

MEMORANDUM

#26.12

TO: Jack T. Bodine
 Right of Way Director

Attn: Hugh Williams, Deputy Right of Way Director

FROM: Donald E. Beitinger
 Central District Right of Way Agent

February 10, 1975

DATE :

SUBJECT:

Project No. F-044-1 (6)
 MULDOON ROAD
 Parcels No. 6, 7 and 10

STATE vs. C.B.S. REAL ESTATE
 CO., INC., et al
 Civil Action No. 75-7660 C

Attached is a JUDGMENT and FINDINGS OF FACT AND CONCLUSIONS OF LAW filed February 9, 1975 in the Trial Courts and relating to the above project.

Please note how existing right of way was determined: the entry date does not establish and does not segregate the land and would not preclude the P.L.O. from applying.

In addition, it would appear that we should adjust our thinking and realign rights of way affected by the P.L.O. Rights of way should not be established by entry date but by the parent date on homesteads and the date purchased on homesites, small tracts, etc., as it relates to public domain and utilized by the Federal Government only.

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 CIVIL RIGHTS DIVISION
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DEB: so

Attachments: 2

Route A		Init. Date	
<input checked="" type="checkbox"/>	Director		
<input checked="" type="checkbox"/>	Deputy	AM/E	1/7
<input checked="" type="checkbox"/>	C & SC Area		4/7
<input checked="" type="checkbox"/>	I & W Area		2/2
<input checked="" type="checkbox"/>	SP & SE Area		3/1
<input type="checkbox"/>	Appraisal		
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		I	St SC W Fed.

<input type="checkbox"/>	PRE-CONST ENGR.
<input type="checkbox"/>	DESIGN ENGR.
<input type="checkbox"/>	PLN & PROGRAM ENGR.
<input type="checkbox"/>	TRAC ENGR.
<input type="checkbox"/>	INTERMED ENGR.
<input type="checkbox"/>	RIGHT OF WAY OFFICER
<input type="checkbox"/>	FINANCE
<input type="checkbox"/>	PERSONNEL
<input type="checkbox"/>	SUPPLY
<input type="checkbox"/>	CONST. ENGINEER
<input type="checkbox"/>	MAINT. ENGINEER
<input type="checkbox"/>	MAINT. SUPERVISOR
<input type="checkbox"/>	EQUIPMENT MANAGER
<input type="checkbox"/>	PIPELINE OFFICE
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RIGHT OF WAY DIVISION

*cc: Entry Date
 Establishing R/W*

*cc to B. Pinchley, BLM
 4/19/76 em*

1 IN THE SUPREME COURT FOR THE STATE OF ALASKA
2 THIRD JUDICIAL DISTRICT AT ANCHORAGE

3 STATE OF ALASKA,)
4 DEPARTMENT OF HIGHWAYS,)
5)
6 Plaintiff,)
7 vs.)
8 30,938 Square feet, more or)
9 less; C.B.S. REAL ESTATE CO.,)
10 INC., an Alaskan Corporation;)
11 ORIS O. ANDERSON and AIKO K.)
12 ANDERSON, husband and wife;)
13 LOREN P. BOYD; MUNICIPALITY OF)
14 ANCHORAGE; CHUGACH ELECTRIC)
15 ASSOCIATION, INC.; TRANS-)
16 AMERICA TITLE INSURANCE)
17 COMPANY and SECURITY TITLE)
18 & TRUST COMPANY OF ALASKA,)
19)
20 Defendants.)

FILED in the Trial Court
State of Alaska, Third District

FEB 9 1976

By _____ Deputy

21 Civil Action No. 75-7660 C
22 Parcels Nos. 6, 7 and 10
23 Project No. F-044-1(6)

24 JUDGMENT

25 The complaint in the above entitled action required
26 the court to fix the width of plaintiff's right-of-way easement
27 for what is now known as Muldoon Road, across certain specifi-
28 cally described lands in private ownership of defendants prior
29 to further improvement of the roadway during the forthcoming
30 construction season. The scheduled hearing for this purpose
31 set by the court for December 2, 1975, in the Notice of Filing
32 Complaint, was called by the Court at the time and
33 place prescribed. None of the defendants appeared. The
34 scheduled hearing was continued in open court and came on
35 regularly for hearing on December 29, 1975 pursuant to re-notice
36 of hearing mailed on December 12, 1975, to defendants. None of
37 the defendants appeared.

38 Pursuant to motion of plaintiff State of Alaska,
39 parcel 6 as described and platted in Schedule "A" and "A-1" of
40 the complaint was dismissed by the court.
41

1 The court heard testimony and received documentary
 2 evidence, including aerial photographs, offered by plaintiff
 3 State of Alaska, concerning its allegation of ownership and
 4 width of existing right-of-way for Muldoon Road. Based on the
 5 evidence adduced at the hearing relevant to parcels 7 and 10,
 6 the court ruled that the right-of-way width provisions of Public
 7 Land Order 601, dated August 10, 1949, was applicable to and
 8 set the right-of-way width for Muldoon Road when constructed
 9 across public lands in 1950.

10
 11 NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

12 That plaintiff shall have judgment against defendants
 13 fixing the width of the existing right-of-way easement owned by
 14 plaintiff for use in Alaska Project No. F-044-1(6), Muldoon Road
 15 as follows:

16 Parcel 7: The easterly 50 feet as described
 17 and platted in Schedules "B" and "B-1"
 18 complaint containing 11, 847 square feet,
 19 more or less.

20 Parcel 10: The westerly 50 feet as described and
 21 platted in Schedules "C" and "C-1" of
 22 the complaint containing 7,497 square
 23 feet, more or less.

24 DATED at Anchorage, Alaska, this 9th day of
 25 February, 1976.

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DEPARTMENT OF LAW
 OFFICE OF THE ATTORNEY GENERAL
 ANCHORAGE BRANCH, HIGHWAY SECTION
 340 "K" ST., SUITE 200, ANCHORAGE, ALASKA 99501
 PHONE 279-4569

Receipt is hereby acknowledged of the above
 Judgment this 19th day of February,
 1976.
Richard M. [Signature]

Receipt is hereby acknowledged of the above
 Judgment this 20 day of Jan,
 1976.
Paul F. [Signature]

Receipt is hereby acknowledged of the above
 Judgment this 20 day of Jan,
 1976.
[Signature]

Receipt is hereby acknowledged of the above
 Judgment this 21st day of Jan,
 1976.
[Signature]

Receipt is hereby acknowledged of the above
 Judgment this 22 day of Jan,
 1976.
[Signature]

Receipt is hereby acknowledged of the above
 Judgment this 21st day of Jan,
 1976.
[Signature]

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
 DEPARTMENT OF HIGHWAYS,)
)
 Plaintiff,)
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 vs.)
)
 30,938 Square feet, more or)
 less; C.B.S. REAL ESTATE CO.,)
 INC., an Alaskan Corporation;)
 ORIS O. ANDERSON and AIKO K.)
 ANDERSON, husband and wife;)
 LOREN P. BOYD; MUNICIPALITY OF)
 ANCHORAGE; CHUGACH ELECTRIC)
 ASSOCIATION, INC.; TRANS-)
 AMERICA TITLE INSURANCE)
 COMPANY and SECURITY TITLE)
 & TRUST COMPANY OF ALASKA,)
)
 Defendants.)

FILED in the Trial Court
State of Alaska, Third District

FEB 9 1976

B, Deputy

Civil Action No. 75-7660 C
Parcels Nos. 6, 7 and 10
Project No. F-044-1(6)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FRAMING THE ISSUE

The crux of the request to the Court in the above entitled cause is to fix the width of the existing highway right-of-way easement owned by plaintiff State of Alaska, across two tracts of land in private ownership of defendants described, platted and identified as Parcel Nos. 7 and 10, Alaska Project No. F-044-1(6), Muldoon Road, located in the north one-half of Section 13, T. 13 N., R. 3 W. S.M. near the intersection of Glenn Highway, prior to further improvement and upgrading of the road during the forthcoming construction season. Following statchood, the United States conveyed its right, title and interest in Muldoon Road to the State of Alaska by deed dated June 30, 1959 (Exhibit 8) described at page 12 of the enclosures thereto as Federal-Aid Secondary Class "A" Route 530. Thus, the request to the Court may be

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 ANCHORAGE BRANCH, HIGHWAY SECTION
 315 - ST. SUIVE SEC. ANCHORAGE ALASKA 99501
 PHONE 273-4300

1 further narrowed to fixing the width of the right-of-way
2 easement across Parcel Nos. 7 and 10 that the United States
3 reserved unto itself or otherwise acquired under existing
4 laws as of the date of conveyance to the State of Alaska.
5 In turn, the above question raises two specific alternative
6 legal questions:

7 1) At the time of construction had the lands
8 involved become other than "public lands" within the meaning
9 of Public Land Order No. 601, dated August 10, 1949, so as
10 to preclude its application prescribing widths for rights of
11 way of local roads?

12 2) If so, what width right of way did the United
13 States have at the time of conveyance to the State of Alaska?

14 FINDINGS OF FACT

15
16 At all times relevant in these proceedings the
17 United States was, inter alia, the sovereign of the soil, the
18 landowner, the road builder, the subdivider, the grantor to
19 both the State and the original landowner-grantee and the
20 public recorder. Moreover, all pertinent actions of the
21 United States were taken by the Secretary of Interior or
22 through his delegated authority to subordinate agencies
23 within the department, the Alaska Road Commission and the
24 Bureau of Land Management. (Congress transferred the highway
25 function to Department of Commerce in 1956)

26 On May 17, 1949, the Regional Administrator,
27 Bureau of Land Management, determined that, effective
28 September 21, 1949, certain described public lands in Section
29 13, inter alia, were suitable for disposition as small
30 tracts for cabin and home sites by lease and sale pursuant
31 to the provisions of the popularly called Small Tract Act of
32 1938, as amended, and extended to Alaska, currently codified
33 in 43 U.S.C.682a-d, and caused it to be published in the
34 Federal Register (Exhibit 3).

1 Fourteen days later a petition dated June 1, 1949,
2 requested the Alaska Road Commission to construct a system
3 of farm roads to include Muldoon Road substantially as shown
4 in green on Exhibit 1.

5 On August 10, 1949, a secretarial directive
6 published in the Federal Register as Public Land Order No.
7 601 fixed uniform right-of-way widths for all categories of
8 highways on public lands in Alaska, the minimum width being
9 for local roads fixed at 100 feet, fifty feet each side of
10 the center line.

11 Late in the summer of 1949, the proposed location
12 of Muldoon Road was field inspected; the center line was
13 surveyed and staked by the Alaska Road Commission the following
14 spring, 1950, after breakup (Exhibit 9).

15 On August 18, 1949 and September 22, 1949, leases
16 were executed with conditional provisions creating a preferred
17 right or option to purchase, at a stipulated price, the
18 tracts comprising Parcel Nos. 7 and 10, respectively (Exhibits
19 6 and 7).

20 On May 1, 1950, the Bureau of Land Management
21 issued instructions to its cadastral surveyor providing for
22 subdivisions of certain public lands, including the subdivision
23 in Section 13. In addition to reciting the reasons for the
24 subdivisions, the instructions required the cadastral surveyor
25 to survey the center lines of the roads and highways constructed
26 by the Department of Interior, specifically noting the
27 widths of the rights-of-way for local roads fixed by Public
28 Land Order No. 601, at 100 feet, 50 feet on each side of the
29 center line (Exhibit 5). The subdivision plat (Exhibit 10)
30 shows by dash lines a right-of-way width of 100 feet for
31 Muldoon Road with Parcels 7 and 110 marked thereon in open
32 court.

33 Muldoon Road was constructed during the construction
34 season of 1950 by the Alaska Road Commission and was sub-
stantially completed by August 8, 1950 (Exhibit 2)

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ANCHORAGE BRANCH, HIGHWAY SECTION
250 FIFTH AVENUE, SUITE 202, ANCHORAGE, ALASKA 99501
PHONE 279-4309

1 in 1950 (Exhibit 11) during construction of Muldoon Road
2 depicts 100 feet of right of way, and certainly would have
3 been used to describe each parcel, legally incorporating the
4 plat directly by reference into the patent, except that it
5 was not then prepared and filed. Instead each tract is
6 described by aliquot parts in the patent with the later
7 filed official subdivision plat indirectly incorporated by
8 reference, as follows:

9 The area described contains 2.50 acres according
10 to the Official Plat of the Survey of the said
11 Land, on file in the Bureau of Land Management.

12 It is unnecessary for proper decision, however, to draw any
13 specific conclusion from the foregoing if private property
14 rights against the United States had not vested when Muldoon
15 Road was constructed.

16 A century ago, the United States Supreme Court
17 twice considered and fixed the time private property rights
18 vested in public land against the United States. The clear
19 rule resulting from the opinions in Frisby v. Whitney, also
20 called the Yosemite Valley Case, 9 Wall. 187, 19 Law. Ed.
21 668 (1870), and Hutchings v. Lowe, 82 U.S. 77, 21 Law. Ed.
22 82 (1873) is that a qualified person seeking to obtain title
23 to public land of the United States under its public land
24 laws acquires no vested interest in such land against the
25 United States until he complies with all the statutory
26 prerequisites for patent, including payment of the sale
27 price, if applicable.

28 In the latter Yosemite opinion the Court restated
29 its earlier decision, in pertinent part:

30 ... The power of regulation and disposition,
31 conferred upon Congress by the Constitution, only
32 ceases when all the preliminary acts prescribed
33 by those laws for the acquisition of the title,
34 including the payment of the price of the land,
35 have been performed by the settler. When
36 these prerequisites have been complied with,
37 the settler for the first time acquires a
38 vested interest in the premises occupied by
39 him, of which he cannot be subsequently de-
40 prived. ...

1 The Court further observed that requiring less
2 than full compliance with all prerequisites to obtain title
3 would

4 deprive Congress of the power to reserve such
5 lands from sale for public uses of the United
6 States, though needed for arsenals, fortifi-
7 cations, lighthouses, hospitals, custom-
8 houses, court-houses, or for any other of the
9 numerous public purposes for which property
10 is used by the Government. It would require
11 very clear language in the Acts of Congress
12 before any intention thus to place the public
13 lands of the United States beyond its control
14 by mere settlement of a party, with a declared
15 intention to purchase, could be attributed to
16 its legislation.

17 The Supreme Court reiterated:

18 The decision in Frisbie v. Whitney was
19 pronounced by a unanimous court, and sub-
20 sequent reflection has satisfied us of its
21 entire soundness. The construction there
22 given to the pre-emption laws is, as there
23 stated, in accordance with the construction
24 uniformly given by that department of the
25 Government, to which the administration of
26 the land laws is confided, and by the chief
27 law officers of the Government to whom that
28 department has applied for advice on the
29 subject. It is the only construction which
30 preserves a wise control in the Government
31 over the public lands...

32 In the instant case, the subdivided lands in
33 section 13 as of August 10, 1949, the effective date of PLO
34 601, were clearly public lands of the United States. A
35 local road later constructed thereon by the Department of
36 Interior would have a right-of-way width of 100 feet unless
37 the lands at the time of construction were no longer public
38 lands of the United States. Stated differently, the subdivided
39 tracts would not be public lands of the United States if at
40 the time of construction of the local road the lessees of
41 parcels 7 and 10 had acquired a vested interest in the
42 property as against the United States. Under the federal
43 rule established in Frisby and Hutchings, the last prerequisite
44 for patent of small tracts was the payment of the purchase
45 price. 43 CFR 257.14(e) provides:

46 (c) If the applicant has paid the
47 full purchase price and otherwise complied
48 with the foregoing and no objection appears,
49 cash certificate will be issued by the manager,
50 to be followed by patent.

1 Both parcels were paid for in 1951, at which time
2 private property rights against the United States became
3 vested.

4 This conclusion is entirely consistent with and
5 undoubtedly provides the legal basis for a standard provision
6 of the lease itself. The United States and the original lessee
7 specifically understood and agreed that nothing contained in
8 the lease "shall restrict the acquisition, granting, or use of
9 permits or rights of way under existing laws."

10 For these reasons, the Court concludes that the
11 right of way width provision of PLO 601 applied to, and set
12 the width of Muldoon Road as a local road at the time it was
13 laid out and constructed in 1950 across parcels 7 and 10.
14 This conclusion makes it unnecessary to consider alternative
15 issues.

16 Accordingly, the Court fixes the width of the
17 existing Muldoon Road right-of-way easement owned by the
18 plaintiff State of Alaska as follows:

19 Parcel 7: The easterly 50 feet as described and
20 platted in Schedules "B" and "B-1" of the
21 complaint containing 11,847 square
22 feet, more or less.

22 Parcel 10: The westerly 50 feet as described and
23 platted in Schedules "C" and "C-1" of
24 the complaint containing 7,497 square
25 feet, more or less.

26 DONE at Anchorage, Alaska, this 9th day of

27 February, 1976.

28 [Signature]
29 SUPERIOR COURT JUDGE

30 Recipient is hereby acknowledged of the above
31 19th day of January

32 1976
33 Richard A. [Signature]

34 Recipient is hereby acknowledged of the above
35 findings on 20 day of Jan

36 1976
37 [Signature]
38 for Security, Inc.

39 Recipient is hereby acknowledged of the above
40 findings on 20 day of Jan

41 1976
42 [Signature]

43 Recipient is hereby acknowledged of the above
44 findings on 20 day of January

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46 [Signature]

47 Recipient is hereby acknowledged of the above
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51 for [Signature]

52 Recipient is hereby acknowledged of the above
53 findings on 20 day of Jan

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