# MEMORANDUM

State of Alaska
Department of Law

TO: Jim Sharp, Engineering Supervisor
Right of Way Section, Central Region,
DOT & PF

DATE: November 6, 2002

FILE NO.:

TEL. NO.: 269-5161

SUBJECT: '47 Act

FROM: James E. Cantor
Supervising Attorney
Transportation Section

**CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION**

I am attaching for your files a copy of the superior court's 1987 decision in the Wyatt/Birch Road case. We transcribed the oral ruling from a tape of the proceedings.

JEC/sra

Attachment

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CHRIS J. WYATT, MELISSA M. WYATT, BRUCE C. WRIGHT, NANCY W. WRIGHT, DERRIL D. BERGT, PATRICIA M. BERGT, and JULIE A. EATON,

Plaintiffs,

vs.

STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES and the MUNICIPALITY OF ANCHORAGE,

Defendants.

Case No. 3AN 85-8739 Civil

Filed in the Trial Courts
STATE OF ALASKA THIRD DISTRICT
MAY 18 1987
Clerk of the Trial Courts
By

ORDER

Upon Plaintiffs' Motion for Partial Summary Judgment and Defendants' Opposition thereto, and exhibits and affidavits submitted by the parties therewith, this Court, being fully advised as to the premises;

IT IS HEREBY ORDERED that Plaintiffs' Motion for Partial Summary Judgment is DENIED, except that plaintiffs are granted partial summary judgment to the effect that AS 601 did not grant the federal government/state a 50' one-side of centerline right-of-way nor did it establish a standard for roads taken pursuant to the 1947 act. The reasons for this ruling were stated at oral argument on 5/12/87, Tape F-1722, Log 1950. The parties are to brief the "taking" issue before trial on the remaining issues may go forward.

DATED this 18th day of May, 1987 at Anchorage, Alaska.

Honorable ~~Peter J. Michalski~~ Jay M. Rabinowitz
Superior Court Judge

I certify that on 5-18-87
a copy of the above was mailed to each of the following at their addresses of record:
[illegible] Michael Condon.

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**WYATT V. STATE**

**MAY 12, 1987**

**Judge Joan Katz Woodward Oral Ruling on Summary Judgment**

**Adopted as a Final Ruling by Order of May 18, 1987**

I think that I am going to issue some tentative rulings, which I will then either confirm by written order, or vary by written order so there will be no time lines for you all that will run from today's decision, today's tentative decision.

Looking first at the question of the effect of PLO 601 and whether it created a fifty-foot each side of the centerline right-of-way, I find that it did not and I find that it did not for the reason that there were valid existing rights. My understanding of the Alaska cases cited as well as the Interior Board of Land Appeals Decisions referenced by the State, is that the critical basis for determining whether there is a valid existing right is whether a claim has been validly initiated with the proper steps having been undertaken to initiate the claim. The opinion for instance in *Resource Investments v. State Department of Transportation*, 682 P.2d 280 (1984), Alaska decision, involved an application for homestead entry. I think the, well I will not go too far – but I think two or three of the Alaska State Supreme Court opinions explicitly refer to applications for entry. Those applications for entry, as I understand it, do not require in advance of granting those applications that the homesteader have done very much of anything. His right to begin doing things to ripen his claim and to a patent accrues after he is given the right to enter on to the land. So it is a very minimal kind of showing that needs to be made in order to create a valid existing right. I think that the notice of location and

settlement of the claim is simply an alternative means of initiating claims when there has been no survey and should be entitled to the same benefit of creating an existing right. I rely not only on some common sense in this regard and on 43 C.F.R 65.2, which set out the settlement procedures, but on the writings in the 50's of Mr. Barber, who referred to claims as well entry and indicated that the width of the road would be limited as against subsequent valid claims. He indicated that statute did not specify, believe he is referring to the 1947 Act, the statute did not specify the width the right-of-way reserved so that any valid claim or entry initiated after the Act and prior to Public Land Order No. 601 etc., would be subject to the reservation of sixty-six feet, so on. So I think, his writing, that of Mr. Puckett also refers, well refers specifically to settlers as well as entrymen, indicates that no distinction was contemplated at the time nor is there a valid basis for making such a distinction.

I also find no authority for relying on, or no authority that convinces me for relying on PLO 601 as indicating the standard to be applied to reservations under the 1947 legislation. I think Mr. Barber's memorandum is significant. He is the only one to write a memorandum from a standpoint of legal analysis and he indicates very clearly that its his opinion that 601 doesn't have that effect and that the width would be limited, he says to that recognized by the courts in one place, and I think in another place he may refer to locate custom, and he says that is the thirty-three or sixty-six foot limitation.

So on the 601 arguments, I tentatively find for the plaintiffs. As to the effect of the 1947 Act itself I think there are genuine issues of material fact in terms of what was the custom at the time and in terms what actually was accomplished. I just don't see any

other way of looking at the evidence that's been submitted. It went both to custom and the reality of what was done, and I think that needs to be resolved by an evidentiary proceeding rather then on Summary Judgment. As to the particular homesteader whose land is also affected by O'Malley Road, I do not intend to issue a tentative ruling or probably any ruling at this time on the one bite issue, I think that's a very difficult issue and it may become moot depending on what the trial on the question of what the custom was and what actually was accomplished indicates, in other words if at trial its established that there was only thirty-three feet ever taken, that puts an end to the State's argument I think and that makes the question of one bite irrelevant, makes it moot or mute as we said earlier. So I think its appropriate to resolve the factual issue before we try and do something that hasn't been done since 1960 really and analyze the one bite issue, that a real conflicting policy arguments that I see, very valid arguments on both sides, the arguments that are expressed in Meyers while I agree are, its dictum and not controlling at all those arguments make some sense as to the arguments reflected in the Hillstrom Opinion. So, I'm just as happy to wait and see if that issue becomes mooted, we will chalk that one up to judicial restraint which is probably a euphemism for a judge not wanting to get into a quagmire where it looks pretty uncertain. I would ask that before trial, or I would require that the taking issue be briefed, and I think it's a legal question, I don't think it's a factual question, though I maybe wrong. It may evolve as one but, I don't know that there's going to be any case or controversy on the Declaratory Judgment, if in fact there's been no taking. So, I really think its makes sense before an Evidentiary Hearing is instituted that, that issue, which is a fairly narrow issue be briefed.

And I think counsel can decide among yourselves when you would want to do that, if somebody moves for a trial setting conference at that time I would ask that a specific deadline for that issue be established, and I would ask you to remind my law clerk of that if she is doing the trial setting conference and I am not, which is probably going to be case. In other words, before we got to far down the road, I think that issue should be resolved if possible.

I think that covers my comments, did I leave anything unclear for the moment, I will if I indicated issue written order, either confirming or if I feel its appropriate changing and in that case detailing the reasons for any changes in my order. Thank you very much we will go off record.