IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

STATE OF ALASKA

Plaintiff,

KENAI PENINSULA BOROUGH, a municipal corporation

Intervenor,

v.

OFFSHORE SYSTEMS – KENAI, an Alaskan partnership

Defendant.

Case No. 3KN-08-453 Civ.

REPLY TO OPPOSITIONS TO MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT OF THE STATE OF ALASK AND KENAI PENINSULA BOROUGH

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INTRODUCTION

Offshore Systems – Kenai ("OSK"), by and through its attorney, Ronald L. Baird, hereby replies to the oppositions of the State of Alaska ("State") and Kenai Peninsula Borough ("Borough") to OSK's motion for summary judgment and opposes the motions for summary judgment of the State and OSK. The State opposes OSK's motion for summary judgment and claims entitlement to summary judgment on its claims. As explained herein, the claims asserted by the State are invalid as a matter of law for additional reasons raised by its briefing, but at a very minimum present genuine issues of fact preventing summary judgment in its favor.

Much of the Borough's memorandum sets forth argument purporting to establish the State's claims. OSK objects to such argument as violating this court's order dated October 14, 2008 limiting the Borough's intervention herein as solely for the purpose of asserting its own claims against OSK. The complaint which the Borough filed after that order sets forth only the theory that the Borough reserved an easement in its deeds to OSK under a clause of the deeds concerning "easements . . . ascertainable by physical inspection." Additionally, the Borough has an interest in the dispute over the meaning and enforcement of reservations in the State patent to the Borough addressing a shoreline easement and a duty to plat an additional easement. The Borough has not opposed OSK's motion request number 6 that the Borough does not have a prescription claim over OSK's property.

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Fundamentally, the State and Borough seek to upset a policy decision which was made over 40 years ago by two departments of the State executive branch each acting within their spheres of authority and which is expressly and consistently reflected in numerous public records since then. That decision was to limit the public road administered by the then Department of Highways to an area short of the beach and public land valuable as an industrial property and to leave administration of the valuable industrial site to the Department of Natural Resources under a long-term lease. OSK has relied to its detriment on that decision and the public records reflecting it by constructing at its own expense roads used in its business. The State now seeks to seize those roads for public use. No law, public policy or equity justifies the State's attempt.

ADDITIONAL FACTS

The State's claim that it is entitled to summary judgment requires consideration of additional facts not presented in OSK's memorandum. As will be seen, these additional facts do not support the State's claims but provide additional grounds for their dismissal as a matter of law.

On July 26, 1866, Congress enacted a statute providing that the "right of way for the construction of public highways over public lands, not reserved for public uses, is hereby granted."[1] On March 4, 1915, Congress enacted a statute providing:

> That when the public lands of the Territory of Alaska are surveyed, under direction of the Government of the United States, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the

[1] Act of July 26, 1866, 14 Stat. 251,253 later codified as R.S. 2477 and 43 U.S.C. §932 (emphasis added).

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same are hereby, reserved from sale or settlement for the support of common schools in the territory . . .[2]

(Emphasis added)

Section 36, the property at issue here, was surveyed in 1922.[3] The survey created three parcels of land which are at issue in this case: Lot 1 which borders Cook Inlet and consists of 6.22 acres, the southeast ¼ of the section which is immediately to the south of Lot 1, and Lot 3 consisting of 42.51 acres which borders Cook Inlet and is adjacent to Lot 1 on the west.[4]

On August 10, 1949, Public Land Order 601 ("PLO 601") was issued withdrawing public lands along certain roads for highway purposes "subject to existing surveys and withdrawals for other than highway purposes."[5] In 1951, Departmental Order 2665 was issued by the Secretary of Interior converting the prior withdrawals to easements but requiring that for roads constructed thereafter, survey stakes were to be set in the ground and notices posted along the route.[6] By the State's own omission, no road building activity had occurred in Section 36 as of 1951.[7]

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[2] Act of March 4, 1915, 38 Stat. 1214 (copy attached as Exhibit 19).
[3] Exhibit 20, hereto.
[4] See, Exhibit 20.
[5] The history and terms of these orders was considered at length in *State v. Alaska Land Title Association*, 667 P.2d 714 (Alaska 1983). The relevant text of PLO 601 is quoted at 718, n.4.
[6] *Alaska Land Title*, *supra*, 719 n.5.
[7] State's Memorandum in Support of Motion for Summary Judgment and in Opposition to OSK's Partial Summary Judgment Motion dated February 24, 2009 ("State's Memorandum"), page 6 and Exhibit B.

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On June 30, 1959, the Secretary of Commerce executed a Quitclaim Deed to various roads in the state. Included among these is "Nikishka Beach Road" described in the deed as:

> From a point on . . . [Kenai Spur Road] . . . north to Nikishki Beach. Length 0.8 miles.[8]

As measured and calculated by OSK's surveyor expert, Scott McLane, 0.8 mile along the original road right-of-way from its intersection with Kenai Spur Road falls short of even the top of the bluff above Cook Inlet let alone to the beach itself along any route including straight down the bluff.[9] There is no photographic or other evidence of the extent of the road in 1959.

On March 7, 1960, James Arness applied to lease 365.9 acres within Section 36.[10] On June 2, 1960, Division of Lands of the Department of Natural Resources issued Arness a lease of the north ½ of Lot 3[11] and a special land use permit for tidelands adjacent to Lot 3[12] both for a five year term ending June 2, 1965 and for the purpose of allowing Arness to construct to "a barge unloading facility." The lease makes no

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[8] State Exhibit S, pages 7-11.

[9] Expert Report of M. Scott McLane, P.L.S.("McLane Report"), Exhibits 1-8 filed herewith. The Borough has submitted an Affidavit of Max Best dated March 4, 2009 in which he states that he measured the distance of Nikishka Beach Road and found it to be approximately .8 miles in length from the North Spur Highway to the beach. OSK objects to the court's consideration of this testimony as expert testimony for which the Borough has not complied with the pre-trial order by designating Mr. Best as an expert or providing a report. Additionally there is no foundation for the opinion and its relevance is questionable since he appears to be discussing the road as it currently exists. And finally, the Borough should not be allowed to prove the State's claims.

[10] Exhibit 21.

[11] Exhibit 22.

[12] Exhibit 23.

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mention of any right-of-way for any roads. On March 28, 1961, Arness applied for a lease of the West ½ of Lot 1 answering a question concerning what improvements were on the land with "none."[13] On February 15, 1962, the Division of Lands issued a lease, ADL 02844, of the West ½ of Lot 1 to Arness for a five year term ending February 14, 1967 "subject to the stipulation that the Lessee shall not prevent the public from using the Nikishka Beach Road."[14] An aerial photograph dated May 2, 1963[15] shows that a dock has been constructed with a road leading from it through the north ½ of Lot 3 and the west ½ of Lot 1 connecting to a road to the south. On May 15, 1964, the Division of Lands replaced its prior lease of the North ½ of Lot 3 with a 55 year lease to Arness, again with no mention of any right-of-way for any roads.[16]

Soon after statehood, the Alaska Department of Highways began developing a project known as Wildwood North, Project S-0490, to reconstruct a portion of what is now Kenai Spur Highway and "Nikishka Beach Road." In a memorandum dated July 6, 1964, right of way agents working on the project observed that while they had obtained affidavits of the staking of the roads within the project, former employees could not testify as to when the roads had been posted.[17] A memorandum dated August 19, 1964, from Assistant Attorney General, Norman F. Glass of Juneau to a counterpart in Anchorage addressed an additional issue concerning Project No. S-0490 stating:

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[13] Exhibit 24.
[14] Exhibit 25.
[15] McLane Report, Exhibit 5.
[16] Exhibit 3 to original memorandum.
[17] Exhibit 26.

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In response to your inquiry of July 20, 1964, concerning the right-of-way width of the above captioned project we are of the opinion that Department of the Interior Order 2665, as amended, was inoperative as to establishment of right-of-way width across school lands.

The establishment of school lands in Alaska was accomplished by the Act of Congress of March 4, 1915 (38 Stat. 1214) as amended. Under the provisions of this Act sections numbered 16 and 36 of each township were to be reserved for the support of school as of the time they were surveyed. The reservation of a particular section of school land becomes effective at the time the land is surveyed. 42 Am.Jur. Public Lands §79 (1938).

One of the effects of a reservation is to separate the lands reserved from the remaining mass of public lands. Subsequent laws are not to be construed to embrace reserved lands even where no express exception is made to the subsequent law. U.S. v. Minnesota, 270 U.S. 181, 70 L.Ed. 539 (1925); Wilcox v. Jackson, 13 U.S. 498, 10 L.Ed. 264 (1839).

We are of the opinion that the rule expressed in the above cases applies to the reservation of school lands in Alaska and that orders of the Secretary of the Interior issued subsequent to the reservation do not affect these lands, at least where they are not made expressly applicable. We would conclude, therefore, that Order 2665 as amended did not operate to establish the width of highway right-of-way across school sections.

This conclusion finds support in the language of at least some of the other orders issued by the Secretary of the Interior which operated to establish highway right-of-way widths in Alaska. For example, PLO 601 and PLO 757 both state that their provisions are ". . . subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes . . . " [Emphasis added] While this limitation does not appear in Order 2665, we think it is no less applicable.

(Emphasis added)[18]

In a memorandum from the district right of way agent to the preconstruction engineer dated September 18, 1964, the agent, acknowledging and attaching the assistant attorney

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[18] Exhibit 27.

general's opinion, confirmed changing the project termini and other revisions to the right-of-way map to reflect the opinion.[19]

A right of way map for "Nikishka Beach Road" was prepared by the Department of Highways on September 8, 1965.[20] It shows both an "Existing R/W" for "Nikishka Beach Road" and additional new right-of-way both ending at a surveyed location south of the southern boundary of Lot 1 and far from a line labeled "Edge of Bluff." A dashed line extends beyond the right-of-way to the north which forks into a line ending at "Dock Rd" in Lot 3 and a line along the top of the bluff labeled "Beach Road." The latter does not extend to an area labeled "Cook Inlet."

On February 25, 1966, the Department of Highways submitted an "APPLICATION FOR RIGHT OF WAY PERMIT" to the Division of Lands of the Department of Natural Resources for a highway.[21] Enclosed with the application was a surveyed legal description and a plat of the requested right-of-way.[22] The legal description states that a certain amount of the acreage is "contained in existing right of way." The plat shows the requested right-of-way stopping short of the south boundary of Lot 1.

On August 8, 1966, the Division issued "Right-of-Way Permit" ADL 32264 to the Department of Highways for a "public highway" attaching the description and plat

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[19] Exhibit 28.
[20] Exhibit 29.
[21] Exhibit 30, pages 1 and 2. Exhibit 30 is a copy of a copy from DNR File ADL 32264 obtained by the undersigned from the department prior to the commencement of this litigation.
[22] Exhibit 4 to prior memorandum at pages 5 and 6.

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discussed above.[23] A few days later on August 17, 1966 it issued two 55 year leases to Arness for the west ½ of Lot 1 and for the northwest ¼ of the northwest ¼ of the southeast ¼ of section 36.[24] Unlike its predecessor, the new lease for the west ½ of Lot 1 makes no reference to "Nikishka Beach Road" instead stating in the property description "Subject to a 60 foot wide right-of-way for existing roads to the beach." The property described by the other lease lies immediately to the south of Lot 1. The property description in that lease states "Subject to a 60 foot wide right-of-way for existing roads to the beach and Highway Right-of-Way Permit serialized ADL 32264."

According to as-built plans of the State, project S-0490 was constructed between April 26 and August 24, 1967.[25] The plans "entered May 9, 1968" expressly state "END NIKISHKA BEACH ROAD - STATION 41+00.0." A sheet showing the end point is similar to the right-of-way drawing with the constructed road terminating short of the right-of-way end with a note "Construct connection Sta. 40+00 to 41+00 to meet existing roadway."

At this point in the chronology, it is important to note several things. First, by the time of the issuance of the long-term agreements by DNR to Arness and the Department of Highways in 1966 and the completion of the road project in 1967, the meaning of "Nikishka Beach Road" had been expressly settled to not refer to a roadway extending into Lot 1 and certainly not to the beach of Cook Inlet. Second, the Department of Highways being aware of various infirmities in its claims to a right-of-way under the

[23] *Id.*
[24] Exhibits 5 and 6, respectively to the prior memorandum.
[25] Exhibit 31.

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federal land orders had acknowledged the need for a permit from DNR for right-of-way in section 36 and been granted one. Third, a different right-of-way for "existing roads to the beach" was now an obligation of Arness not by any right granted to the Department of Highways, but in a lease administered by DNR. Fourth, no right-of-way of any character had been created within Lot 3, the location of the dock road.

Photographic evidence subsequent to 1967 shows nothing which can be interpreted to be a beach road along the top of the bluff in Lot 1.[26] There is only the dock road originally constructed by Arness.

In late 1979, the DNR issued a public notice of the proposed conveyance of Section 36 and other lands to the Borough and distributed it for interagency review.[27] The patent[28] issued in the following year expressly states that Lot 1 is "subject to" to leases not at issue here and nothing else. The southeast ¼ is conveyed "Excluding Right-of-Way Permit ADL 32264 (Nikiski Beach Road)" and subject to other ADL lease and permit numbers not at issue here. The same reference to "ADL 32264 (Nikiski Beach Road)" appears at two locations elsewhere in the patent.[29] The patent therefore expressly equates "Nikiski Beach Road" with the DNR permit issued to the Department of Highways. There is no reference in the patent to the language in the 55 year leases, "Subject to a 60 foot wide right-of-way for existing roads to the beach." There is, as discussed in OSK's opening memorandum, an express obligation of the Borough to plat

[26] McLane Report, Exhibits 6, 7, and 8.
[27] Exhibit 32.
[28] Exhibit 7 to prior memorandum.
[29] Lot 3 is conveyed excluding ADL 36812 because the latter clips the southeast corner of that parcel well inland from the area in dispute here.

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an easement to the shore of Cook Inlet before "development or conveyance shall occur." As an aerial photo from the prior year indicates.[30] Lots 1 and 3 were already developed at this time.[31]

After, issuance of the patent, DNR sent letters to the then lessee under the two long-term leases, Jesse Wade, advising him that:

> The conveyance, effective May 16, 1980, includes all of the Grantor's rights, title and interest in and to the surface estate.
>
> . . .
>
> Administration of the lease, permit or claim shall also vest in the Kenai Peninsula Borough. . . .
>
> Rentals which may have been paid to the State of Alaska after the effective date of the conveyance will be transferred to the Kenai Peninsula Borough. Future payment of rentals should be made to the Kenai Peninsula Borough.[32]

As noted in OSK's opening memorandum, the Borough and Wade later addressed and resolved what rent was due and owing under the leases.

By the 1980's, the road to the dock had seriously deteriorated.[33] There was no road in the other direction toward the beach.[34] In 1986, OSK completely reconstructed the site including the road to the dock.[35] Sometime thereafter an additional road down

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[30] McLane Report, Exhibit 7.
[31] The State has yet to disclose its own file for the Borough's municipal selection of Section 36, ADL 201285
[32] Exhibit 33.
[33] Exhibit 34, Excerpt from Deposition of Clemente Gubuat, deposition page 10: Exhibit 35, Excerpt from Deposition of Jesse Wade, deposition pages 54-55.
[34] Exhibit 34, deposition pages 13,14; Exhibit 35, deposition page 32. McLane Report, Exhibit 4.
[35] McLane Report, Exhibit 3, aerial photo dated May 22, 1986.

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the bluff to the east was constructed.[36] By 1990, these were the only roads visible in the parts of Lots 1 and 3 which had been leased to Wade.[37]

The 1990 deeds contain no specific, express reservations to the Borough. Again, there was no use of the language in the leases, by now administered by the Borough, "Subject to a 60 foot wide right-of-way for existing roads to the beach." In 1992 after the Borough's conveyances, the Borough was asked by DNR to evaluate a permit request for a seafood waste line through Lot 1 and into tidelands.[38] The request was reviewed by the Borough's Planning Commission and a borough planner wrote to DNR stating that the Borough had no objection to the pipeline "to be buried in upland areas and will extend approximately 500 feet from the shore up to the existing state right of way for Nikiski Beach Rd."[39] No reference is made to any right-of-way in the area held by the Borough. In 2003, the Borough joined in a plat with OSK to subdivide property for a land exchange.[40] The approved and recorded plat shows "Nikishka Beach Road 175' R/W" in the location of the ADL permit and shows roads extending beyond this into Lot 1.[41] No mention is made of any state or borough right-of-way other than the area of the DNR permit.

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[36] Exhibit 34, deposition page 14.
[37] McLane Report, Exhibit 2.
[38] Exhibit 36.
[39] *Id.*
[40] Exhibit 37.
[41] *Id.*

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ARGUMENT

I. No Easement In Section 36 Vested In The State Pursuant To Any Federal Land Orders or under R.S. 2477 Because The Lands Were Reserved For School Purposes Until They Were Conveyed To The State In 1962.

Section 36 was reserved for school purposes as of its survey in 1922. As the Assistant Attorney General explained in his 1964 memorandum, lands reserved for school purposes were not within the public domain to which the federal land orders applied. Section 36 remained in this reserved status until it was conveyed to the State. Thus no easement for a highway in Section 36 had vested in the State prior to conveyance of Section 36 by the federal government.

The State suggests that this deficiency was cured by an act of the Alaska legislature, 1978 Alaska Sess. Laws, Chap 182 ("Chap. 182") which redesignated school lands as general grant lands to be managed with other state lands.[42] But Chap 182 states only that

> (b) The redesignation of school lands in (a) of this section does not affect the validity of a deed, contract for sale, lease, easement, right-of-way [or] permit . . . .

This language is of no assistance to the State. Under federal law, the State had no valid easement. Because the state statute "does not affect the validity of" any such easement, it remained invalid after enactment of the statute. Instead, the State must argue that Chap 182 had retroactive effect to make something valid which was invalid. A statue has retroactive effect if it gives to gives to pre-enactment conduct a different legal effect from

[42] 1978 Alaska Sess. Laws, Chap 182, Section 2 (partially excerpted in State Exhibit J).

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that which it would have had without the passage of the statute.[43] Statutes are given retroactive effect only if there is an express legislative directive to that effect.[44] No such legislative directive exists in Chap 182.

Any claim that the Quitclaim Deed to the State as to the portion of Nikishka Beach Road in Section 36 is somehow "revived" by subsequent legislation also is meritless. A quitclaim deed, like a government patent, passes only the title the government has on the date of the instrument.[45] The after-acquired title doctrine, which applies in the case of warranty deeds to pass title which is cured by events subsequent to the deed, does not apply to quitclaims and government patents.[46]

The 1964 opinion does not address easements under R.S. 2477. The result, however, is the same. As noted above, the offer of the right-of-way is only on lands "not reserved for public purposes." The reservation for school purposes provided by the Act of March 4, 1915 is clearly for such a purpose and attached in 1922. The reservation remained in place until Section 36 was patented to the State. Thus, no public construction or use of Section 36 could vest any rights in the State under R.S. 2477.

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[43] *Eastwind, Inc. v. State*, 951 P.2d 84, 847 (Alaska 1997) *quoting, Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1093 (Alaska 1985).
[44] AS 01.10.090. *Eastwind, supra*, at 846.
[45] *North Star Terminal & Stevedore v. State*, 857 P.2d 335, 340 (Alaska 1993).
[46] *Id. See, also, Ellingstad v. State, Dept. of Natural Resources*, 979 P.2d 1000, 1006 (Alaska 1999)(to the same effect citing *North Star*).

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II. There Is No Evidence That Nikishka Beach Road Was Ever Posted In Compliance With D.O. Order 2665 So The State Never Acquired An Easement Under That Order.

As noted above, D.O. 2665 required that right-of-ways for roads constructed after 1951 would be established only when the road was staked and posted. While there is some evidence in the record of the staking of "Nikishka Beach Road," there is no evidence of it ever having been posted. An internal memorandum of the State at the time of planning for the construction of Project S-0490 confirms that no evidence of the posting of the road had been found.[47] Accordingly, no right-of-way for Nikishka Beach Road vested in the State under D.O. 2665.

III. There Is No Exception To The Merger Doctrine For Estates Held By A Trustee And In Any Event The State Is Not A Common Law Trustee As To Highways.

In its opening memorandum, OSK set forth the doctrine of merger which operates to extinguish easements when both the burden and benefit vest in the same entity. The State, without any citation to authority, posits an exception to the doctrine for legal estates acquired in the capacity of a trustee.

Nothing in the modern restatements of both the law of trusts and the law of servitudes supports such an exception. An exception for interests held by a trustee which was set out in the first restatement of the law of servitudes was not carried forward into the current one.[48] The technical difficulty with such an exception is that the merger

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[47] Exhibit 26.

[48] *Cf.*, *Restatement of Property*, *Servitudes*, §497 (1944), comment e, with *Restatement 3d of Property*, *Servitudes* §7.5 (2000), comment d.

doctrine is based on legal estates in land whereas the right of a beneficiary to land held by a trustee is equitable only.[49] An interest in land held by a trustee is not a different kind of estate. Moreover, nothing in policy supports such an exception. The purpose of the merger doctrine is to foster reliance on record title.[50] There is no justification for allowing the Department of Transportation and Public Facilities to cloud title in State Patents based on off-record interests. Such a claim devalues state land when disposed of for any purpose.

Even if there was a trustee exception to the merger doctrine, the State's claim to trusteeship status as to highways of the state must be heavily qualified. Conceding that there are cases reciting such a conclusion[51], it is clear that the allusion to the State as a "trustee" is by analogy only to a true trustee relationship. It is not dispositive of substantive issues of law and policy.

Finally, the State's reliance on *Safeway v. State*[52] and AS 19.05.070 is misplaced. In *Safeway*, a street dedicated on a plat approved by the Municipality was later incorporated into a state highway plan of the Department of Transportation. The case holds that even though the municipality had formally vacated the platted street, that action could not affect the interest retained by the Department by its incorporation of the

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[49] *See*, *Restatement 3d of Trusts*, §42 (2003), comment b (trustee takes settlor's full legal title).

[50] *Restatement 3d of Property, Servitudes* §7.5 (2000), comment b.

[51] The State's reliance on the public trust doctrine here is entirely misplaced. That doctrine is applicable to the State's ownership of tide and submerged lands and has extensive common law and constitutional roots. See, *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1117-18 (Alaska 1988) citing *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892)(explaining doctrine).

[52] 34 P.3d 336 (Alaska 2001).

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street into a recorded state highway map.[53] The case says nothing about merger. That doctrine as applied to the State's pre-statehood interests, has nothing to do with any purported action by the Borough. It rests entirely on actions of the State alone. As to AS 19.05.070, that statute does not specify that the department "may only" vacate an easement by a deed.[54] The common law applies in Alaska unless "inconsistent with a state statute.[55]

IV. Even If The State Had Rights Prior To The Issuance Of The DNR Permit, It Abandoned Them In Favor Of The Rights Granted By The Permit.

Abandonment of an easement occurs when specific acts of the easement holder, other than mere non-user, indicate an intent to relinquish the easement rights.[56] As discussed at length in the statement of facts, the two long-term leases issued to Arness and the right-of-way permit issued to the Department of Highways within days of each other in 1966 represent a comprehensive effort of the Department of Natural Resources and the Department of Highways to resolve and coordinate their responsibilities within Section 36. The Department expressly received only the permit while the DNR issued leases which it would administer. A claim that despite these public records, the Department of Highways retained secret, off-record easements within the lands covered by the DNR leases is illogical. The Department of Highways needed additional right-of-way width from DNR and DNR could not be expected to grant that with Highways still

[53] Id. at 339-40.

[54]

[55] AS 01.10.010.

[56] *Kelley v. Matanuska Electric Association, Inc.*, Opinion No. 1312, 11-12 (September 24, 2008) citing *Restatement 3d of Property, Servitudes* §7.4 (2000).

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claiming rights which would interfere with the administration of the leases. In addition, the easement claims under federal law were at least clouded in Highway's own view. Accordingly, if the Department of Highways had any easements within the areas covered by the leases, other than the permit it received, it abandoned those in favor of receiving the unclouded, express rights of the permit.[57]

V. The Three Instruments Of Title At Issue Here, Properly Construed, Do Not Support Either The State's Or The Borough's Claims.

Three instruments in the title to real estate have been brought into issue in this case. A three- step procedure should be employed when interpreting an instrument of title to real estate: 1) look to the four corners of the instrument to see if it unambiguously presents the parties' intent, 2) if the document is ambiguous, consider the facts and circumstances surrounding the conveyance, and 3) if these two steps do not resolve the controversy, resort to rules of construction.[58] This approach is similar to but not identical with the approach to the interpretation of contracts.[59] The interpretation of a written instrument of title is a question of law for the court resolvable on motion for summary judgment[60] unless extrinsic evidence surrounding the intent of the parties to the

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[57] It is important to distinguish, as the State does not, this argument of OSK from its argument, *infra*, concerning laches. The former concerns extinguishing rights which already exist while the latter concerns failure to bring rights into existence within a reasonable time.

[58] *Ashley v. Baker*, 867 P.2d 792, 794 (Alaska 1994); *Norken v. McGahan*, 823 P.2d 622, 625-6 (Alaska 1991).

[59] The principal difference is that a threshold finding of ambiguity is not required before considering extrinsic evidence of the parties' expectations concerning a contract. *Ashley, supra*, 867 P.2d at 794, n. 1.

[60] *Wessells v. State, Dept. of Highways*, 562 P.2d 1042, 1050-51 (Alaska 1977).

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instrument raises issues of fact.[61] Here no former officials of the State or the Borough with personal knowledge of the facts surrounding any of the instruments have been identified as witnesses who will testify as to the parties intent so the credibility of witnesses is not in issue.[62] Contrary to the State's suggestion, the interpretation of written instruments is not a proper subject of expert witness testimony.[63]

A. The 1959 Quitclaim Deed Did Not Convey A Right-Of-Way Extending To The Beach Of Cook Inlet.

As noted in previous sections, there are several matters of law which prevent any rights from vesting or continuing in the State pursuant to the 1959 Quitclaim Deed from the Secretary of Commerce to the State.[64] Even if the court were to resolve all of those matters in the State's favor, the 1959 Quitclaim Deed, properly construed does not help the State.

> The deed included among the roads granted "Nikishka Beach Road" described as:
>
> From a point on . . . [Kenai Spur Road] . . . north to Nikishki Beach. Length 0.8 miles.[65]

The State places heavy reliance on the phrase "to Nikishki Beach" as establishing that the granted road went all the way to the beach along Cook Inlet. But "to" in this context is

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[61] *Ault v. State*, 688 P.2d 951, 955 (Alaska 1984).
[62] *Id.*
[63] *See, e.g., Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 509-510 (2d Cir. 1977)(the special legal knowledge of the judge makes the witness' testimony concerning the meaning of contract terms superfluous).
[64] State's Memorandum, Exhibit S, pages 4-11.
[65] State Exhibit S, pages 7-11.

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ambiguous meaning either in the direction of or actually arriving at the object.[66] Thus, the extent of the road must be determined from the additional specification of a length. As located by OSK's expert, 0.8 mile does not reach the beach or even the top of the bluff as it existed at approximately the time of the deed.

The extrinsic evidence also supports an interpretation of the deed as applying to a road not reaching the beach. The most probative of this is the State's own right-of-way map prepared for Project No. S-0490.[67] That document shows the existing right-of-way but that right-of-way does not extend the full length of the roads shown on it. Additional support for this interpretation is found in Arness's application for a lease of Lot 1 in which he indicates that no improvements existed within this tract.[68] The "appraisal report" relied on by the State[69] is not probative stating only that the area "offers" a road approach to the beach, not that one exists, and in any event is made by someone who states he has not seen the property.

The 1959 deed then as a matter of law did not convey a right-of-way which extended clear to the beach of Cook Inlet.

[66] Webster's Third New International Dictionary, 2401 (1993).
[67] Exhibit 29.
[68] Exhibit 24.
[69] State's Memorandum, Exhibit E

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B. The 1980 State Patent To The Borough.

1. All Rights Of The State Under The Leases Passed To The Borough.

The 1980 State Patent to the Borough[70] operates as a quitclaim of all interest the government had at the time of the conveyance.[71] The deed "excludes" the right-of-way permit, makes certain parcels "subject to" leases then assigned to Wade, and provides that the whole section is "subject to the reservation" concerning the shoreline easement and a duty to plat an easement to the shoreline. While "subject to" can occasionally mean "reserving," here the express use of "reservation" elsewhere in the patent simply indicates that the patent is not disturbing the rights of the lessee.[72] The letters written after the patent to Wade[73] expressly turning over lease administration to the Borough and the Borough's exercise of that authority confirm that all rights under the leases were transferred to the Borough.

To suggest that the State somehow retained the right to enforce a single lease covenant concerning the "60 foot wide right-of-way for existing roads to the beach" tortures both the deed and the lease beyond recognition. If this was the intent, the State could have easily provided for this by inserted the phrase from the lease in the deed. It did not.

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[70] Exhibit 7, Borough's Memorandum, Exhibit B-23.

[71] See note 45 46, *supra*.

[72] *See*, *Hendrickson v. Freericks*, 620 P.2d 205, 209-210 (Alaska 1980)("subject to lease . . . recorded at . . ." qualified statutory warranty). *See*, *also*, *Aszmus v. Nelson*, 743 P.2d 377, 379 (Alaska 1987)(general "subject to" clause usually intended only to protect grantor from claims of breach of warranty).

[73] Exhibit 33.

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The 1980 deed passed all of the rights of the lessor under the leases to the Borough.

2. The "Subject To Valid Roads And Easements" Provision Of The 1980 State Patent To The Borough Is Irrelevant To This Case.

The State suggests that the clause in the State Patent, "subject to valid roads and easements" somehow created a right-of-way in its favor concerning access through Lot 1 to the beach. As discussed above, the deed contains specific, detailed provisions addressing the matter of access to the shoreline. And "subject to" in this deed did not mean "reserving." On its face, then, the State Patent did not reserve anything to the State pursuant to this language.

The extrinsic evidence also supports this interpretation. The leases contained specific provisions concerning access to the beach and the State Patent did not employ the language of those leases to reserve anything to the State.

Finally, even if the provision had some relevance here, it would have reserved only "valid" roads and easements. Thus, the clause adds nothing helpful because any questions concerning the validity of prior rights, and there are many, are not resolved by the clause. And any roads which may have existed in the 1950's, were no longer apparent in 1980.[74]

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[74] *See*, notes 34 and 35, *supra*.

3. The Obligation To Plat An Easement To The Shoreline Did Not Apply To Lands Leased To Wade Which At The Time Were Developed And Did Not Pass To Subsequent Grantees Of The Borough.

The State Patent contains an express reservation of an easement to be platted to the shoreline which was quoted at length in OSK's opening memorandum. The clause states that the easement is to be platted before "development or conveyance shall occur on the land." As noted above, as of 1980, both the portion of Lot 1 and the portion of Lot 3 leased originally by Arness were developed with a dock road, fuel tanks, a warehouse and other out-buildings.[75] It does not make sense that a clause that was expressly to operate before development of undeveloped lands and could be used to disturb land which was already developed.

Second, the express requirement that the platting occur before "conveyance" negatives any intent to pass this obligation to subsequent grantees. The obligation burdened all of Section 36 which only the Borough owned in its entirety. The Borough itself is the platting authority for this land. Thus, the Borough was in a unique position to plat the best easements for the public interest. To impose the burden on subsequent, private grantees like OSK creates an entirely unnecessary harshness.

The State does not make an argument that it is entitled to enforce the covenant to plat an easement against OSK. It contends that it already has an easement which the court should "locate."

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[75] McLane Report, Exhibit 4.

The Borough argues that this court should impose the easement it desires as the "nearest practical" access.[76] This attempt to take public control of private improvements to land is breathtakingly unlawful. The only reason an access through OSK's lands is easy is because of the extraordinary cost and effort which OSK has expended to make it so. In any event, for the court to make such a determination now would interfere with both the discretion of OSK and the Borough platting board assuming the obligation is OSK's which it is not.

4. Trial Is Necessary To Determine The Location Of The Shoreline Easement.

The State Patent expressly reserves to the State an easement along the mean high water line of Cook Inlet. Neither the State's complaint nor its motion for summary judgment seek any relief concerning this reservation. OSK, however, in its counterclaim, has sought relief from this court to declare the rights of the State and OSK to interests in OSK's lands including the shoreline easement. Of particular concern is how the mean high water line is to be interpreted in the vicinity of the dock which was in place in 1980 when the reservation was imposed. There is a complex body of law concerning the location of the boundary of uplands adjacent to water bodies which will need to be briefed to the court prior to trial. But these issues are not raised by the present motions.

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[76] Once again the Borough offers expert testimony of Max Best (affidavit paragraph 4, Exhibit E-8) to support this contention in violation of the pretrial order in this case. OSK objects to the court's consideration of this evidence on this ground.

C. The 1990 Borough Quitclaim Deeds To OSK.

1. No Rights Under The Leases With OSK Were Retained By The Borough Under The Deeds.

The 1990 Borough quitclaim deeds to OSK contain only a single reservation discussed in the next section. There are no provisions retaining any of the rights the Borough had as lessor under the leases. Like the State Patent, the Borough deeds do not reserve out in the language of the leases a "60 foot wide right-of-way for existing roads to the beach."

In its opening memorandum, OSK explained how the merger doctrine operates to extinguish easements in leases when both the lessor's and tenant's interest vest in the same person. The Borough contends that this is somehow error and would be true only "if the easements in the lease were for the benefit of OSK." This argument is hopelessly mixed up. The easements in the lease are for the benefit of the lessor and burdened OSK's interest as tenant. When OSK acquired the Borough's interest, both the benefit and the burden of the easement vested in one entity and it was extinguished. The Borough's further suggestion that it held the interest in the easement for the public, even if true, ignores the guidance of the Restatement that public easements vest in entities capable of exercising them.[77]

The extrinsic evidence provides no support to the Borough. It participated in two public processes after the quitclaim deeds and asserted no interests were retained by it under those deeds.

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[77] *Restatement 3d of Property, Servitudes* §2.18 (2000), comment b.

2. No Easement Of The Borough Or The State Was "Ascertainable By Physical Inspection" Within The Lands Conveyed To OSK By The Borough Quitclaim Deeds Of 1990.

The Borough contends that OSK took subject to an easement to the beach because of the clause in the Borough's deeds that the conveyance was "SUBJECT TO: . . . easements ascertainable by physical inspection." This argument overlooks the simple fact that the roads which existed in 1990 had all been constructed by OSK.[78] Those roads could not give notice to OSK of any claim by the State or the Borough. The State's alleged maintenance activities, which are disputed[79], did not change the location of these roads.

VI. Even If The Obligation In The State's Patent To Plat An Easement To The Shore Was Transferred To OSK, Its Enforcement Is Now Barred By The Doctrine Of Laches.

OSK pointed out in its opening memorandum that the second reservation in the State Patent was not a specific easement but a covenant to create one by plat. Thus, all this court can do is enjoin someone to do the plat. But such injunctive relief is barred by the long delay in seeking it. Both the State and Borough fail to respond to this argument and instead respond to arguments not made by OSK.

The State argues that this is really an "adverse possession" or "abandonment" argument. This is not responsive. As noted above, OSK does have an abandonment

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[78] *See* notes 33 through 37, *supra*.

[79] Among the many ambiguities arising from the State's activities is the fact that an "End State Maintenance" sign was installed at approximately the south boundary of Lot 1 for most of the time Larry Miller worked for the State in the area. Exhibit 38. Excerpt of Deposition of Larry Miller, deposition page 40.

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argument but it does not relate to this issue. Adverse possession and abandonment are legal theories and defenses. Laches is an equitable defense.

The Borough acknowledges that it "may have failed in its duty to plat."[80] But it cites *Keener v. State*[81] for the proposition that the time for considering laches begins when the State's right-of-way is challenged. *Keener* is inapposite. There the existence and extent of the State's right-of-way was conceded to have been established many years earlier by prior construction of a road and D.O. 2665. The State brought a condemnation suit for additional right of way and sought a determination in the case of the extent of its right-of-way. The landowner contended that the State should have brought suit but it was not clear what suit the State should have brought. Here, affirmative action by the Borough was required to establish and locate an easement. A reasonable time for completion of the platting requirement was something far less than 28 years and in any event before the Borough began to make conveyances. At that point, unreasonable delay began to occur. The Borough does not dispute that OSK has been prejudiced.

The Borough also cites *State v. Simpson*[82] but that case is an equitable estoppel[83] case, not a laches one. And once again, the right-of-way existed and did not have to be created. Thus, mere inaction did not prevent the State from asserting the admittedly dedicated street.

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[80] Borough Memorandum, 34.
[81] 889 P.2d 1063 (Alaska 1995).
[82] 397 P.2d 288 (Alaska 1988).
[83] OSK also has an estoppel claim but it arises from the Borough's failure to mention any right-of-way or duty to plat in subsequent transactions, particularly a voluntary exchange transaction between the Borough and OSK in 2004. The present motions do not address those events and they are reserved for trial.

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VII. Only The State Has A Prescription Claim Which Must Be Proved By Clear And Convincing Evidence Of Use Since 1990.

The Borough has not disputed that it has no prescription claim in this case. Both the State and Borough want to argue about history of public use in connection with their other claims. Its relevance there is limited given the legal principles which control. But the State never disputes that a prescriptive claim cannot run against the Borough. Therefore, the earliest that a prescriptive claim could begin to run here would be in 1990 when title passed to OSK.

It is not clear whether the State is contending that its prescriptive claim is established as a matter of law. If so, the claim is without merit. To prove a prescriptive claim, the State must prove 1) the use was continuous and uninterrupted for the required period, here 10 years, 2) the user acted as if he or she was the owner, not with permission of the record owner, and 3) the use was reasonably visible to the record owner.[84] There is a presumption that the use is permissive and therefore not giving rise to prescription.[85] The State must prove each and every element of its prescription claim by clear and convincing evidence.[86]

The most critical flaw in the State's prescriptive claim is that it is based on use of roads constructed and maintained by OSK for its own purposes.[87] And they were

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[84] *Weidner v. State, Department of Transportation and Public Facilities*, 860 P.2d 1205, 1209 (Alaska 1993) *citing*, *McGill v. Wahl*, 839 P.2d 393, 397 (Alaska 1992).
[85] *Id. See, also, Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 416 (Alaska 1993).
[86] *McDonald v. Harris*, 978 P. 2d 81, 83 (Alaska 1999).
[87] See cases collected in *Restatement 3d of Property, Servitudes* §2.16, page 249-50 (2000).

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improved by OSK without objection by the State contrary to its statewide policy reflected in regulations of requiring permits for activities in state right-of-way.

CONCLUSION

OSK remains entitled to the relief it originally requested by its motion and neither the State nor the Borough are entitled to relief pursuant to their motion. A trial should proceed limited to the State's prescriptive claim and evidence and briefing concerning the location of the easement along the mean high tide line reserved in the state patent. At most in addition, the trial could include questions of fact concerning extrinsic evidence to interpret the State Patent and Borough quitclaim deeds and estoppels against the Borough in enforcing the platting covenant.

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Certificate of Service

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