is jurisdictional when the action is against the United States or any of its agencies.

Shultz's failure to reference 28 USC § 1331 as the basis of the Court's jurisdiction is not consequential if a reading of the complaint delineates a cause of action arising under the laws or the constitution of the United States of America. See Mir vs. Fosburg, 646 F.2d 342, 347 (9th Cir. 1980), Vukonich vs. Civil Serv. Comm'n, 589 F.2d 494, 496 (10th Cir. 1978), Southpark Square Ltd. vs. City of Jackson, Mississippi, 565 F.2d 338, 340-341 (5 Cir. 1977), cert. denied. 436 U.S. 946, 98 Sup. Ct. 2849, 56 L. Ed. 2d, 787, (1977).

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The appendix forms to the Civil Rules, Official Form 2(b) requires no more statement of subject matter jurisdiction than is stated in Shultz's complaint.

> Jurisdiction, founded on the existence of a Federal question and amount in controversy.
>
> The action arises under [the Fifth Amendment to the Constitution of the United States]; and [the Act of July 26, 1866, c. 262, § 8 14 Stat. 253; U.S.C., Title 43 § 932], as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and cost, the sum of ten thousand dollars. See Federal Rules of Civil Procedure, Appendix of Forms, Form 2(b).

Shultz's paragraphs three (3) and eleven (11) meet and exceed the suggested Federal Rule Form, particularly when considered in light of all allegations made as a basis for Shultz's complaint. The Government is suggesting an over technical "form pleading" which has long since been abandoned as a procedural requirement.

> The use of particular language or words is unnecessary; all that is required is that the allegations in the complaint clearly show that jurisdiction exists. [Footnotes omitted.] See 5 Wright and Miller, Federal

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Practice and Procedure § 1206, at pp 79-80 (1969).

> Although Plaintiff has failed to cite a valid jurisdictional statute as a basis for its complaint, Rule 8(a)(1) of the Federal Rules of Civil Procedure only requires that a pleading setting forth a claim for relief contain a short and plain statement of the grounds upon which the Court's jurisdiction depends. If there is a statement in the Complaint sufficient to give the Court jurisdiction, the particular statute conferring jurisdiction need not be specifically pleaded. *** See Framlau Corp. vs. Dembling, 360 F. Supp. 806, 808-809 (DC Pa. 1973). See also Civil Rules 2, 8(f) and 10.

In Framlau the Court found Plaintiff's allegation that he was denied due process as guaranteed by the Fifth Amendment to the United States Constitution sufficient to establish Court jurisdiction.

Alternatively Shultz tenders with this filing an amended complaint adding a jurisdictional paragraph referencing the provisions of 28 USC § 1331 and 2409a. This amendment is

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permissible as a matter of right pursuant to the provisions of Civil Rule 15(a), since the government as of yet has not filed a responsive pleading.

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served .... *** See Civil Rule 15(a).

II. SUFFICIENCY OF COMPLAINT

The Government argues that Shultz's complaint fails to state a cause of action, therefore is subject to dismissal pursuant to Civil Rule 12(b)(6). In ruling on a 12(b)(6) motion, the allegations of the complaint should be construed most favorably to the pleader -- Shultz.

> [I]t is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed most favorably to the pleader. See Scheuer vs. Rhodes, 416 U.S. 232, 236; 94 Sup. Ct. 1683, 40 L. Ed. 2d 90, 96 (1974).

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The allegations of the complaint must be accepted at face value for purposes of such a dispositive motion. See California Motor Transp. Co. vs. Trucking Unlimited, 404 US 508, 515-516; 92 Sup. Ct. 609, 30 L. Ed. 2d 642, 649 (1972).

The substance of Shultz's complaint is that he is being deprived of a property right without due process of law or compensation in violation of Article V of the Amendments to the Constitution of the United States. In support of his claim, Shultz has alleged the following facts:

1. That he owns certain real property which is described in the complaint;

2. That the Department of the Army has formed a Military Reservation under certain public land orders which are identified in the complaint;

3. That within the land claimed by the military there was a pre-existing public road or roads pursuant to the provisions of 43 USC § 932;

4. That the roads in question are identified as -- Fairbanks Chena Hot Springs Trail (also known as Lazelle Road, Fairbanks Small Wood Road, and Route 7-J), Wiest Road (also known as Wiess Road, River Road and Tank Road) and Trainor Gate Road;

5. That the roads referred to have never been legally vacated;

6. That in 1981 the Department of the Army restricted the publics use of the referenced roads;

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7. That the referenced roads are necessary for Shultz's ingress, egress and development of his property;

8. That Shultz has a property right recognized by State law in the hereinbefore referenced public road or roads.

Assuming all of these allegations to be true, it is self evident that the Government has enfringed on Shultz's constitutionally protected property rights.

The substance of the Government's argument is directed toward the allegations of Paragraph Three and the reference to a public highway under the provisions of 43 USC § 932. Since Plaintiff Shultz is filing an Amended Complaint with more detail the Govermnent may choose to abandon this particular argument. However, if it is pursued, the Court's focus should be on Paragraphs Four, Five, Six, Eight and Nine of the First Amended Complaint, which allege the basic elements of a Section 932 right-of-way. See Wilderness Society v. Morton, 479 F. 2d 842, 882 (DC Cir. 1973); certiorari denied. 411 U.S. 917, 936 L. Ed. 2d 309; 93 Sup. Ct. 1550; Dillingham Commercial Co., v. City of Dillingham, 705 P.2d 410, 413-414 (Alaska 1985); and Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961). No doubt the Government at trial may contest the existence of a public road, however, for purposes of this motion those roads described in Paragraph Four and the allegation that these roads were authorized and in existence under the provisions of 43 USC § 932 within the referenced Military Reservation are totally ignored. There is

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nothing in law and the Government has cited to no authority, which requires the allegations of the complaint to detail each factual event necessary to prove an allegation. Shultz does not dispute that he must prove that the public roads in question came into existence at a time when the land in question was not otherwise reserved. That proposition is effectively suggested in Paragraphs Four and Five.

The Government's second contention that Shultz has failed to allege either an interest in the public, himself or a predecessor ignores the words "public road or roads" used throughout the First Amended Complaint and particularly Paragraphs Sixteen and Seventeen. In determining whether a party has a recognizable property right State law must be considered. See Kinscherff v. United States, 386 F.2d 159, 160 (10th Cir. 1978). In Alaska, an individual has a compensatory property right in a public right-of-way. See B & G Meats, Inc. v. State, 601 P.2d 252, 254 (Alaska 1979). Under Alaska law, a "right-of-way" is considered an easement. See Wessells v. State Department of Highways, 562 P.2d 1042, 1046 n.5 (Alaska 1977). An easement is compensable by statute. See AS 09.55.250(2).

In deciding a Rule 12(b)(6) motion, the determination is not whether the Plaintiff will prevail on the allegations set forth in his complaint, but whether the plaintiff is entitled to offer evidence to support his claims. See Scheuer vs. Rhodes,

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416 U.S. 232, 236 94 Sup. Ct. 1683, 40 L. Ed. 2d 90, 96 (1974). The purpose of the motion is to determine the legal feasibility of the complaint and not to assess the weight of any evidence which might be offered. See Geisler vs. Pertocelli, 616 F.2d 636, 639 (2nd Cir. 1980). Judging by these legal standards and accepting the allegations of the complaint as true, it becomes self evident that a legal cause of action exists which would permit the submission of evidence.

III. SUMMARY JUDGMENT/STATUTE OF LIMITATIONS

As the Government correctly points out, 28 USC 2409a(f) provides a twelve year statute of limitation. Applying that to the present case, the cause of action must have accrued subsequent to April 22, 1974.

The Government has submitted the Affidavit of Randall K. Accord suggesting that the Department of the Army has exerted control over the public road and/or roads in question since the inception of the Military Reservation in 1943 to 1970. Attached are the Affidavits of Henery Brockman and Bud Wiese which contradict the Affidavit of Randall K. Accord, creating a genuine dispute as to a material fact. To summarize the Affidavits of Henery Brockman and Bud Wiese the road or roads in question were in use prior to the existence of the Military Reservation.

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In creating the Military Reservation, the Government clearly recognized the existence of public roads by inclusion of the language that the land was being reserved subject to "valid existing rights".[1/] Except for times associated with a war and perhaps other similar emergencies, the public has had free and unlimited access to use the public road and roads described in Shultz's complaint to access Shultz's property as well as other public uses and purposes.

Shultz's Affidavit asserts that he has had uninterrupted use from the time of purchase of his property in 1974 until 1981. During this time Shultz neither requested nor was required to obtain a pass, permit or other authorization from the Army to cross the subject Reservation. In 1981, the Government closed Trainor Gate Road and informed the public, including Shultz, that it would no longer allow access to the subject roads without a permit or pass and that the Government was maintaining that there were no public roads within the geographic limits of the Military Reservation. Shultz challenged the Government's decision and continued to use Trainor Gate Road. As a result of his actions, Shultz was charged with trespass under the provisions of 18 U.S.C. §1382. The trespass claim was subsequently disposed of on a no contest plea. For the next

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[1/] Copies of the land orders are attached hereto as Appendix "A".

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several years, Shultz attempted to resolve the matter by negotiations with the Army, the State of Alaska, the Fairbanks North Star Borough or any other person that would show concern. Shultz's effort met with no success. In 1986 Shultz was again charged with trespass for entering the Fort Wainwright Military Reservation without a pass, permit or authorization from the Government. Shultz was acquitted of the charge. A copy of the Judgment of Acquittal is attached hereto as Appendix "B". The U.S. Magistrate determined that the Government could not sustain its burden of proof to establish exclusive ownership of the subject property.

A Civil Rule 56 motion for summary judgment is somewhat akin to a Rule 12(b)(6) motion. The difference between the two is that the former incorporates evidence outside the pleadings, however, to the extent that such evidence does not contradict, Plaintiff's complaint, the allegations are to be accepted as well pleaded. In addition, on those matters involving contradictory evidence, all presumptions are resolved in favor of the non-moving party. See Adickes v. S.H. Kress & Co. 398 U.S. 144, 90 Sup. Ct. 1598, 26 L. Ed. 142 (1970) and Pepper & Tanner, Inc. v. Shamrock Broadcasting, Inc., 563 F.2d 391 (9th Cir. 1977). A mere denial of the allegations of the complaint or contradicting affidavits are not sufficient to warrant summary judgment. See Goldwater v. Ginzburg, 414 F. 2d 327, 337, (2 Cir. 1969) certiorari denied, 396 U.S. 1049, 90 Sup. Ct. 701, 24 L. Ed. 2d

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695. Countering affidavits are sufficient to show specific facts that present a genuine issue requiring trial. See First National Bank of Arizona v. Cities Serv. Corp., 391 U.S. 253, 289, 88 Sup. Ct. 1575, 1593 20 L. Ed. 2d 569 (1968).

The Government has not filed an answer and other than its argument the only countering evidence which it has offered is the Affidavit of Randall K. Accord. Accord's Affidavit addresses only the issue of the Statute of Limitations. For purposes of this motion for Summary Judgment, those allegations set forth in Shultz's Complaint relative to the existence of a public right-of-way under Section 932 must be accepted as true. As well, the Government's actions in interfering with the use of the foregoing right-of-way are not contested. The sole issue discussed in Randall K. Accord's Affidavit relates to when a cause of action accrued and the application of the twelve year statute of limitations. See Government's Memorandum in Support of Motion to Dismiss and Alternatively for Summary Judgment, dated August 19, 1986, at Pages Four through Eight. Randall K. Accord's statement of "controlled access" from 1943 until 1970 is disputed by the Affidavits of Henery Brockman and Bud Wiese. There are other individuals described in Shultz's Affidavit which could contradict the Government's Affidavit. The identity of all of these individuals are not as yet known, however, some are

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Roger Ferris, and Tom Kouremetis. [2/] There are genuine issues as to material facts, which are more specifically stated in Shultz's statement of genuine issues, encompassing the time period from 1943 to 1970. The veracity and knowledge of these affiants will have to be tested at trial to resolve the conflicting evidence. As is self evident from an examination of the Affidavits, this presents a contested issue of fact which cannot be resolved by a dispositive motion pursuant to Civil Rule 56.

Irrespective of the dispute concerning the nature of "controlled access" of the Post from 1943 to 1970, the Government does not contest Shultz's Affidavit that the Fort Wainwright Military Reservation was "open" from at least 1974 through 1981. Even Randall K. Accord's Affidavit acknowledges in the last clause of the third sentence of the last paragraph that from the early 1970's, with the advent of the Alyeska Pipeline Construction era, the Post became "opened". This time period, from 1974 to date, is the time period which is most crucial for

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[2/] Brockman and Wiese's Affidavits cover the time period from prior to 1943 to 1954. Shultz feels confident that there are other individuals who used the subject roads from 1954 through 1970 and would attest that no permits or permission were required. Because of the unavailability of certain affiants as well as the difficulty to locate other affiants given the passage of some thirty years, Shultz requests relief pursuant to the provisions of Civil Rule 56(f). As set forth infra in Shultz's Opposition Memorandum, the integral time period is from 1974 through 1986.

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purposes of determining when a cause of action accrued. For even if it is assumed arguendo that the Base was under "controlled access" from 1943 to 1970, this would not preclude an action commenced in 1986 nor does it dispose of the State's interest in the referenced public road or roads -- if the Military Reservation was "open" within twelve years prior to the filing of this law suit. The United States Supreme Court in the case of Block v. North Dakota held that the imposition of the Statute of Limitations pursuant to section 2409a(f) does not extinguish title or effectuate a transfer of title.

> The State probably is correct in stating that Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution. Such a law would not run afoul of the equal footing doctrine or the Tenth Amendment as asserted by North Dakota, but it would constitute a taking of the State's property without just compensation, in violation of the Fifth Amendment. Section 2409a(f) however, does not purport to strip any state, or anyone else for that matter, of any property rights. The Statute limits the time in which a quiet title suit against the

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> United States can be filed; but unlike an adverse possession provision, § 2409a(f) does not purport to effectuate a transfer of title. If a claimant has title to a disputed tract of land, he retains title even if his suit to quiet his title is deemed time barred under § 2409a(f). A dismissal pursuant to § 2409a(f) does not guiet title to the property in the United States. Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter will finally be put to rest on the merits. [Footnotes omitted.] See Block v. North Dakota, 461 U.S. 273, 291-292 103 Sup. Ct. 1811, 1822, 75 L. Ed. 2d 840 (1983).

State law governs the question of adverse possession and although normally ten years precludes an action in Alaska, this does not apply in this instance, since the roads in question are owned by the State. The State of Alaska's title cannot be jeopardized by adverse possession. As long as the State has title, Shultz's interest remains intact.

> Whether, in the absence of a suit by it, the United States would ever acquire good title to a disputed area would, under the present

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> status of the law, be stictly a matter of State law. *** In many instances, the United States would presumably eventually take the land by adverse possession, but, if so, it would be purely by virtue of State law. Here, North Dakota asserts that the disputed land is public trust land that cannot ever be taken by adverse possession under North Dakota law. [Citations omitted.] See Block v. North Dakota, 461 U.S. 273, 291-292 103 n. 28 Sup. Ct. 1811, 1822, 75 L. Ed. 2d 840 (1983).

Alaska law is similar.

> No prescription or statute of limitations runs against the title or interests 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. See AS 38.95.010. See also Classen v. State, Dept. of Hwys., 621 P.2d 15, 17 (Alaska 1980) and Walsh v. Emerick, 611 P.2d 28, 30 (Alaska 1980).

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Possession relative to public property is irrelevant evidence.

> The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more is conclusively presumed to give title to the property except as against the State or the United States. See AS 09.25.050.

If the Government cannot acquire title by adverse possession and the provisions of 28 USC 2409(a) do not effectuate transfer of title, then the road and or roads were still public in the 1970's through 1981 when the Fort Wainwright Military Reservation was on an "open" status. As acknowledged in both Mr. Accord's and Shultz's Affidavits, the public took advantage of this "open" status and used the referenced public roads. By allowing the "open" status the Government in effect rejuvenated the right to quite title to these roads and did not start the running of the Statute of Limitations until 1981 when it closed Trainor Gate Road and began prosecuting citizens, such as Shultz, for attempted use of the road or roads without authorizations or permits. Based on the Government's own supporting Affidavit of Randall K. Accord, the Statute of Limitations can not be an affirmative defense to the Court's jurisdiction in this instance, since it is agreed by all parties that the public had open access to the referenced roads within twelve years from the filing date of Shultz's complaint.

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Besides being legally defective, it is not in the Government's interests to pursue a disposition of this case which does not address the merits. As set forth in Shultz's Affidavit, he has twice been charged with trespass on the Fort Wainwright Military Reservation because of the dispute concerning the status of the subject roads. The first disposition was disposed of by Mr. Shultz without the benefit of counsel on a no contest plea. The second disposition was disposed of with counsel and resulted in an acquittal because of the Government's inability to meet its burden of proof and show exclusive ownership. This type of civil disobedience is encouraged if the merits of the present controversy are not resolved. For even if the Government should prevail on its argument involving limitations on the present motion or some subsequent motion, this would not resolve the title question to the roads in issues. The Supreme Court determined in Block v. North Dakota ex rel. etc. cited supra, that in circumstances similar to those presently before the Court title questions will never be resolved to either party's satisfaction. Unless the matter is resolved, Shultz, and the public generally can continue to trespass across Fort Wainwright and the Government will likely not be successful in prosecuting such trespassers because of the unresolved title status. In order to alleviate this civil disobedience and neutralize the opportunity for possible serious consequences to some individual in the future, it is in everyones' interest to resolve this

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dispute once and for all.

IV. CONCLUSION

Reviewing Plaintiff Shultz's First Amended Complaint, the appropriate statutory provisions and case authorities cited by the Government and Shultz, requires that the Government's pending motions be denied. Based on the Affidavit of Randall K. Accord and Paul G. Shultz, the subject action is filed within the twelve year Statute of Limitations because of the "open" policy maintained from 1970 through 1981. Alternatively, there are genuine issues of material fact in dispute as to when the Statute of Limitations began to run. The Complaint on its face states a cause of action which would authorize the submission of evidence and there are genuine issues of material fact in dispute as to if and when the Statute of Limitations began to run with respect to the issues in this litigation.

DATED this 12th day of September, 1986.

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A Professional Corporation

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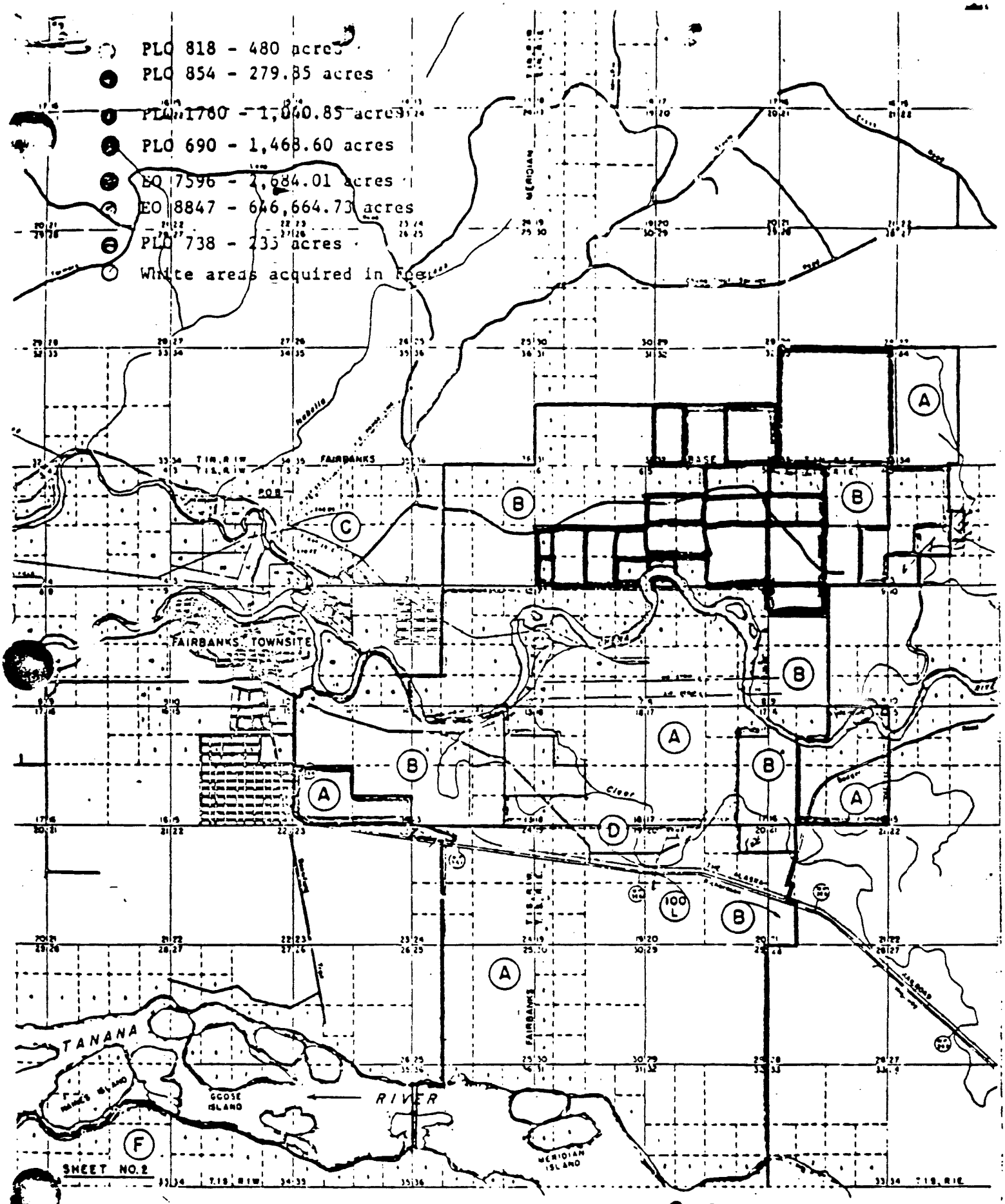


PLO 189

2 Aug 46

Fort Wainwright

13

UNITED STATES
DEPARTMENT OF THE INTERIOR

Public Land Order #139

WITHDRAWING PUBLIC LANDS FOR USE OF THE WAR DEPARTMENT FOR MILITARY PURPOSES

Alaska

By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

Subject to valid existing rights, the following-described public lands are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved for the use of the War Department for military purposes:

Fairbanks Meridian

T. 1 N., R. 1 E.,
sec. 32, E½SW¼ and SE¼.
T. 1 S., R. 1 E.,
sec. 4, lots 3 and 4, S½NW¼, and SW¼;
sec. 5, lots 1, 2, 5, and 7, S½NE¼,
S½NW¼, N½SW¼, and SE¼;
sec. 6, lots 6, 7, and 8, E½SW¼,
W½SE¼, and NE¼SE¼;
sec. 9, N½NW¼.

The areas described aggregate 1,454.36 acres.

Jurisdiction over the public lands hereby reserved shall revert to the Department of the Interior and to any other Department or agency of the Federal Government which had any jurisdiction over such lands immediately preceding the issuance of this order, according to their respective interests, upon expiration of the six months' period following the termination of the unlimited national emergency declared by Proclamation No. 2487 of May 27, 1941 (55 Stat. 1647). The public lands, however, shall remain withdrawn from appropriation as herein provided until otherwise ordered, pending classification and a determination as to whether the lands, or portions thereof, are needed for public purposes.

This order is confidential and shall not be filed in the Division of the Federal Register of the National Archives, or published in the Federal Register, or be given other publicity, until publication thereof has been expressly authorized by or at the direction of the Secretary of War.

Ladd AFB
Confidential status released by ltr Sec of War dtd 27Jun46
(See F R 2Aug46
Amended by PLO 284
Revoked by PLO 690 (reserves for D/AF

UNITED STATES
DEPARTMENT OF THE INTERIOR

CODE OF FEDERAL REGULATIONS
TITLE 43--PUBLIC LANDS; INTERIOR

Chapter I—General Land Office
Appendix--Public Land Orders

Public Land Order 284

ALASKA

AMENDING EXECUTIVE ORDER AND CERTAIN PUBLIC LAND ORDERS WITHDRAWING PUBLIC LANDS FOR THE USE OF THE WAR DEPARTMENT

By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

The Executive Order of April 30, 1942, and Public Land Orders Numbers 5, 20, 36, 47, 48, 69, 71, 77, 95, 96, 103, and 139, withdrawing certain public lands in the Territory of Alaska for the use of the War Department for military purposes, are hereby amended by adding thereto the following paragraph:

"The jurisdiction granted by this order shall cease at the expiration of the six months' period following the termination of the unlimited national emergency declared by Proclamation No. 2487 of May 27, 1941 (55 Stat. 1647). Thereupon, jurisdiction over the lands hereby reserved shall be vested in the Department of the Interior, and any other Department or agency of the Federal Government according to their respective interests then of record. The lands, however, shall remain withdrawn from appropriation as herein provided until otherwise ordered."

Similar provisions contained in Public Land Orders Numbers 77, 95, 96, 103, and 139, are hereby superseded.

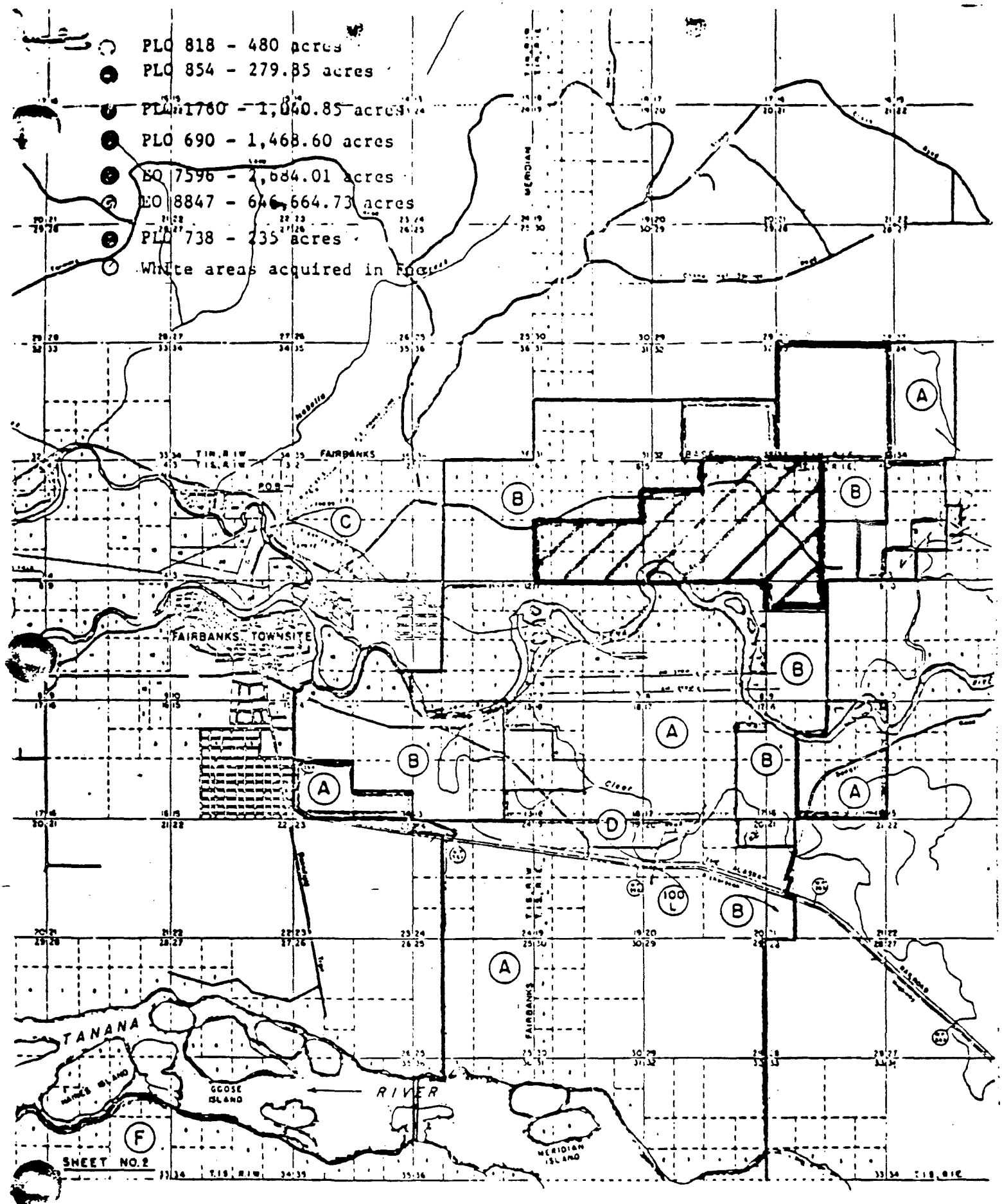
This order is confidential and shall not be filed in the Division of the Federal Register of The National Archives, or published in the Federal Register, or be given other publicity, until publication thereof has been expressly authorized by or at the direction of the Secretary of War.

/s/ Abe Fortas
Acting Secretary of the Interior

Jun 12 1945

See E.O. 9526

PLO 284



PLO - 690

Fort Wainwright

TITLE 43—PUBLIC LANDS: INTERIOR

Chapter I—Bureau of Land Management, Department of the Interior

Appendix—Public Land Orders

[Public Land Order 690]

ALASKA

WITHDRAWING PUBLIC LANDS FOR USE OF THE DEPARTMENT OF THE AIR FORCE FOR MILITARY PURPOSES; REVOKING EXECUTIVE ORDER NO. 8325 OF JANUARY 22, 1940, AS AMENDED, AND PUBLIC LAND ORDER NO. 139 OF JUNE 12, 1943, AS AMENDED

Ladd Air Force Base

By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

1. Subject to valid existing rights, the following-described public lands are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved for the use of the Department of the Air Force for military purposes:

FAIRBANKS MERIDIAN

T. 1 N., R. 1 E.,
Sec. 32, E½SW¼ and SE¼.
T. 1 S., R. 1 E.,
* Sec. 4, lots 3, 4, S½NW¼ and SW¼;
Sec. 5, lots 1, 2, 3, 4, 7, S½NE¼, S½SW¼, N½SW¼, and SE¼;
Sec. 6, lots 6, 7, 8, S½SW¼, W½SE¼, NE¼SE¼;
Sec. 8, N½NW¼.

The areas described aggregate 1,402.80 acres.

It is intended that the lands described above shall be returned to the administration of the Department of the Interior when they are no longer needed for the purpose for which they are reserved.

2. Executive Order No. 8325 of January 22, 1940, as amended, and Public Land Order No. 139 of June 12, 1943, as amended, withdrawing the above-described lands for the use of the War Department for military purposes, are hereby revoked.

OSCAR L. CHAPMAN,
Secretary of the Interior.

NOVEMBER 22, 1950.

[F. R. Doc. 50-10762; Filed, Nov. 28, 1950; 8:45 a. m.]

* Should read "Sec. 4, lots 3, 4, S½NW¼ and SW¼" See correction attached.

PLO 690

EXECUTIVE ORDER

WITHDRAWAL OF PUBLIC LAND FOR USE OF THE WAR DEPARTMENT

ALASKA

By virtue of the authority vested in me by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497, and subject to the conditions therein expressed and to valid existing rights, it is ordered that the following-described public land in Alaska be, and it is hereby, temporarily withdrawn from settlement, location, sale, or entry, and reserved for the use of the War Department for military purposes:

Fairbanks Meridian

T. 1 S., R. 1 E., sec. 5, lot 6, containing 14.24 acres.

This order shall continue in force until revoked by the President or by act of Congress.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
January 22, 1940.

[No. 8325]

[F. R. Doc. 40-365; Filed, January 23, 1940 12:44 p. m.]

Revoked by PLO 690.
(PLO 690 reserves land for Dept. of Air Force

14.24 acres

Ex. O. No. 83[illegible]

[Public Land Order 748]

ALASKA

CORRECTING THE LAND DESCRIPTION IN PUBLIC LAND ORDER NO. 690 OF NOVEMBER 22, 1950

By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, the land description in Public Land Order No. 690 of November 22, 1950, which reserved lands for the use of the Department of the Air Force for military purposes, so far as such description relates to lands in sec. 32, T. 1 N., R. 1 E., Fairbanks Meridian, is hereby corrected to read as follows:

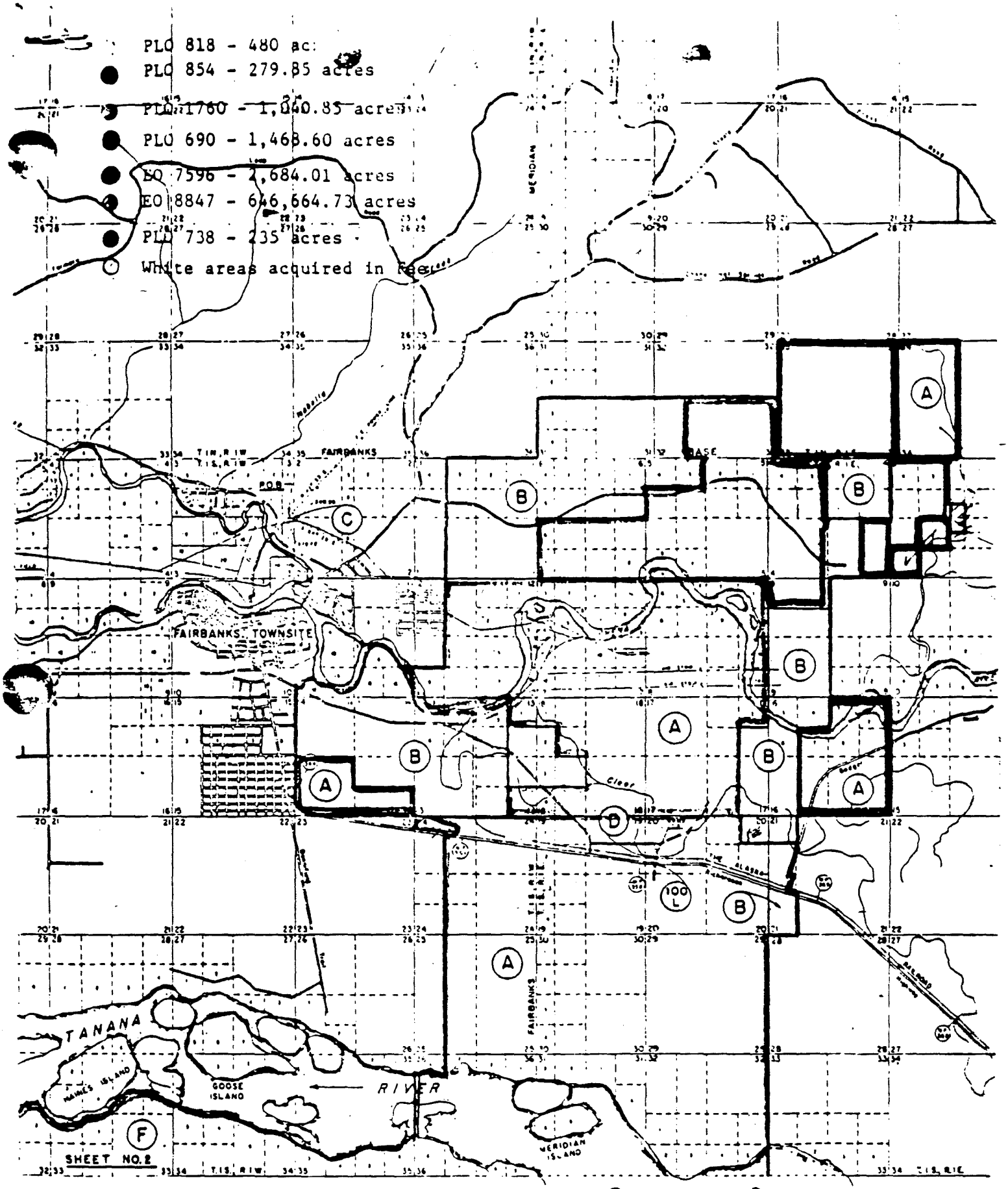
FAIRBANKS MERIDIAN

T. 1 N., R. 1 E.,
Sec. 32, E½SW¼ and SE¼.

R. D. SEARLES,
Acting Secretary of the Interior.

AUGUST 17, 1951.

[F. R. Doc. 51-10070; Filed, Aug. 22, 1951; 8:49 a. m.]



PLO 818
4/19/52

Fort Wainwright

Encl 5

FEDERAL REGISTER, 4/19/52

[Public Land Order 818]

ALASKA

WITHDRAWING PUBLIC LANDS FOR USE OF DEPARTMENT OF THE AIR FORCE FOR MILITARY PURPOSES

By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

Subject to valid existing rights, the following-described public lands in Alaska are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserves for the use of the Department of the Air Force for military purposes:

FAIRBANKS MERIDIAN

T. 1 N., R. 1 E.,
Sec. 24, W½.
T. 1 S., R. 1 E.,
Sec. 3, NE¼SW¼, SW¼SW¼;
Sec. 4, E½SE¼.

The area described contains approximately 480 acres.

It is intended that the lands described above shall be returned to the administration of the Department of the Interior when they are no longer needed for the purpose for which they are reserved.

OSCAR L. CHAPMAN,
Secretary of the Interior.

APRIL 14, 1952.

[F. R. Doc. 52-4440; Filed, Apr. 18, 1952; 8:47 a. m.]

FEDERAL REGISTER, 4/19/52

DEPARTMENT OF THE INTERIOR

Office of the Secretary

ALASKA

NOTICE FOR FILING OBJECTIONS TO ORDER WITHDRAWING PUBLIC LANDS FOR USE OF DEPARTMENT OF THE AIR FORCE FOR MILITARY PURPOSES

For a period of 60 days from the date of publication of the above entitled order, persons having cause to object to the terms thereof may present their objections to the Secretary of the Interior. Such objections should be in writing, should be addressed to the Secretary of the Interior, and should be filed in duplicate in the Department of the Interior, Washington 25, D. C. In case any objection is filed and the nature of the opposition is such as to warrant it, a public hearing will be held at a convenient time and place, which will be announced, where opponents to the order may state their views and where the proponents of the order can explain its purpose, intent, and extent. Should any objection be filed, whether or not a hearing is held, notice of the determination by the Secretary as to whether the order should be rescinded, modified or let stand will be given to all interested parties of record and the general public.

OSCAR L. CHAPMAN,
Secretary of the Interior.

APRIL 14, 1952.

[F. R. Doc. 52-4441; Filed, Apr. 18, 1952; 8:47 a. m.]

FEDERAL REGISTER, 4/29/52

TITLE 43—PUBLIC LANDS: INTERIOR

Chapter I—Bureau of Land Management, Department of the Interior

Appendix—Public Land Orders

[Public Land Order 818]

ALASKA

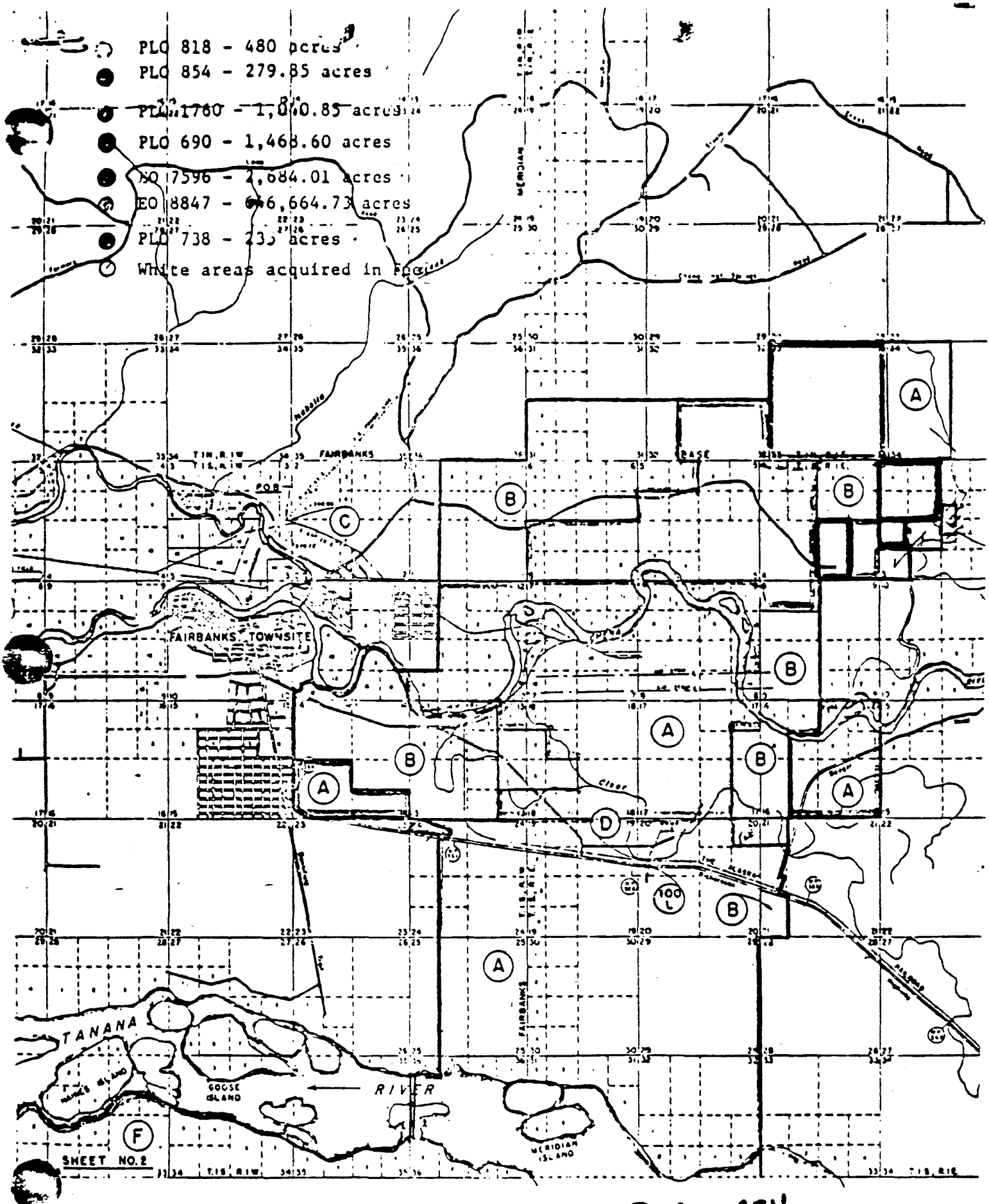
WITHDRAWING PUBLIC LANDS FOR USE OF DEPARTMENT OF THE AIR FORCE FOR MILITARY PURPOSES

Correction

In F. R. Doc. 52-4440, appearing at page 3495 of the issue for Saturday, April 19, 1952, the word "reserves" in the sixth sentence of the second paragraph should read "reserved".

PLO 818

5-1 15



PLO 854
July 16, 1952

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FEDERAL REGISTER, JULY 16, 1952

TITLE 43—PUBLIC LANDS: INTERIOR

Chapter I—Bureau of Land Management, Department of the Interior

Appendix—Public Land Orders

[Public Land Order 854]

ALASKA

WITHDRAWING PUBLIC LANDS FOR USE OF DEPARTMENT OF THE AIR FORCE FOR MILITARY PURPOSES

By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952, it is ordered as follows:

Subject to valid existing rights, the following-described public lands in Alaska are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved for the use of the Department of the Air Force for military purposes:

FAIRBANKS MERIDIAN

T. 1 S., R. 1 E.,
Sec. 3, NW¼ and NW¼SW¼;
Sec. 4, W½SE¼.

The areas described aggregate 280 acres.

It is intended that the lands described shall be returned to the administration of the Department of the Interior when they are no longer needed for the purpose for which they are reserved.

OSCAR L. CHAPMAN,
Secretary of the Interior.

JULY 10, 1952.

[F. R. Doc. 52-7764; Filed, July 15, 1952;

PLO 854