

#13.2

MEMORANDUM

State of Alaska

Theodore G. Smith, Director
 Division of Forest, Land and
 TO: Water Management
 Department of Natural Resources
 323 East Fourth Avenue
 Anchorage, Alaska 99501

DATE: April 22, 1980

FILE NO:

TELEPHONE NO:

FEB 26 1988
RECEIVED

FROM: AVRUM M. GROSS
 ATTORNEY GENERAL *GM*
 By: Barbara J. Miracle
 Assistant Attorney General
 AGO - Anchorage

SUBJECT: Effect of Plat Dedic:
 of Public Areas in
 Subdivision Plat.
 Our File: A66-428-81

By memorandum dated March 19, 1980 you have asked a series of questions concerning the legal effect of a land subdivider dedicating portions of subdivided land for uses such as a public park, public access or as open space.

In reviewing your questions it is necessary to refer to AS 40.15.030 governing dedication of public areas in a subdivision which states as follows:

When an area is subdivided and a plat of the subdivision is approved and recorded, all streets, alleys, thoroughfares, parks and other public areas shown on the plat are deemed to have been dedicated to public use.

I will address your questions in the order given in your memorandum.

(1) - "Who-owns" land when it is "dedicated"?

When land is dedicated as a public area in a subdivision plat, the public area is owned by the public with title in the local municipality which accepted the dedication by approving the plat. (See paragraph 4 for discussion of land in unorganized borough).

(2) Is the word "dedicate" synonymous with grant or convey or reserve?

Under AS 40.15.030 the use of the word dedicate on the subdivision plat is not necessary. All streets, alleys, thoroughfares, parks and other public areas shown on the plat are deemed to have been dedicated to public use.

File: F-042-3(12) SR-1 From 16 to 26 miles west of Glennallen Drawn #46
 Tolsona Ridge Access Rd.

Att. MS 423-015-5 Mat. Source Files

RECEIVED

MAY - 1 1980

EXHIBIT

Theodore G. Smith
Re: Effect of Plat Dedication
of Public Areas in
Subdivision Plat.
Our File: A66-428-80

-2-

April 22, 1980

(3) What language would be more appropriate to effect a grant of the land from the subdivider?

As I have indicated under AS 40.15.030 no particular language is necessary. If an area is identified on the plat as a "street", an "alley", "thoroughfare", a "park", then it will be dedicated under the statutory provision. Whenever a subdivider intends to include as a public area, something not enumerated under AS 40.15.030, it would avoid interpretation problems if he called it "public", (for example, "public" bathing area).

(4) Does it make any difference if the land is inside a municipality with platting authority or in the unorganized borough where DNR has authority?

If land is in a municipality with platting authority, all public areas on the plat are dedicated to public use with title in the municipality by virtue of the plat under AS 40.15.030. In the unorganized borough, DNR is the platting authority only for the change or vacation of plats. If an amended plat includes streets, alleys, thoroughfares, parks or other public areas DNR accepts those dedications by approving the amended plat and holds the dedicated lands and manages them for the public for the use for which they were dedicated.

When a subdivision is created in the unorganized borough, where there is no platting authority, lots or tracts of the subdivision may be sold or offered for sale without approval of a platting authority. AS 40.15.010. In the unorganized borough dedication of lands within a subdivision to public use is not governed by AS 40.15.030 but by common law principles of dedication. Whether public areas shown on a subdivision plat in the unorganized borough have been dedicated to the public would depend upon the facts in each case. Under the common law for a dedication of land to the public use to be complete there must first be an offer of land by the grantor to the public and acceptance by the public. 6A R. Powell, The Law of Real Property, ¶ 934 at 364 (1979 ed.). Although the subdivider need not obtain approval of his plat from a public authority in the unorganized borough, I see no bar to the state sending the subdivider an acceptance of his offer to dedicate areas of the subdivision to the public, when he records the subdivision, (for example,

EXHIBIT

T
4 of 6

Theodore G. Smith
Re: Effect of Plat Dedication
of Public Areas in
Subdivision Plat.
Our File: A66-428-80

-3-

April 22, 1980

"The Director of the Division of Forest, Land and Water Management accepts for the people of the State of Alaska the dedication of the public areas shown on your subdivision plat").

Even if a public body does not officially accept the dedication, the subdivider may be estopped from attempting to revoke his offer if members of the public have relied on the offer. Id. at ¶ 935, p. 370. F. Some courts have held that in the case of dedication by a plat, or by a sale by reference to a plat, no acceptance by a public authority is required to make the dedication effective. Banks v. Wilhoite, 508 S.W.2d 580, 582 (Ky. Ct. App. 1974), Wenderoth, Jr. v. City of Fort Smith, 510 S.W.2d 296, 297 (Ark. 1974).

EXHIBIT

PAGE

T
5 of 6

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LAND AND WATER MANAGEMENT
SOUTHCENTRAL REGION

STEVE COWPER, GOVERNOR

3601 C STREET
BOX 107005
ANCHORAGE, ALASKA 99510-7005
PHONE: (907) 561-2020

July 14, 1988

A
JUL 18 1988
RECEIVED

Paul White
P.O. Box 209
Glennallen, Alaska 99588

Re: Tolsona Ridge Road
AO 32462

Dear Mr. White:

After careful consideration of the need for continued public access to the Tolsona Ridge area for a variety of purposes, I have executed the attached acceptance of the roads within your Habitat West Subdivision. Effectively immediately unrestricted access is to be allowed to the public.

Enclosed is an Attorney General's Opinion on which I based my decision. If you have any further questions, please contact Keith Quintavell from our Mat-Su Area Office. His telephone number is 376-4595.

Sincerely,



Gary Gustafson
Director

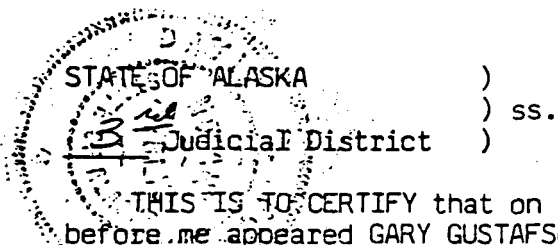
GG:RBT:tls/097lt

Enclosures

EXHIBIT 1
PAGE 1 of 6

I hereby accept for the people of Alaska the dedication of the public areas and roads as shown on your plat of the Habitat West Subdivision as filed in the Chitina Recording District on June 14, 1984 and depicted on Plat 84-10.

Gary Gustafson
Gary Gustafson, Director
Division of Land & Water Management



THIS IS TO CERTIFY that on this 14th day of July, 1988, before me appeared GARY GUSTAFSON known as the Director or Authorized Representative of the Division of Land & Water Management, Department of Natural Resources, and acknowledged to me that this agreement was voluntarily executed on behalf of the State of Alaska.

David R Perez
Notary Public in and for the State of Alaska
My Commission Expires: My Commission Expires Nov. 12, 1989

0971t

Please return the recorded document to:

State of Alaska
Department of Natural Resources
Div. of Land & Water Mgmt.
Southcentral Region
P.O. Box 107005
Anchorage, AK 99510-7005

8 8 0 6 3 3

RECORDED-FILED
CHITINA REC.
DISTRICT

NC
JUL 22 4 28 PM '88

REQUESTED BY Mr. Dave Perez SoA.
DNR O&WM SouthCentral
ADDRESS P.O. Box Region OFF
107005
Anch. AK. 99510

EXHIBIT T
PAGE 2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

PAUL WHITE and
MARCELINE C. WHITE,

Plaintiffs,

v.

STATE OF ALASKA,
DEPARTMENT OF NATURAL RESOURCES,

Defendant.

Case No. 3AN-88-8404 Civ.

STATE OF ALASKA'S
MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT, AND IN SUPPORT OF
STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Whites have moved for summary judgment with respect to the state's second and fourth affirmative defenses. Their motion is without merit and should be denied.

The state also moves for partial summary judgment (1) quieting title in it to a road and utility easement dedicated by the Whites in a plat filed in 1984 with the state Department of Natural Resources, and (2) declaring that the state, pursuant to agreements with the federal government, is entitled to use a federally owned access road, "Anchorage 032462," to access the Tolsona radio relay site.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3650

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3350

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I. STATEMENT OF FACTS.

This case concerns the state's right of access across the Whites' property to the Tolsona radio relay site 1/ located at about mile 165 of the Glenn Highway, and to other publicly owned lands adjacent to the Whites' property.

The relay site and the road access to it were constructed in the mid-1950s; the road was built by the Bureau of Public Roads for the U.S. Air Force, under the supervision of the Army Corps of Engineers, and the Air Force built and initiated use of the relay site. Everette Affidavit, Exhibit A; Luebke Affidavit, Exhibit B, Dickinson Affidavit, Exhibit C. Since then the relay site has been a linchpin in the Alaska's public and private radio, data-processing and telecommunications network, as even the Whites' concede. Id.; Sanders Affidavit, Exhibit D; Fixel Affidavit, Exhibit E; letter from the Whites to the state Department of Natural Resources ("DNR") dated February 10, 1987, Exhibit F. The unpaved road provides access across the Whites' property to

1/ There are actually two adjoining sites, denominated in United States Department of Interior, Bureau of Land Management ("BLM") records AA 5973 and Anchorage 032461, the former being BLM's, the latter reserved by BLM for the Air Force. Although the sites are owned by the United States, the state has communication facilities located on them. This brief lumps the sites and refers to them in the singular.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1 the site. The road has been continuously maintained by the
2 state and federal governments since its construction. Gov-
3 ernmental agencies and the general public have made use of
4 the road since its construction. Exhibits A-E; Herrman Af-
5 fidavit, Exhibit G.

6 In the last few years, however, the Whites have
7 intermittently blocked the road with a gate, ^{2/} and other-
8 wise interfered with governmental agency and the general
9 public's access along the road and to the site. Exhibits
10 A-E, G; see also Whites' Complaint, para. XI, at 3. This
11 initially caused some confusion among certain DNR employees,
12 which did not realize that the state had an agreement with
13 the federal government permitting it to use the road to ac-
14 cess the Tolsona relay site, ^{3/} and further did not realize
15 that the Whites had, through the filing of a subdivision
16 plat with DNR in 1984, dedicated a road and utility easement
17 to public use, which easement the state now owns. Further
18 confusion arose over the fact that the access road built in
19 the mid-1950s overlaps with the platted road and utility
20

22
23 ^{2/} Under AS 38.95.010, Whites' road blockage has no effect
for the purposes of adverse possession.

24 ^{3/} Indeed, the access road was mapped by state engineers
25 in 1964. Exhibit H.

1 easement, except for a small section. ^{4/} This confusion
2 caused DNR officials to discuss with the Whites the poten-
3 tial of a land exchange in order to provide the state with
4 access to a proposed land disposal near the Whites' proper-
5 ty. Exhibit F (Whites' letter proposing land exchange);
6 Exhibit G to Whites' Complaint (1986 letter from DNR to the
7 Whites proposing land exchange discussions).

8 The Whites' property ownership derives from Ms.
9 Dolly Spencer's sale to them of her Alaska Native allotment.
10 Ms. Spencer applied for her allotment in 1967, and claimed
11 use and occupancy from July 27, 1966. Exhibit J. A BLM
12 field report completed in 1975 noted three different, pre-
13 existing rights-of-way across the sought after allotment
14 land. Exhibit K. All three rights-of-way were expressly
15 reserved in the 1975 U.S. Patent to the allotment that Ms.
16

17 _____
18 ^{4/} DNR employees were also apparently unaware of the fact
19 that the state owned additional access across the Whites'
20 property to a state-owned material site. See Exhibit I,
21 containing documentation for a materials site access road,
22 and Exhibit R, granting the state fee title to the right-of-
23 way, as more fully explained below. However, it is not
24 clear from the Whites' pleadings whether they contest the
25 state's right to use this material site right-of-way. Also,
26 BLM filed a trail right-of-way in 1966 for the popular
recreational and mining trail, called the Pinochle Trail,
and it is not clear if the Whites contest public use of this
trail right-of-way. If it becomes clear that the Whites
assert any claim of ownership over these or other publicly
owned rights-of-way, the state will file appropriate motions
seeking to protect its right to use them.

1 Spencer eventually received. Exhibit L. Their existence
2 was reflected graphically in the survey done for the allot-
3 ment, United States Survey 5640, which was completed in 1970
4 and approved in 1973. Exhibit M. The rights-of-way in-
5 clude:

- 6 1. the aforementioned 50-foot access road to the
7 state materials site, Anchorage 058563;
- 8 2. the 50-foot wide (Pinochle) trail right of
9 way, Anchorage 067485; and
- 10 3. the 50-foot access road to the "Tolsona Air
11 Force Station", i.e., relay site, Anchorage 032462.

12 Since 1968 the state and the federal government
13 have had agreements allowing the state to use the access
14 road, i.e., Anchorage 032462, to reach the relay site. Ex-
15 hibit N. The federal government has consistently taken the
16 position that the state has the right to use the access
17 road, as its agent. Exhibit O.

18 In June, 1983, the Whites purchased all the inter-
19 est Ms. Spencer owned in United States Survey 5640, subject,
20 of course, to the reservations in favor of the United States
21 made in the patent. Exhibit P. On June 14, 1984, the
22 Whites filed Habitat West Plat No. 84-10 with DNR. Exhibit
23 Q. The plat dedicates a road and public utility easement
24 across their property. The plat does not show the other
25 aforementioned reserved rights-of-way.
26

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1 On July 24, 1985 BLM issued a decision merging the
2 state's interest as lessor of the material site and the as-
3 sociated right-of-way (denominated Anchorage 058563 in the
4 U.S. Patent to Ms. Spencer), with other lands granted to the
5 state which the right-of-way accessed. Exhibit R. Thus,
6 the state became fee owner of the right-of-way described in
7 Anchorage 058563, which right-of-way crosses the Whites'
8 property.

9 In 1974, prior to Ms. Spencer's receipt of a pat-
10 ent from the United States, DNR placed the access road to
11 the relay site in its "Historical Trail System" inventory.
12 Exhibit S. This inventory serves as the state's recitation
13 of public ownership in roads and trails built throughout the
14 state under RS 2477 and other statutes, of which more will
15 be said below. The state named the road "White Alice Road",
16 referring to the vernacular term for the federal communica-
17 tions facility at Tolsona Ridge.

18 In July, 1988 DNR by letter notified the Whites
19 that the Habitat West Plat No. 84-10 had been accepted by
20 DNR. Exhibit T. This notice was unnecessary as a matter of
21 law, as also will be explained below.

22 The Whites filed this litigation in August, 1988.
23 Their Complaint does not mention the materials site
24 right-of-way which the state owns, or the Pinochle Trail
25 right-of-way reserved to the United States, but only refers
26

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1 to the relay site road, and to the somewhat overlapping road
2 and utility easement dedicated in their Habitat West Plat
3 No. 84-10.

4 **II. CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT**
5 **AS TO THE STATE'S SECOND AFFIRMATIVE DEFENSE.**

6 The Whites have moved for summary judgment with
7 respect to the state's Second Affirmative Defense, which
8 reads:

9 21. On or about June 14, 1984, Plain-
10 tiffs recorded a subdivision plat
11 referred to as Habitat West in the
12 Chitina Recording District dedicating
13 access through this parcel to the access
14 road to the Site.

15 Answer, at 2. In turn, the state moves motions for partial
16 summary judgment seeking to quiet its title in the platted
17 easement. The state also seeks a summary judgment declaring
18 its right, as an agent and permittee of the federal govern-
19 ment, to use the access road reserved to the federal govern-
20 ment in the Whites' deed from Ms. Spencer.

21 Before dealing with the merits of the cross
22 motions, certain facts need amplification.

23 The subdivision plat at Exhibit Q dedicates a road
24 and utility easement across the Whites' property, which
25 easement heads off of the Glenn Highway between Lots 3 and
26 4, turns right to cross Lots 4 and 7, and then joins the
access road constructed by the Bureau of Public Roads in the
mid-1950s. The platted easement and existing road both lead

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

to the relay site. In the Whites' Joint Affidavit supporting their motion for summary judgment they admit that

7. On or about June 14, 1984, plaintiffs recorded a subdivision plat referred to as Habitat West in the Chitina Recording District. This property lies outside any organized Borough.

(Emphasis supplied.) Joint Affidavit, para. 7, at 3. They further claim,

9. That the Bureau of Indian Affairs subsequently returned the plat on or about February 5, 1987 and the plat had been marked "Not a Valid Plat". (See Exhibit D attached to the Complaint). We know of no acceptance of that plat by any governmental agency.

(Emphasis supplied.) Id., para. 9. What the Whites fail to point out, however, is that they also filed an identical plat with the state Department of Natural Resources which was automatically accepted, and therefore the state owns a road and utility easement across the Whites' property to the relay site.

A. The State's Right To Use And Ownerships In The Platted Public Road And Utility Easement.

To understand how the Whites' platted road and utility easement became state property, it is necessary to explain the history of Alaska's platting statutes.

The statutes originate in the 1953 territorial Laws of Alaska, ch. 115. Section 1, ch. I, of ch. 115 required that "(e)ach subdivision or dedication, before any

1 of its lots or tracts may be sold or offered for sale, shall
2 first be submitted for approval to the authority having
3 jurisdiction thereof, as herein prescribed...." This
4 statute was subsequently codified at AS 40.15.010, later to
5 be amended in 1970. Platting authority was granted to
6 cities and school districts outside of cities. See §1, 5/
7 ch. II, ch. 115, Laws of Alaska 1953. Under §4 of ch. II,
8 platting boards were required to approve or disapprove a
9 plat within 60 days, or otherwise the plat was deemed
10 approved and the subdivider could demand a certificate to
11 that effect. 6/

12 Once a plat was affirmatively approved, or ap-
13 proved by default because the platting authority had failed
14 to act in a timely manner, the streets, etc., shown in the
15 plat were considered dedicated to public use:

16 Section 3. DEDICATION OF STREETS,
17 ALLEYS AND THOROUGHFARES. When an area
18 has been subdivided and a plat thereof
19 approved and recorded in accordance
20 herewith, all streets, alleys, thorough-
21 fares, parks and other public areas whom
22 thereon shall be deemed to have been
23 dedicated to public use.

23 5/ Section 1 was subsequently codified at AS 40.15.070,
24 later to be amended in 1970 and 1971.

25 6/ Section 4 of ch. II was subsequently codified at AS
26 40.15.100, later to be repealed in 1972.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1953 Laws of Alaska, ch. 115, §3 ch. I (now codified at AS 40.15.030).

By §68, ch. 69 SLA 1970, AS 40.15.070 was amended to provide for borough approval of plats, reflecting the creation of borough governments. What might happen outside boroughs where no government (i.e., no platting authority) existed remained uncovered in the 1970 statutory scheme.

However, this was cured almost immediately by §1, ch. 112 SLA 1971. That act added a new section, AS 40.15.075, which read:

The division of lands shall be the platting authority in the area outside organized boroughs and outside cities in the unorganized borough and in the third class borough for only the purposes of hearing and action on petitions for the change or vacation of plats and shall execute this function substantially in conformity with the provisions of secs. 150 - 180 of this chapter The Department of Natural Resources shall adopt reasonable regulations governing the exercise of the authority conferred by this section upon the division of lands.

A 1972 amendment to AS 40.15.075 changed the phrase "secs. 150 - 180 of this chapter" to "AS 29.33.210 - 29.33.240". Section 7, ch. 118 SLA 1972. ^{7/} The 1972 amendment also

^{7/} The title 29 citations are now AS 29.40.130 - 29.40.160. See AS 40.15.075 (October, 1988 Michie Reporter pamphlet).

1 repealed AS 40.15.100, which governed the procedure platting
2 authorities were to use to approve or disapprove plats.
3 More recent amendments have substituted "Department of
4 Natural Resources" for "division of lands" throughout the
5 platting statutes. The department has since adopted
6 platting regulations for unorganized boroughs which are now
7 at 11 AAC 53.520.

8 As of 1972 and through today the department is the
9 platting authority in unorganized boroughs only for the
10 purposes of change or vacation of plats. Thus, once a plat
11 is filed with the department for land that is an unorganized
12 borough, the plat is by operation of law automatically 8/
13 accepted, and the streets, etc., dedicated and described in
14 the plat become public. Thereafter, the streets, etc., may
15 only be changed or vacated after public notice and hearing
16

17
18 8/ The Whites cite State v. Fairbanks Lodge No. 1392, 633
19 P.2d 1378 (Alaska 1981) for the proposition that the record-
20 ation of a plat alone is insufficient to constitute a statu-
21 tory dedication. Whites' brief, at 4. However, in that
22 case the platting authority was, at least according to the
23 plaintiff therein, never given the opportunity to approve
24 the plat as required by the applicable statutes. Here,
25 where land is in an unorganized borough, the acceptance or
26 approval is automatic upon filing of the plat. This
reflects a legislative determination that in areas where
there is no local government, there is no need for a formal
act of acceptance of a dedication since there is no govern-
ment upon which the obligation to maintain the easement
might ordinarily fall following acceptance of an easement
dedication.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1 consistent with AS 29.40.130 - 29.40.160. The public
2 notice and hearing are required in order to prevent what has
3 become a publicly owned easement from being converted to
4 private property without the opportunity for the public to
5 comment and/or object.

6 Thus, when the Whites filed the Habitat West
7 Subdivision plat no. 84-10 with the Department of Natural
8 Resources on June 14, 1984, the road and utility easement
9 shown thereon was automatically accepted and came into state
10 ownership by operation of law. That the Whites may now
11 claim they had no intention to dedicate is irrelevant. The
12 only way the easements can now be changed or vacated is by
13 following the change or vacation procedures set out in AS
14 40.15.075 and 11 AAC 53.520. Indeed, if a formal act of
15 acceptance were required, there would be no need for this
16 provision requiring departmental permission to change or
17 vacate the plat. 9/

18
19
20 9/ Even if AS 40.15.075 implied that some formal Depart-
21 ment of Natural Resources' act of acceptance of the plat
22 dedication was required, this occurred in 1988 when the
23 department's Director of the Division of Land and Water
24 Management notified the Whites by letter, after the con-
25 troversy over governmental and general public use of the
26 road had erupted, that the plat had been accepted. Exhibit
R. (The Assistant Attorney General's opinion that is part
of Exhibit R is incorrect in asserting that some sort of
formal act of acceptance is required.) While such a formal
(Footnote Continued)

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1 There being no question of material fact on the
2 issue of statutory dedication under AS 40.15.075, the state
3 requests that its motion for partial summary judgment be
4 granted on that issue and that the court find and declare
5 that the state is the owner of the the road and utility
6 easement dedicated in the plat at Exhibit O. In turn, the
7 state further requests that the Whites' motion for partial
8

9
10 _____
11 (Footnote Continued)

12 act of acceptance was not required, it demonstrated accep-
13 tance sufficient for proof of a common law dedication and
14 acceptance. See *Swift v. Kniffen*, 706 P.2d 296, 301-02
(Alaska 1985) (discussing the elements of common law ded-
15 ication and acceptance of an easement); *State v. Fairbanks*
16 *Lodge No. 1392*, 633 P.2d 1378, 1380 (Alaska 1981). The
17 latter case states

18 Here, assuming arguendo that filing the
19 plat may stand as an offer to dedicate
20 the streets as shown on the plat (foot-
21 note omitted), there was no showing that
22 the offer was ever accepted. Accept-
23 tance, in this context may occur through
24 a formal official action or by public
25 use consistent with the offer of dedica-
26 tion or by substantial reliance on the
offer of dedication that would create an
estoppel. (Citations omitted.)

27 (Emphasis supplied.) *Id.* In the above quote the omitted
28 footnote, 633 P.2d 1380 n. 3, points out that a court can
29 find intent to dedicate based on objective facts, such as
30 the filing of a plat, notwithstanding testimony as to a
31 contrary subjective intent. In this case there would be
32 adequate evidence of a both objective intent (i.e., the plat
33 filing) and public use to survive the Whites' motion and to
34 prove that common law dedication had occurred even if
35 statutory dedication under AS 40.15.075 had not occurred.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1 summary judgment as to the state's Second Affirmative
2 Defense be denied.

3 B. The State's Right To Use The Anchorage 032462
4 Right-Of-Way As A Federal Agent/Permittee.

5 Even if no public platted right-of-way exists as a
6 consequence of the filing of Habitat West Plat No. 84-10,
7 the Whites cannot seriously contend that the state has no
8 right to use the right-of-way reserved to the United States
9 in Anchorage 032462, and for which the United States has
10 expressly granted the state permission to access the radio
11 relay site. See Exhibits N - O.

12 The Whites' Complaint, para. XIV, at 4, alleges
13 that the United States has "abandoned" the right-of-way. As
14 a matter of law, "abandonment" of public lands is not
15 possible. See U.S. v. City of Columbus, 180 F. Supp. 775,
16 777 (S.D. Oh. 1959); Royal Indemnity v. U.S., 313 U.S. 289,
17 294 (1940); U.S. v. Beaver, 350 F.2d 4, 8-9 (9th Cir. 1965).
18 See also Exhibit U (BLM noted as current administrator of
19 the site, and continued need for the site expressed.)

20 To the extent the Whites may contend no such
21 federal right-of-way exists, the United States is a neces-
22 sary and indispensable party to this litigation under Alaska
23 Civil Rule 19, and must be joined as a party before this or
24 any other court can adjudicate the respective property
25
26

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1 interests of the federal government, or the state as its
2 agent/permittee.

3 However, it is clear that the United States has
4 granted the state permission to use the right-of-way de-
5 scribed in Anchorage 032462, and the court should according-
6 ly grant the state's cross motion for partial summary
7 judgment on this issue.

8 **III. MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO**
9 **STATE'S FOURTH AFFIRMATIVE DEFENSE.**

10 The Whites have also moved for partial summary
11 judgment with respect to the state's Fourth Affirmative
12 Defense, which reads:

13 23. Upon information and belief, the
14 road was accepted through public con-
15 struction, maintenance and use under
16 R.S. §2477, §8 of ch. 262 of the Act of
17 July 26, 1866, 14 Stat. 253, 43 U.S.C.
§932 (1976) [repealed with a savings
clause in Pub. L. No. 94-579, tit. VII,
§706(a) (Oct. 21, 1976)], and therefore
is a public right-of-way.

18 Answer, at 3. The road referenced in the state's Fourth
19 Affirmative Defense is the access road crossing the Whites'
20 property which was constructed in the mid-1950s and which
21 overlaps in significant part the road and utility easement
22 dedicated in the Habitat West plat discussed above.

23
24
25
26
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1 To understand the state's Fourth Affirmative
2 Defense, an exposition of the law surrounding what is
3 commonly referred to as RS 2477 ^{10/} is necessary.

4 RS 2477 was a federal law passed in 1866 as
5 Section 8 of the federal Mining Act of 1866. RS 2477 reads:

6 The right of way for the construction of
7 highways over public lands, not reserved
8 for public uses, is hereby granted.

9 This statute was repealed in 1976, but with a savings clause
10 for pre-existing rights-of-way, and many such rights-of-way
11 were established across public lands prior to 1976.

12 In 1938, the U.S. Department of the Interior
13 adopted regulations which provided that

14 The [RS 2477] grant [from the United
15 States] . . . becomes effective upon the
16 construction or establishing of highways
17 in accordance with the State laws, over
18 public lands not reserved for public
19 uses. No application should be filed
20 under said R.S. 2477 as no action on the
21 part of the Federal Government is
22 necessary.

23 43 CFR 244.55 (1938)(par. 55, Circ. 1237a, May 23, 1938).

24 Thus, it is state, not federal, law which determines how an
25 RS 2477 could have been established in Alaska prior to 1976.

26 See also "Limitation of Access to Through Highways Crossing

24 ^{10/} The "R.S." or "RS" refers to the Revised Statutes of
25 the United States, a codification which occurred in the late
26 1800s.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1 Public Lands," 62 L.D. 158, 161 (April 15, 1955)(state law
2 controls establishment and manner of use of RS 2477 rights-
3 of-way).

4 One manner under which RS 2477 rights-of-way can
5 be established under Alaska law was first described in a
6 series of territorial decisions. See Clark v. Taylor, 9
7 Alaska 298, 308 (4th Div. Fairbanks 1938)("The public may,
8 by user, accept the dedication contained in section 2477,
9 R.S.U.S. ..."); Berger v. Ohlson, 9 Alaska 389, 395 (3rd
10 Div. Anchorage 1938)[("A) highway grant may be accepted by
11 the public without acceptance by the public authorities and
12 continued use of the road under circumstances clearly
13 indicating an intention to accept is sufficient."]; accord
14 U.S. v. Rogge, 10 Alaska 130, 151 (4th Div. Fairbanks 1941).

15 The concept of acceptance of the offer of an RS
16 2477 right-of-way through public user, as well as by the
17 more formal actions of a governmental body, was firmly
18 established after Alaska became a state in Hamerly v.
19 Denton, 359 P.2d 121, 123 (Alaska 1961):

20 But before a highway may be created,
21 there must be either some positive act
22 on the part of the appropriate public
23 authorities of the state, clearly
24 manifesting an intention to accept a
25 grant, or there must be public user for
26 such a period of time and under such
conditions as to prove that the grant
has been accepted (footnote omitted).

Id.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1 Thus, under Alaska law the RS 2477 grant can be
2 accepted through either by public user, or by some sort of
3 positive act, like construction 11/ and/or maintenance of a
4 road or the passage of a law by public authorities 12/.

5 In this case, affidavits submitted as Exhibits to
6 this brief demonstrate acceptance of the RS 2477 grant for
7 the contested road through construction, maintenance and
8 user. Certainly the affidavits at a minimum raise material
9 issues of fact as to the state's Fourth Affirmative Defense
10 which prevent granting the Whites' motion for partial
11 summary judgment as to the defense. The affidavits demon-
12 strate that the contested road was built in the mid-1950s
13 using public funds and by public agencies, and has been
14 maintained since then by governmental authorities. Con-
15 struction occurred while the land was open, public domain,
16

17 _____
18 11/ See 43 CFR §2822.2-1 (1980) ["Grants of rights-of-way
19 under R.S. 2477 are effective upon construction or estab-
20 lishment of highways in accordance with State laws over
21 public lands that are not reserved for public uses."
(Emphasis supplied.)] The construction need not be by
22 public authorities, although obviously that is the most
23 powerful kind of "acceptance," of the RS 2477 grant.

24 12/ The Whites claim in their opening brief, at 5, that the
25 RS 2477 offer applied only to "highways and not rights-of-
26 way". This is not the law. Girves v Kenai Peninsula
Borough, 669 P.2d 1311 (Alaska 1983) held that the mere
passage of a section line dedication statute was adequate
acceptance without regard to actual construction of the
right-of-way.

1 and before the Whites' predecessor, Ms. Spencer, made her
2 entry. See Hamerly, 359 P.2d at 123 (entry segregates the
3 land from the public domain, but not before).

4 Moreover, since its construction in the mid-1950s,
5 the road has been used by the public, including both the
6 general public and governmental agencies accessing the relay
7 site and maintaining the road. Thus, acceptance can be
8 found in "public user". Acceptance by user is also evi-
9 denced in the state's claim of the road as part of its
10 Historical Trail System inventory. Exhibit S. Certainly
11 the affidavits at a minimum raise a material issue of fact
12 as to proof of public user such that the Whites' motion for
13 partial summary judgment must be denied.

14 Acceptance also can be found in state maintenance
15 of the road over many years, as averred to by the affiants
16 in Exhibits A - E, G.

17 In short, the Whites' motion with respect to the
18 state's affirmative defense relating to RS 2477 should be
19 denied.

20 **III. CONCLUSION.**

21 The Whites' partial summary judgment motion should
22 be denied because there has been a statutory dedication of a
23 right-of-way by plat; because the state is entitled to use
24 the BLM right-of-way Anchorage 032462 as an agent/permittee
25 of the federal government, which right-of-way overlaps the
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

platted right-of-way; and in any event because there are material issues of fact in issue as to the RS 2477 road constructed in the mid-1950s and used and maintained since then by the public, including governmental agencies.

In turn, the state's motion for partial summary judgment should be granted in the form of the Order submitted herewith.

RESPECTFULLY submitted this 17th day of January, 1989, at Anchorage, Alaska.

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

Michael J. Frank
By: Michael J. Frank
Assistant Attorney General

This is to certify that a copy of the foregoing is being mailed/hand-delivered to the following attorneys or parties of record: Stan Stanfill, Esq.

Robert M. [Signature]
NAME DATE 1/20/89

MJF/rlr
a:tolsona.mjf
mjf7/disk29

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550