

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

STATE OF ALASKA,
DEPARTMENT OF HIGHWAYS,

Plaintiff,)

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;)
LORIN 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

By: _____ Deputy

AM 12 3
Civil Action No. 75-7660 C
Parcels Nos. 6, 7 and 10
Project No. F-044-1(G)

JUDGMENT

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

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

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH, HIGHWAY SECTION
310 W. 5th St., Suite 200, Anchorage, Alaska 99501
PHONE 274-1128

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

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

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

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

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

DATED at Anchorage, Alaska, this 9th day of

February, 1976.

[Signature]
Superior Court Judge

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH, HIGHWAY SECTION
300 "K" ST., SUITE 200, ANCHORAGE, ALASKA 99501
PHONE 372-4509

Receipt is hereby acknowledged of the above judgment this 10th day of February, 1976.
[Signature]

Receipt is hereby acknowledged of the above judgment this 17th day of February, 1976.
[Signature]

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

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
DEPARTMENT OF HIGHWAYS,)

Plaintiff,)

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

By..... Deputy

OR 25 100

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

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
400 ALASKA BUILDING, HIGHWAY SECTION
115 S. 11. AVENUE, ANCHORAGE, ALASKA 99501
PHONE 279-4563

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 statehood, 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 536. Thus, the request to the Court may be

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

- 1) At the time of construction had the lands involved become other than "public lands" within the meaning of Public Land Order No. 601, dated August 10, 1949, so as to preclude its application prescribing widths for rights of way of local roads?
- 2) If so, what width right of way did the United States have at the time of conveyance to the State of Alaska?

FINDINGS OF FACT

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

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

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE OFFICE, HIGHWAY SECTION
309 "K" ST., SUITE 200, ANCHORAGE, ALASKA 99501
PHONE 373-4574

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE OFFICE, HIGHWAY SECTION
350 P.O. BOX 5011, ANCHORAGE, ALASKA 99501
PHONE 272-5121

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

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

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

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

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

Muldoon Road was constructed during the construction season of 1950 by the Alaska Road Commission and was substantially completed by August 8, 1950 (Exhibit 7)

On September 21, 1951 the stipulated purchase price was paid for Parcel 7 and in due course patent thereto was issued on March 31, 1952; on April 10, 1951 the stipulated purchase price for Parcel 10 was paid and patent issued thereon in due course on June 13, 1951. (Exhibits 6 and 7).

Huldoon Road, as originally constructed, was a local road within the meaning of Public Land Order 601.

CONCLUSIONS OF LAW

It is fundamental that Article IV, § 3, Clause 2 of the United States Constitution vests in the Congress alone the authority to determine under what terms and conditions property of the United States may be disposed of. The small tract act, like the earlier enacted homestead laws, provides the congressional authority and prerequisites for disposition of public lands of the United States to qualified persons. The primary difference between the two laws relate, to size and a simplified, transferable method of proving compliance with land use and improvement prerequisites to acquire title. Implementing small tract regulations of the Secretary of Interior, 43 CFR 257 (1949 Edition) prescribe at subsection 257.2(c):

(c) No direct sale will be made of lands under the act. Use and improvement of the land under lease will be required before it will be sold. Leases of lands which are classified for lease and sale will contain an option permitting the lessee to purchase as provided in § 257.10. ...

At this point two matters should be noted as

The unofficial,

"working" subdivision map mentioned in paragraph 8 of the small tract notice published in the Federal Register (Exhibit 3) should show contemplated road access but it is not now available. The official subdivision plat now regularly filed (Exhibit 10), prepared by field survey notes compiled

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ALABAMA BRANCH, HIGHWAY SECTION
300 N. 47th AVENUE, SUITE 200, ANCHORAGE, ALASKA 99501
PHONE 273-3333

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

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

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

A century ago, the United States Supreme Court twice considered and fixed the time private property rights vested in public land against the United States. The clear rule resulting from the opinions in Frisby v. Whitney, also called the Yosemite Valley Case, 9 Wall. 187, 19 Law. Ed. 668 (1870), and Hutchings v. Lowe, 82 U.S. 77, 21 Law. Ed. 32 (1873) is that a qualified person seeking to obtain title to public land of the United States under its public land laws acquires no vested interest in such land against the United States until he complies with all the statutory prerequisites for patent, including payment of the sale price, if applicable.

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

... The power of regulation and disposition, conferred upon Congress by the Constitution, only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he cannot be subsequently deprived. ...

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ALBUQUERQUE BARRACKS, HIGHWAY SECTION
160 N. 1ST ST., SUITE 209, ALBUQUERQUE, ALABAMA 98701
PHONE 273-4564

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 (e) 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.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH, HIGHWAY SECTION
19. 5TH ST., SUITE 300, ANCHORAGE, ALASKA 99501
PHONE 279-1320

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

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

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

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

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

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

DONE at Anchorage, Alaska, this 9th day of

February, 1976

[Signature]
SUPERIOR COURT JUDGE

OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH, HIGHWAY SECTION
360 "N" ST., SUITE 200, ANCHORAGE, ALASKA 99501
PHONE 273-2508

I hereby acknowledge of the above
[Signature]
1976

I hereby acknowledge of the above
this 29 day of February
1976
[Signature]

I hereby acknowledge of the above
[Signature]
1976

I hereby acknowledge of the above
[Signature]
1976

I hereby acknowledge of the above
[Signature]

I hereby acknowledge of the above
[Signature]