

**SHULTZ vs. THE U.S. ARMY - WHO WON?**

**An RS2477 Case**

**Opinions by Patrick H. Kalen, PLS**

**The Alaska Surveying & Mapping Conference**

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This case could have become an important precedent, but because of the way the rulings were written and timed it is destined to become a mere obscure footnote in legal history. Published decisions are what we look for when researching legal cases, in this case the decision was published, then vacated, stripping it of legal meaning. A brief synopsis of events is as follows:

1) Paul Shultz realizes that because of historical roads across Ft. Wainwright, he may be able to get use of roads on the Army Post to be declared to be public roads. He has two motives, first, he objected to a pass system that the Army instituted in 1981. After several traffic infractions he was banned from driving on base roads as a condition of probation. A second motive was that he wanted to subdivide his land. Fairbanks North Star Borough would not allow it unless legal access was proved to exist. Through Fairbanks counsel Joe Sheehan, Shultz filed a quiet title action, asking that Lazelle Road (and other roads) be recognized as public roads over which the US Army lacked jurisdiction. The suit was filed in 1986, became Case No. F86-30 Civil.

2) In 1990, the Army's counsel, Bruce Landon, contacted me and asked if I could help. I had a strong suspicion that the old sled road to Chena Hot Springs and other roads might qualify as public roads under 43 USC § 932. If they did, the Army might not have a weak case. I agreed to write a report, and refrain from further involvement in the litigation if the facts of the report were not helpful to the Army's side of the case.

3) My preliminary report was delivered to the Army on November 9, 1990. Indications were that Lazelle Road went to a different homestead than the property owned by Shultz, and that the Fairbanks to Chena Hot Springs sled road was probably a public road, but it did not go to Shultz' property either. A third route, Weist Road, ended at a homestead a mile short of Plaintiff's property. The case appeared to me to be clear cut, not worthy of continued litigation. Counsel for Mr. Shultz thought otherwise, and over the next several months the case was argued almost entirely by surveyors and land experts. For the plaintiff, Karen Tilton, PLS, Eric Stahlke, PLS, William Mendenhall, PLS and Jay Sullivan, SRWA were retained. The defense used Patrick Kalen, PLS and Junior Kerns, land manager for Fort Wainwright as their witnesses, and relied on cross examination of plaintiff's witnesses to make their case.

4) Continued detailed research was undertaken. The plaintiff did not have a report, but rather exhibits in the form of aerial photographs, and some drawings were prepared. I sat in on depositions by Karen Tilton and William Mendenhall in which they gave the argument for the existence of legal access to Shultz property. I wrote a final report Titled LAZELLE ROAD, ROADS AND TRAILS ACROSS LADD FIELD, A SURVEYOR'S REPORT. It was delivered to the Army dated April 18, 1991.

5) A trial was held in April 1991 before Federal Court judge Andrew Kleinfeld. I tried a different approach to presenting map evidence. I managed to get permission to bring a light table into the Federal Courthouse in Fairbanks. Significant portions of testimony were made with exhibits on the light table. Everything was prepared in 1"=1000' scale, which matched a set of airphotos that the US Army COE had taken in 1938, TA-B. The judge came down from the bench and studied photos, asking many questions about them. The trial lasted nearly two weeks. The judge's ruling was made in July of 1991. The facts as outlined in Kalen's Surveyor's Report of April 18, 1991 were upheld in every respect. This included where the roads were, and when they were built. None of them led to the plaintiff's property. Roads that do today were constructed by the US Army after

they took title to the land. One important aspect that I had not previously had experience with was the Federal Statute of limitations. I did not really think that it was germane, but I went along with the argument. We showed that the Fairbanks to Chena Hot Springs Sled Road had been out of service since 1950-51 by taking a number of tree ring counts, and documented blockage of the original roads by the Ft. Wainwright landfill from airphotos.

6) Sheehan appealed the case to the 9<sup>th</sup> Circuit Court of Appeals. His brief was submitted in May of 1992, the Army's brief opposing his motion in July of 1992. The appeal was heard by a special three judge panel, Schroeder, Fletcher and Alarcon. They overturned Judge Kleinfeld's decision. Judge Fletcher wrote a lengthy decision, and it was published, stating that it had been decided November 30, 1993. Her basic premise was that the original homesteader must have traveled overland to get to his property, and therefore a trail had to exist, even if it could not be identified. This could have set a startling new precedent for access to land, particularly in Alaska. No longer would the user have to prove where the road was. All previous litigation (mostly states, federal cases are rarer) shows that RS 2477 rights of way require a high standard of proof regarding the physical existence of the road. I have the opinion that Sheehan's brief was very well written, and that some of his statements were not adequately contested.

7) Many friend of the Court briefs were filed, on behalf of Tanana Chiefs Conference, Pacific Legal Foundation, Resource Development Council for Alaska, Alaska Miner's Association, State of Alaska, Sierra Club, Audubon Society, Alaska Environmental Center, in addition to the main brief filed by the Department of Justice. The case was reargued in December of 1994 before the same three judge panel that had overturned Judge Kleinfeld's in 1992. First, the Court ordered the parties to attempt to settle the case by mediation. It was tried in 1995, but ultimately, mediation failed. Finally, on September 20, 1996 the opinion of November 1993 was withdrawn, and the case was declared to be decided – Judge Kleinfeld's decision was restored. Judge Alarcon dissented, stating that "I would deny the petition for a rehearing and reverse the district court's judgement for the reasons set forth in Judge Fletcher's scholarly opinion in Shultz v. Department of the Army."

8) Sheehan made one last ditch attempt, filed an appeal with the United States Supreme Court. On April 20, 1998 his petition was denied, the case is now over.

But remember that the decision Judge Fletcher published in November of 1993 had wide distribution. It has words in it that would set exciting new precedent for the standard of proof for determining RS 2477 rights of way across Federal land. As late as January of 2001 at a surveying and Mapping Conference, Jay Sullivan was speaking eloquently about the case, citing passages from the vacated decision. I offer in its place my surveyor's report and the FINDINGS OF FACT AND CONCLUSIONS OF LAW for Case No. F86-030 Civil. This is the decision made by United States District Court Judge Andrew Kleinfeld. There was some good fun for awhile, but now the party is over, his decision was upheld.

Is there a precedent in all of this? First and foremost, like numerous state cases, the plaintiff has the burden of showing where the road is, and documenting use of it. This case has a new twist, however, the Federal Statute of limitations. Judge Kleinfeld held that 28 USC § 2409a(g) did apply, that notice that the roads were not usable prior to 1974, had been given by the Army, more than 12 years before he filed suit.

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## LAZELLE ROAD, ROADS, AND TRAILS ACROSS LADD FIELD

### A SURVEYOR'S REPORT

By: Patrick H. Kalen, PLS

Prepared for:

The United States Department of Justice

April 18, 1991

## Lazelle Road, Roads, and Trails across Ladd Field

**Statement of the problem:** It is proposed that Paul G. Shultz has a right to access across Fort Wainwright north of the Chena River that derives from 43 USC, paragraph 932, utilizing Trainer Gate Road, Lazelle Road, River Road, Tank Road, and Sage Hill Road. Mr. Shultz alleges that all of these roads are public roads because of the historic use of trails in the area between the Chena River and Birch Hill prior to the creation of Ladd Airfield and Fort Wainwright (and his acquisition of property in the area). He further alleges that the Army agreed to provide alternate access to the existing trails and roads that he says led to his property.

The United States Department of the Army contests this position, maintaining that the gravel roads were constructed by the Army for their own uses, and that no one owning land east of Fort Wainwright used the trails for access until after Fort Wainwright was formed. Legal proceedings are pending in federal court to resolve the dispute. Mr. Shultz wishes to subdivide his property, and is barred by the Fairbanks North Star Borough from doing so until he is able to demonstrate practical legal access.

**Source material and documentation methods:** This report deals with the question of physical and legal access, focusing primarily on the history of the various roads and trails from 1905 through 1951. The United States General Land Office (GLO) surveys, Alaska Road Commission (ARC) reports, various letters in the Territory of Alaska and United States Army files and aerial photographs were relied upon extensively to develop this report. Exhibits were acquired and/or developed from survey maps, field notes, aerial photographs, and property ownership data to aid in the interpretation of the history of land use in the area.

One to twelve thousand (1:12,000), or one inch equals one thousand feet (1"=1,000') was selected as the scale to produce most of the various drawing and photo exhibits, primarily to match a set of photographs taken just prior to the construction of Ladd Field. A digitizer was utilized to enter various maps and aerial photographic data into a 386 PC computer. Survey notes and legal descriptions were also entered into the computer. Drawings were created that depict the entered data on map overlays that illustrate the location of boundaries and land occupation and physical features at various time intervals.

Exhibits have been assigned letters to conform to their proposed use in U.S. District Court Case No. F86-030 Civil. Refer to Exhibit "AH" for a depiction of a strip of land two miles tall north and south and 9 miles wide east to west, in Township One South, Range One West, and Township One South, Ranges One and Two East, plus Section 16 of Township One South, Range One East, of the Fairbanks Meridian. The three township plats were digitized to form a base drawing showing the section lines, the Chena River, and the trails as they appear on the plats. The calls from the field notes for trails and roads that

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the surveyors encountered when running the section and township lines have been added to the drawing. The wording of each call, a tick mark across the section line in the direction called for, and the distance in chains and feet has been placed on this drawing.

Exhibit "F" was prepared from a set of photographs found in the Bureau of Land Management files in Fairbanks called TA-B that were taken for the U.S. Army on July 22, 1938, shortly after the first land withdrawal creating a military base along the Chena River upstream of Fairbanks was issued. The photographs were matched to physical features such as streams and ponds that appear on the USGS map, then trails and roads were digitized into the computer. The photographs are very close to a scale of 1"=1000', so that it has been easy to place them under any other overlay rendered in the same scale to check the approximate position of features from other time periods with those in place in 1938. There are many photos, and it is tedious to compare positions one photo at a time.

The computer drawing allows one to view all of the trails and roads as they existed in 1938 at once, and makes it practical to make accurate comparisons of boundaries and physical features depicted on other drawings and photographs. However, the accuracy is not as close as one would expect to obtain from aerial photographs mapped using more sophisticated equipment and survey control data. While error up to five feet horizontally might be obtained using controlled photography, errors in horizontal positioning of over one hundred feet, and even two hundred feet in the few very worst cases, occur when overlaying property lines and topographical features. This error should not be confused with the distance between physical objects near each other, which can be measured to an accuracy of ten feet or less on the 1938 airphotos.

Refer to Exhibit "G" for a modern topographic map depicting the same area as Exhibit "B". It was prepared by obtaining a negative copy of the United States Geological Survey (USGS) Fairbanks D-2 1:24,000 (1"=2000') southeast quarter map, and the Fairbanks D-1 southwest quarter, combining them, and doubling the scale to 1"=1000' for a depiction of the area under study on clear plastic. No data has been added to, or taken from, this exhibit.

The many transactions that are part of the record of land occupation found in the public records are depicted in 1"=1000' scale on a set of drawings for easy reference to questions such as what land was open and unreserved and when. These drawings have been assigned exhibit designations as follows:

|                            |            |
|----------------------------|------------|
| Property ownership in 1915 | Exhibit J  |
| Property ownership in 1926 | Exhibit DD |
| Property ownership in 1941 | Exhibit H  |
| Property ownership in 1951 | Exhibit I  |
| Property ownership in 1990 | Exhibit AV |





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|---|---------------|
| North Pacific Aerial Surveys, 9/25/72,<br>Fairbanks 1-4, speculative<br>digitized into computer | Exhibit Q     |
| Air Photo Tech, 4/30/74, FAI 5, 017 & 018   | Exhibit R     |
| A computer composite drawing of P, Q and R  | Exhibit P-Q-R |
| NASA High Altitude Aerial Photo, infrared<br>02800 ALK GC CIR 8/79, # 3750                      | Exhibit EC    |

**Early History:** The area that became Ladd Field, and later Fort Wainwright, was first occupied in 1905 after placer gold discoveries near Fairbanks drew a population. Locations were made along the Chena River, and on nearby Birch Hill and Approach Hill, removing some of the land from the status of open and unreserved public land. In the Birch Hill and Chena River areas, the roads under study originated before the land was surveyed.

At the same time, government action was taking place concerning access. Colonel W. P. Richardson came to Skagway, Alaska in May of 1905 to set up the Board of Commissioners for Alaska, carrying out instructions contained in an Act of Congress passed on March 3, 1905 to develop roads in Alaska. At the time, the Territory was "without even the semblance of a road of any kind throughout its vast area," as the first report for 1905 reported. Placer gold discoveries had led to the development of a thriving community at Fairbanks, and some "beginnings of road construction had been undertaken by private subscription." Colonel Richardson undertook to develop a road from Valdez to Eagle in 1905, but by 1906 the Board of Commissioners decided to pioneer a road to Fairbanks first. It was first a pack trail, but was upgraded to a sled road by the federal government in 1906, when a construction program to upgrade it to a wagon road was commenced, starting at Valdez.

The board engaged in an ambitious program to develop roads and trails from Fairbanks to the outlying mines at Ester, Gilmore, Chatanika, and Olnes. The routes out of Fairbanks were all designated as Route 7. Homesteaders on Birch Hill and along the Chena River recorded their entries, but the General Land Office was not yet established. The earliest references to homestead entries is in 1903, and it is clear that the Chena River is the primary highway being used for access. A flurry of entries in 1904 through 1910 encompassed much, if not all of the land upstream from Fairbanks along the Chena River, and the Birch Hill area. The descriptions are poor, making it difficult to state with precision just where the lots were located. However, local place name calls sometimes make it possible to roughly ascertain the location of a homestead parcel. Because of the poor record keeping, and the fact that the people preceded the Alaska Road Commission, the land on Birch Hill, and the land along the Chena River was removed from the public domain before

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any record of roads was placed in the government records. The earliest mention of a road to "Big Chena Hot Springs appears in 1911 in the recorder's office filing of a homestead. A few earlier filings, indicate that the precursor to the Steese Highway was in existence by 1905. It was first called the "summer road to the mines", and the "trail to Goldstream".

The status of the first trails around Birch Hill was to provide private access to homesteads. The GLO and the USGS conducted the first rectangular survey in Alaska beginning in 1910, with most field work in Township 1 South, Range 1 West and Township 1 South, Range 1 East being done in 1911. The plats and field notes were approved in 1913. Some of the homestead driveways are identified in these documents, as is Smallwood Road. None would meet the test of public road at the time of the survey, because the land had been segregated from the public domain and no public construction had taken place yet.

In the plats and in the field notes, cabins are called for at several locations along the Chena River: in Section 12, T. 1 S., R. 1 W.; in Sections 8, 16, 10 and 12, T. 1 S., R. 1 E.; and in Section 7, T. 1 S., R. 2 E. (Courtney's farm house). That settlement outside of Fairbanks was sparse is attested to by the call for some buildings by the names of the owners, such as "Sweeney's House" in Section 6 between present day Lazelle Road and River Road.

The General Land Office had been refining their survey methods since 1804, periodically issuing an upgraded Manual of Instructions for the Survey of the Public Lands of the United States. The version issued in 1902 was the basis for making the original survey establishing the Fairbanks Baseline and the Fairbanks Meridian. When creating townships, or subdividing them into sections, the practice of calling for the distance along the line being run to anything noticeable the surveyor observed was well established. Streams, trails, roads, hills, and changes in vegetation or character of the land are typical calls that are placed both on the plat and in the field notes. This practice is enough a part of the system of rectangular surveys of the United States that these calls are strong evidence as to the existence of objects, the location at which the object intersects the survey line, or the distance and bearing to a nearby structure. If an object, such as a road is not called for, it can be taken as strong evidence that it did not exist when the surveyors established the line.

The question is, what were the termini of the roads existing at the time, and how did they serve the settlement in the area now called Approach Hill, and the land east of Fort Wainwright's current boundaries? It is clear that a winter trail that ran to the west from Fairbanks was located out in the flat, near and a little south of the base of Birch Hill. It was called the Fairbanks-Smallwood Road and was in the process of being established in 1910-1911. It evolved into a winter sled trail to Chena Hot Springs in 1911 to 1912, and is thoroughly documented

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in public records thereafter. It was designated Route 7J, the Fairbanks-Chena Hot Springs Trail, in the Board of Commissioner's report of 1912, which pinpoints that year as when the sled road was initially located and cleared for the first ten miles.

A homestead driveway probably ran right along the base of Birch Hill to the Harry Lazelle homestead. Its documentation is not as clear as that for Route 7J, as it was a private road up through 1921, and so does not appear in the early records of roads and trails. There were a few scattered entries onto Birch Hill prior to the original cadastral survey of 1910-1913 that removed the property from the public domain. The first General Land Office filings were made in 1914, after the GLO plat had been accepted. It is possible that the first two or three homesteaders on Birch Hill used the Fairbanks-Smallwood Trail at first, but it is unlikely that its use as a private driveway was anything more than transitory. The Smallwood Trail was located out in the flat, where permafrost posed great difficulties for wagon road construction. The homesteaders probably built a wagon road right along the base of Birch hill, achieving better drainage, making a road that could be used in the summer. It is probable that numerous trails were made in the course of cutting and hauling firewood from Birch Hill.

The other trails and roads north of the Chena River lack the clear documentation that the Fairbanks-Smallwood Road enjoys. The General Land Office Survey conducted in 1910-1911 shows that many trails existed close to Fairbanks. There are eight calls for trails and roads from the Chena River through the Government Road to Fox (today's Steese Highway) along the section line between Section 11 and 12 and Sections 1 and 2. One mile to the east, along the Fairbanks Meridian, three trails remain north of the Chena River from the Chena River to Birch Hill. And three more miles east of the Fairbanks Meridian, a single "winter road" remains. Here, it is clear that the call is to what became the Fairbanks to Chena Hot Springs Sled Road.

The Chena River was the primary highway used by explorers and settlers to get to land east of Fairbanks. As for overland use, it is clear that there were two routes roughly parallel to each other, the northerly one being named Fairbanks-Smallwood Road on the plat. Calls for the roads and trails are not consistent, and the locations depicted on the township plats beyond the intersection at the section lines are fanciful and inaccurate. (The field note calls, however, are generally regarded by surveyors as being quite accurate). The northerly route is called "wagon road," "Fairbanks-Smallwood Creek Road," "road," "winter wood road," and "winter road" respectively, from west to east. One thing is clear about it however, it was located out in the flat away from the base of Birch Hill, except for two short "wood road" branches to the north, one of which is depicted on the plat of T. 1 S., R. 1 E. The winter road probably ended in Section 3 in 1910, as it was not encountered by the surveyors establishing the Fairbanks Baseline that year.

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The southerly road was also inconsistently named in the survey notes, and is not named on the township plats. In Section 1, about 1600 feet southeast of the beginning of the Fairbanks-Fox Road, it shares the same route as the Fairbanks-Smallwood Road. It branches to the south shortly after crossing the line between Sections 1 and 2. In successive calls as the road is traced to the east it is then called "wagon road," "road," "old road," "road," and finally, "wagon road to Fairbanks" where it appears to end in Section 7, T. 1 S. R. 1 E. It is possible that the surveyors did not show a private driveway continuing to the east from the end of the wagon road to what became the Weist homestead. This southerly route has portions that coincide with the River Road of the present.

In 1911, a cabin was located in Lot 4 of Section 16, at the base of Approach Hill, on the Weist homestead (I have not yet found an earlier name applied to that hill). This hill provided a ready source of birch firewood, and enjoys an excellent aspect for cultivation of the southerly slope, so was likely sought out as higher value land as soon as settlement began near Fairbanks. Another cabin located in Section 10, on Lot 3, the Nissen homestead, was water-locked in 1910-11. Of course, it had excellent access to the Chena River, and to another route to Fairbanks just across the Chena River. None of these scattered entries became official until the rectangular-survey system was established by acceptance of the General Land Office plats of Townships One South and Ranges One West and One East in 1913. In 1914 a number of filings were made. They are depicted on Exhibit D, a map showing the property ownership as of 1915.

It is possible that there was also a connection to a "dim road" called for along the line between Sections 8 and 9 to the northerly side of Approach Hill, where birch trees would predominate. I believe that it is likely that the settler on Lot 4 (James Weist) on the south side of Approach Hill used the Chena River and a road on the south side of the river that connected to a "trail to Fairbanks" as the GLO called it, through Section 16, and nearly due west to Fairbanks. This route, a precursor to Badger Road, would be a much shorter and direct route to town than one running north, particularly in the winter, because it was almost two miles shorter.

A cabin was also in place on Lot 1 of Section 8, along a wagon road connection that ran northeasterly through Sections 8, 9, and 4 to the Fairbanks-Smallwood Road. This trail makes little sense from the point of view of going to Fairbanks - it runs in nearly the opposite direction. However, it would serve as an ideal shortcut for private wood cutters bringing firewood from Birch Hill to the Chena River, cutting four miles off an overland haul. On the GLO plat of the government's 1911 survey, it is the only connection between the Fairbanks-Smallwood Road and the wagon road that is depicted along the Chena River in Sections 5 and 8 (Weist Road). The GLO did not find a wagon road dedicated along the Chena River in Sections 12 and 6. However, they do call for "trail follows bank" at the north bank of the

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Chena along the Fairbanks Meridian.

Another settler's cabin is called for in the survey notes and plat in Section 10 - the George Nissen homestead. The typed notes state that it is in the east half of Section 10, in conflict with the plat, which depicts it in Lot 3, in the west half of Section 10. The cabin is well over a mile from any trail or road located north of the Chena River, and would have been rather difficult to reach via the Fairbanks-Smallwood Road through the middle of Ft. Wainwright, or the roads along the right bank of the Chena, over a mile away, as it is surrounded by sloughs and Columbia Creek. However, it was a relatively short distance downstream on the Chena River to a landing in Section 15 that connected to the "trail to Fairbanks" south of the Chena, the precursor to Badger Road, Montgomery Road, and Gaffney Road.

It is my opinion that as of 1911, a right of way under 43 USC para. 932 was being established by users for what the General Land Office designated as the Fairbanks-Smallwood Road on plats of their 1910 and 1911 surveys that were approved in 1913. The clarity of the right of way is clouded by the uncertainty of location, and the fact that the private owners were there before the road. Prescription, rather than 43 USC para. 932, might more properly be applied to the first 2 miles or so through private property. The Board of Road Commissioners for Alaska report of 1912 indicates that in the winter of 1911-1912, a group of private individuals interested in the route worked on it, and the first \$100.00 of public money was expended on the road. It is not at all clear whether or not the precursor to River Road has a right of way deriving from 43 USC para. 932. In my opinion, such a right could be argued to reach Lot 1 of Section 17, Township 1 South, Range 1 East. Beyond there to the east, it is James Weist's driveway, ending at his farmhouse.

**1910 to Executive Order # 7596, 1937:** The Fairbanks-Chena Hot Springs Road (as the "Smallwood Road" of the BLM plat was named), or Route 7J, is referenced in public records virtually on an annual basis up through the formation of Ladd Field by Executive Order 7596 on March 31, 1937, and continued to be mentioned up through 1946. Some pertinent milestones found in the Board of Road Commissioners for Alaska (up through 1917), and the Alaska Road Commission (from 1921 through 1946) reports are as follows:

1) Route 7J was begun in 1910 by volunteers, when the first 10 miles were located and cleared over an earlier trail. It appears first in the Report of the Board of Road Commissioners for Alaska in 1911-1912. All documents from the Board of Road Commissioners, and from the Alaska Road Commission (ARC), misstate the point of beginning of Route 7J, calling for it at 2.5 miles on Route 7G (Fairbanks-Gilmore Road), possibly because of long detours that were necessary to get started across the Chena River and Noyes Slough. A direct summer route to Gilmore from Fairbanks required bridges. It is difficult to determine the exact location of the beginning of the roads from the earliest written records of 1912 to 1920.

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2) By 1913, the route was developed into a sled road 64 miles in length that went from 2.5 mile on the Fairbanks-Gilmore Road (today's Steese Highway) to Chena Hot Springs. That construction shortened an existing route, which had already been pioneered by private individuals. The earliest route was abandoned and lost to history, a relatively common occurrence with the earliest pioneer routes. It appears likely that the first couple miles of the Fairbanks to Chena Hot Springs Sled Road was constructed close to Birch Hill. It is clear that it was relocated more than twice, and that it did not remain in the positions shown on the GLO plat of 1913.

3) In 1921, in response to a petition from the settlers on Birch Hill, gravel was placed on the first 2.5 or 3 miles of the trail along the base of the hill, upgrading it to a full-fledged wagon road. Route 7J was then listed as 2.5 miles of road, 61.5 miles of sled road. My interpretation of the records is that the upgrading was made to a route to the north that began near the base of Birch Hill and ran along the base of the hill. It was in place in 1910, referred to by the GLO as the "wagon road to ridge trail" in their 1911 survey notes. This probably was built as a private road by the early settlers to Harry Lazelle's homestead, and became Lazelle Road. It was proposed that the road along the bluff would someday be continued along the base of Birch Hill to become the road to Chena Hot Springs.

4) In 1924, the Board of Road Commissioner records say that a new section of sled road was built, south of where the 7J sled road had been located (Smallwood Trail). The gravel road along the base of Birch Hill was designated Route 7GA, Lazelle Road. At first it was listed as the "first three miles of road," then, in 1924 and subsequent years, it was listed as 2.5 miles of wagon road. It was stated that Route 7J, the Fairbanks to Chena Hot Springs Sled Trail, began 2.5 miles from Fairbanks, and 7GA, Lazelle Road, 3 miles from Fairbanks. From that time on, the expenditures of territorial maintenance money on each route were kept separate. Route 7J reverted back to 64 miles in length. The Fairbanks - Chena Hot Springs Sled Road revision made in 1924 may have been close to the Smallwood Road of 1911, but an important distinction can be inferred from aerial photographs of 1938 that the winter road was "engineered," that is, it was laid out as a set of tangents and curves, a remarkable and not too common sight for winter trails.

5) A competing movement was begun to upgrade the road to Chena Hot Springs, in a different location, i.e., a proposal to extend the Weist homestead road. A group of private citizens subscribed funds in 1923. A letter in the ARC files states that the citizens "cleared and grubbed 10 miles of road," but photographic evidence from 1938 casts some doubt on exactly what was done. A movement to get the War Department to upgrade the road subsequently raged on for a number of years, reaching a peak in 1927. However, the local citizens movement failed to garner the funds to construct a road to Chena Hot Springs.

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6) There was some limited success with obtaining funds for Lazelle Road. It was upgraded to 4 miles in length by 1939. However, the status of it as a private road at the place where a branch to the south in Section 5 ran down to the winter road was recognized by officials, who negotiated a right-of-way agreement with the homesteaders. A sixty foot wide right-of-way was platted in conjunction with the right-of-way agreement. The road was extended to 4 miles in length, running up onto Birch Hill and back down in a loop. In my opinion, Lazelle Road from about 1.5 mile and throughout the entire loop portion was removed from the domain of 43 USC para. 932 by these documents. The right-of-way purchase, which included a clause reverting the right-of-way to the owners at such time as the road would "cease to be a public highway."

**Creation of Ladd Field and W. W. II:** On March 31, 1937, Executive Order 7596 created Ladd Field out of unreserved public land south of the Chena River. The order contained some land north of the river by including all of Section 12, Township 1 South, Range 1 West, and Section 8, Township 1 South, Range 1 East. The former encompasses the extension of the Alaska Railroad that Trainer Gate Road parallels; the latter encompasses a substantial portion of the left bank of the Chena River where River Road was subsequently constructed. At this point in time, the Fairbanks-Chena Hot Springs Sled Road and Lazelle Road were unaffected.

On June 12, 1943 Ladd Field was expanded considerably by Public Land Order #139. Additional purchases of private property were made by the Army to consolidate the military base boundaries, to make the Birch Hill area available for fuel storage, and to construct landing lights on Approach Hill. The Army purchases of the private holdings made the use of Lazelle Road moot for the properties near Birch Hill. A final purchase (by a condemnation action) was of the Nodaker homestead in 1952, which had relied on a driveway running easterly from the Lazelle Road loop up on Birch Hill. After that purchase there was no more private property being served by the Lazelle Road. The Army tended to use the road as its own throughout the war, and it appears that Nodaker had to get to Lazelle Road over the top of Birch Hill. River Road no longer served any private property after the purchases. No road existed east of Approach Hill as the aerial photography discussed below shows.

A route north of Birch Hill that ran along the foothills in better drained land was pioneered, a viable alternate to the sled road. Gold mining was shut down during the war, so the mines that had been served by the sled road had zero traffic during the war.

There is a change in the way records were kept from 1935 to 1940, as the Territory of Alaska assumed some road maintenance responsibility, side by side with the Board of Commissioners for Alaska. As indicated above, the Territorial entity was named the

## Lazelle Road, Roads, and Trails across Ladd Field

Alaska Road Commission (ARC). In its records, the 7J and 7GA designations have been dropped, as was the descriptive format of the work done on the roads. It was replaced by tabular reports of dollar expenditures on various roads by name. The Fairbanks-Chena Hots Springs sled road continued to receive maintenance funds up through 1946. I suspect that most of these funds were expended far from town. The portion through Ladd Field was blocked from 1943 and remained blocked throughout the war. It is my opinion that in the euphoria that accompanied the end of the war, the trail was briefly used, from 1946 to 1949 or 1950. Alternative routes from Gilmore Trail and the precursor to Chena Hot Springs Road had come into existence.

In 1950, an extension was pushed through from Lazelle Road near the present day ski lodge along the base of Birch Hill to Sage Hill. The Fairbanks to Chena Hot Springs Sled Road from Canol Road to Sage Hill was permanently abandoned about the same time this connection was made.

In my opinion, nothing contained in PLO #139 acted to extinguish or vacate the sled road, and its present status is that of abandoned right-of-way. The length of time of abandonment (and the documentation on maps of its precise location) is such that a court would have to decide where it is, should a reason arise to determine its original location. It is my opinion that the record is clear that Route 7J was never usable as a summer road for vehicular traffic, and that commercial traffic and travel to occupied land ceased when Chena Hot Springs Road opened.

**Evidence from Aerial Photographs, 1938 to 1951:** Heretofore the discussion is based on maps and written records from surveyors and accountants. It is difficult to pin down things such as where the roads are located, what habitation is present, and how much development has taken place. On July 22, 1938, a series of low level aerial photographs were commissioned by the U.S. Army. A fine set of stereo pairs covering the entire area under contention was obtained, and somehow saved for posterity. One set of black and white prints is in the possession of the Bureau of Land Management. I have not been able to determine whether the negatives for these photographs exist, or whether a map was made using a stereoscopic plotter and the photos. Still, the photos were taken at a relatively low level, so that roads, trails, and houses show up clearly, and it is possible to state with some degree of confidence what existed at the time. The scale of the photos is very close to 1"=1000'.

I also obtained aerial photographs taken by USGS in August 4, 1949, and August 9, 1951, and studied oblique photographs taken by the Army on August 28, 1946, also in the possession of the BLM. Things such as faint trails would be difficult to discern on the USGS photos, due to the high altitude from which they were taken, and impossible on the Army obliques. Roads show clearly on all photos.



## Lazelle Road, Roads, and Trails across Ladd Field

A careful study of the 1938 photos, searching for roads and trails, leads me to the following conclusions:

1) There is a trail leading to Approach Hill from Fairbanks that approximates one in Sections 5, 8, and 9 which was in place in 1911. There are two connections to the Fairbanks-Chena Hot Springs Sled Road. Neither one makes much sense from the point of view of "going to town," as the trail itself is much more direct. In a fashion similar to xax connection "A" noted by the GLO in 1911, the connections slant strongly toward the northeast, so that one going toward Fairbanks would almost double the distance traveled. Connection "A" itself has faded to where it does not show up on the aerial photographs, leading me to the opinion that it had been abandoned for years. The trail along the river also fades away wherever it crosses open ground. I could not discern bridges across the various sloughs it crosses. It is my opinion that it was not practical as a route in the summer, because the trace is so weak - obviously no fill material had been placed yet. It should be noted that the Approach Hill homestead was quite close to a well-defined trail on the south side of the Chena River that was the "trail to Fairbanks" in 1911, and still in use in 1938.

2) The Fairbanks-Chena Hot Springs Sled Road has a clear, strong trace in 1938, presumably from a combination of use and maintenance, but no gravel fill material is apparent on any part of the trail. Gravel looks white on aerial photos, and in no place is the white appearance typical of gravel in evidence. The sled road appears to have been engineered, that is, laid out with tangents and curves, quite unlike the fragments of the earlier Smallwood Trail. A bridge across Columbia Creek is evident.

Lazelle Road remains quite separate from the sled road for about 1.5 miles from the Steese Highway, and, at that point, is a well defined two lane road, with imported gravel. It runs close to the sled road at 1.5 mile, and numerous trail connections can be seen. Lazelle Road after that point is not much different in appearance from the sled road, indicating that it is a dirt road. The respective trails diverge and then converge again in the south half of Section 4, at about four miles along Lazelle Road. From there on, there is one strong trail track, with faint branches. Should a court ever be required to rule on the location of Lazelle Road and the Fairbanks-Chena Hot Springs Sled Roads, it is my opinion that the July 22, 1938 photographs would provide the strongest piece of evidence as to their actual locations.

3) A cabin is located on Lot 3, Section 10, not far from where one is indicated on the GLO plat of the 1910-1911 survey. I could not find a direct trail leading from the Approach Hill homestead to this cabin, but the sloughs nearby may well have provided a roundabout way to get to the cabin in the winter. This cabin, the only sign of habitation east of Approach Hill, is totally water-locked in 1938. It is my opinion that access was made via the Chena River and the "trail to Fairbanks," which came

## Lazelle Road, Roads, and Trails across Ladd Field

quite close to the Chena River just downstream of the cabin. Unlike Approach Hill, there is only one building, no sign of cultivation (none larger than the cabin), and no merchantable firewood in proximity.

In the period between 1938 and 1946, when the base was expanded to the north, intermediate aerial photographic documentation is not as good. A set of 1946 oblique photographs do not allow for mapping, and give poor coverage of the main base and the western entrances, but provide excellent views from Ski Road to Approach Hill and beyond. Some specific facts are revealed by the 1946, 1949, and 1951 aerial photographs concerning the "completion" of Ladd Field, as follows:

1) By 1946, the top of Approach Hill has been excavated, cutting off the highest two points, and a cluster of farm buildings that were located in the southeast corner of a cleared field at the base of the hill have been removed. These buildings were located quite close to where a cabin was located in 1911. No all-weather access to Approach Hill is discernible as yet (i.e. a gravel fill section has yet to be constructed), except for 200 to 300 feet along the right bank of the Chena River. It seems likely that excavation equipment crossed the Chena River from Approach Hill to the east end of the runway. It is clear that the Approach Hill farm is no longer operating in 1946.

2) Further to the west, in Section 10, there is still a cabin on or nearly on Lot 3. A road has not yet been built east of Approach Hill, and the lot remains water locked. A cat trail appears now, north of Approach Hill by several hundred feet and of the cabin by 1600 to 1800 feet. It was built by the Army for a power line. A new structure appears in Lot 2 of Section 15 in 1949 that was absent in 1938. It lies directly across from Badger Road, where it comes close to the Chena River. It lies on the same water locked island as the smaller cabin on Lot 3 of Section 10. It clearly did not, as of August, 1949, enjoy overland access from River Road.

3) The "trail to Fairbanks" has been replaced by Montgomery Road and Gaffney Road, running across Ladd Field. A few portions of the new roads are in approximately the same place as the 1938 trails. Private traffic is routed down Badger Road to the Richardson Highway. This is the most practical way to get to Fairbanks for the homesteader living on the still water-locked areas across the Chena River upstream of Approach Hill, the Nissen homestead (if it was occupied).

4) In 1946, a portion of River Road (called Tank Road on the USGS maps of today) was constructed from the west to an intersection near the section line between Sections 5 and 6, then run north-northwesterly from the intersection to Lazelle Road, where the ski lodge is located today. No portion of Ski Road, as it is called, lies near old trails except for a perpendicular crossing of the Fairbanks to Chena Hot Springs Sled Road. About 2000 feet

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of the new road was built on or close to the old wagon road to Fairbanks, Weiss, or River Road. Most of it was a brand new road that began near the Trainer Gate Road westerly bridge approach. Road construction in 1946, appears to be "in progress." Where the road abruptly turns left at 90°, to run to Lazelle road there is a T intersection, rather than a curve to the left, with the continuation not meeting exactly, but pointing toward the old River Road trail. By 1949, the road had been continued past the T intersection the rest of the way to Approach Hill, very close to the old wagon road position, until near the hill itself, where a the Army chose a new route. Trainer Gate Road does not show in the 1946 photo; however, its construction as an adjunct to the Alaska Railroad extension to Ladd Field is well documented elsewhere.

5) Lazelle Road was developed into a loop road by 1946, with numerous branches to the Army fuel storage facilities. A quarry was operated in Section 1, Township 1 South, Range 1 West for many years. It became a primary source for fill material for the base. The Army built a tank farm on Birch Hill north of Lazelle Road, and constructed Canol Road to get to it, and a branch off Canol Road to reach Lazelle Road and the material site. A quarter mile section of the road was abandoned as a road in Section 1 from at least 1949 to the present. It also appears that access to the base and Birch Hill from Lazelle Road was extinguished in 1943 when the Army consolidated its holdings on Birch Hill. It is my opinion that Lazelle Road has been operated by the Army, for its own purposes, since 1943, and that no private individual has depended upon it for access since World War II. However, I am not yet aware of any vacation activity that was applied to the road.

6) The case for the Fairbanks-Chena Hot Springs Sled Road is somewhat more ambiguous as to purpose. Although the Army did purchase any private holdings near Birch Hill that would have relied on the road, it was maintained primarily as a true connection, with a clearly defined terminus, and maintained by public funds up through 1946. It remains clearly identifiable in the 1949 and 1951 aerial photographs. What happened to it was simply that as the area north of Birch Hill and Wigwam Creek was opened to homesteading after World War II, the settlers built a better road, much of it up out of the permafrost bog that the sled road crossed. Somewhere between 4 and 6 miles of bog crossing was avoided by the new route, which became Chena Hot Springs Road, a clearly well developed road by 1949. I suspect that the 1946 entry of some maintenance expenditures by the Alaska Road Commission on the Fairbanks-Chena Sled Road was the last time the public was concerned with the route across Ladd Field. The Fairbanks people had finally achieved what they had agitated for so hard from 1924 to 1928, a real road to Chena Hot Springs. In 1951, public construction and maintenance efforts were redirected to that road, and the old sled road was abandoned as a commercial route. Portions of the old winter trail remain in use today by dog mushers, and other winter recreational users.

## Lazelle Road, Roads, and Trails across Ladd Field

**1950 to the present:** The army constructed a connection from River Road near Approach Hill to Sage Hill in 1952, which they call Sage Hill Road. It ran around the north side of Birch Hill and up the hill, connecting to the Lazelle Road loop up on Birch Hill. The portion of Lazelle Road that runs from the area in Section 5 where it ran up onto Birch Hill in 1938 toward Sage Hill was extended along the base of Birch Hill by the Army in 1953 or 1954 to connect with Sage Hill Road. It was not constructed on any portion of the original Fairbanks to Chena Hot Springs Sled Road. The old sled trail track remains clearly visible on the ground to this day, getting as close as 100 feet from the base of Birch Hill at its closest.

The Fairbanks to Chena Hot Springs Trail was blocked by the sanitary landfill in Section 1 in 1969 or 1970. Aerial photographs clearly show this blockage running over the trail and extending 300 to 500 feet north of the trail by June 6, 1971, when it was photographed. Very little has been done to the dump fill limits since then, with the result that the dump has simply grown higher.

**Conclusions:** Access to the Paul Shultz's property cannot be found in the manner sought in his complaint. Access by each of the roads under study is as follows:

1) Trainer Gate Road. There can be no access that relies on Trainer Gate Road, as it was built by the Army for its own use, on land that was not available for entry or for building of roads pursuant to provisions of 43 USC para. 932.

2) River Road. This road did not even have so much as a private driveway that led to Mr. Shultz's land by 1951, and had not served private property owners since 1943. Rights to its use ended that year, when the Army purchased the property it served. As late as 1970, no person used it for access.

3) Lazelle Road. This road never did have any use deriving from 43 USC para. 932. It became a public road in two actions, a petition by the owners to transfer it to the ARC in 1923, and a filing of a right of way document in 1940 dedicating much of the road. Its use as a public road ceased in 1943 when the Army purchased the private land over which it was built. One individual retained rights to use it for a private driveway until 1951, when the Army purchased his homestead.

4) Fairbanks-Chena Hot Springs Road. This road has a murky origin, and was revised in location a number of times, and renamed as well, from Smallwood Road to Big Chena Hot Springs Road. It could be reached by Lazelle Road in several locations prior to 1923. By 1924, its location was fixed by public construction. Maps from 1925 forward confirm that it was

## Lazelle Road, Roads, and Trails across Ladd Field

maintained in separate location from Lazelle Road from 1924 through 1943, when the Army blocked it. Sporadic use of it probably occurred after the war, but the portion from Canol Road to Sage Hill was abandoned by about 1950 or 1951. It has never been vacated. It became a public road through two private holdings by acceptance of its location and use. From the Fairbanks Meridian to Chena Hot Springs the winter trail was entirely on land that was open and unreserved land, and has a vested right of way pursuant to 43 USC para. 932. This right is subject to regulation by the United States where it crosses federal land, and the right may be affected by other federal statutes.

4) Courtney Ranch Road. This road name was first used in 1991 by the plaintiff in Case 86 30 Civil. A winter trail that appears on the 1938 aerial photographs. It is a dead end trail running through wild, unenclosed and uncultivated country, with branches at both the beginning of the trail near Sage Hill, and at the end near the confluence of the Little Chena And Chena Rivers. Large gaps in the route make it impossible to state precisely where it was located. It appears to have sporadic, desultory use, and, like the Courtney Ranch homestead that it appears to lead to, it is abandoned by 1938. Subsequent trails lead to the east, but not to the Courtney Ranch. There are at least three, and possibly four such faint trails leading generally southeast from near Sage Hill. Today, a route popular with recreational users has replaced the first and second trails across the tundra visible in aerial photographs. It is clear that although the land was available, use by the public was not established to any of the several trails that would qualify as highways pursuant to 43 USC para. 932.

5) Homestead Road. This road did not exist yet in 1944 when the Army purchased the Weist homestead around Approach Hill, although it is possible that the other land owner, and the entryman east of the Weist homestead made foot trails to their property through the Weist homestead. The Army pushed cat trails through the property to the Chena River. When Homestead Road was constructed in the early 60's, it was partially located on the army cat trails. By 1972, there was not yet any persons using homestead road to get to their homes. The road took place after the rights to access had been purchased by the Army, on land that was not available for the creation of public roads.

The Army built the virtually all of the roads leading to the private land east of Fort Wainwright, almost all of it new routing, during a time period when the mines were closed and no people crossed Ladd field to get to their homes. What remains is a right of the public to the Fairbanks-Chena Hot Springs Trail, but probably not to any branches, or driveways within Army property.

Lazelle Road, Roads, and Trails across Ladd Field

I HEREBY CERTIFY that I am properly registered and licensed to practice Land Surveying in the State of Alaska, and that to the best of my knowledge the dimensions, details, and opinions contained in this Report are correct and true.

Date: April 18, 1991



AUG 02 1991

BRUCE M. LANDON  
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Environment & Natural Resources Division  
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FILED

NOV 25 1991

UNITED STATES DISTRICT COURT,  
DISTRICT OF ALASKA  
IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA  
By \_\_\_\_\_ Deputy

PAUL G. SHULTZ,  
  
Plaintiff,  
  
v.  
  
DEPARTMENT OF ARMY, UNITED  
STATES OF AMERICA,  
  
Defendant.

Case No. F86-030 Civil  
  
FINDINGS OF FACT  
*AND*  
CONCLUSIONS OF LAW

*JK*

- I. FINDINGS RELATING TO PLAINTIFF AND HIS PROPERTY.
1. Plaintiff owns land east of Fort Wainwright.
  2. The only existing road access between Fairbanks and plaintiff's property is through Fort Wainwright.
  3. Plaintiff's southern property line is the north bank of the Chena River.
  4. The closest public highway to plaintiff's property is Badger Road which is on the south side of the Chena River.
  5. There is no bridge across the Chena River in the vicinity of plaintiff's property.

6. Plaintiff and other property owners obtain road access to their property through Fort Wainwright generally using a route consisting of Trainer Road, River Road and Homestead Road.

7. The Trainer Road/River Road/ Homestead Road route does not correspond to routes which plaintiff claims pre-dated the creation of Fort Wainwright.

8. The Department of Army issues decals <sup>or permits</sup> to civilian <sup>9x</sup> property owners east of Fort Wainwright allowing them to traverse Fort Wainwright.

9. Plaintiff is currently barred from Fort Wainwright pursuant to a probation order filed October 16, 1990.

10. The Fairbanks NorthStar Borough will not permit plaintiff to subdivide his property unless he has unrestricted legal access to his property constructed to Borough standards.

## II. FINDINGS RELATING TO THE GENERAL HISTORY OF FAIRBANKS AND FORT WAINWRIGHT.

11. Fairbanks came into existence around the turn of the century.

12. During the period 1902-1920, a significant number of agriculture homesteads developed along the Chena River.

13. During the period 1902-1920, there was traffic to other mining settlements east of Fairbanks including Smallwood Creek.




14. Firewood was the dominant form of heating in Fairbanks in the early part of the twentieth century and numerous wood roads existed throughout the Fairbanks area.

15. Fort Wainwright (previously also known as Ladd Field and Ladd Air Force Base) is a military installation established through a series of land orders and land acquisition actions, the first of which was Executive Order (EO) 7596 dated March 31, 1937. The land orders and acquisitions were made subject to valid existing rights.

16. Many trails and roads came into existence prior to the creation of Fort Wainwright.

### III. FINDINGS RELATING TO WIEST ROAD.

17. A road commonly called Wiest Road existed prior to the establishment of Fort Wainwright.

18. Wiest Road terminated at the Wiest Homestead (S 1/2 of NW 1/4 and SW 1/4 Sec. 9, and lots 4 and 5 of Sec. 16, T1S, R1E, Fairbanks Meridian) inside what is now Fort Wainwright and to the west of plaintiff's property. Wiest Road does not reach plaintiff's property, *and never did.* 

19. Wiest Road has been obstructed by the Fort Wainwright sanitary landfill since a time prior to 1974 and continuously thereafter.

20. By virtue of the landfill obstruction, plaintiff and his predecessors in title knew or should have known of the government's claim, and if Wiest Road ever was an RS 2477 right-of-way, the statute of limitations in 28 U.S.C. § 2409a(g) bars ~~its adjudication.~~ *plaintiff's claim.* H

21. The appearance of Wiest Road on aerial photos dated 1979 indicates that Wiest Road had fallen into disuse long prior to 1974.

22. The disuse does not establish abandonment but is circumstantial evidence which leads the court to infer that Wiest Road had been blocked by the military for a period beginning prior to twelve years before the filing of the complaint in this action.

23. Homestead Road does not ~~overlap~~ *correspond to or overlap* Wiest Road. 1/2

24. Wiest Road does not correspond to the location of River Road (also known as Tank Road). At points, the routes overlap, but particularly west of the Fort Wainwright sanitary landfill the two routes diverge markedly.

IV. FINDINGS RELATING TO HOMESTEAD ROAD AND ACCESS TO NISSEN HOMESTEAD.

25. Plaintiff's earliest predecessor in interest was George Nissen whose homestead (SE 1/4 of SW 1/4 Sec. 3 and SW 1/4 of SE 1/4 Sec. 3 and E 1/2 of N 1/4 and W 1/2 of NE 1/4 and Lots 2 and 3 of Sec. 10, T1S, R1E, Fairbanks Meridian) is on the north

bank of the Chena River approximately 2 miles upriver (east) of the Wiest homestead.

26. George Nissen raised a substantial vegetable crop.

27. The size of the Nissen crop far exceeds that needed for personal consumption and was produced for sale in Fairbanks.

28. Nissen built his cabin on the Chena River. *The court infers from this circumstantial evidence that Nissen used the Chena River to get his crops to market. and the convenience of down river and inconvenience of overland travel* <sup>^</sup> 1/4

29. If Nissen had taken his crops to market by wagon overland, a clear road should have been visible on the 1938 aerial photos, but was not.

30. There is no bridge or other crossing of Columbia Slough visible on aerial photos taken in 1938.

31. During the 1920's, Mr. Buzby swam horses across Columbia Slough.

32. Columbia Slough flows from north to south into the Chena River at a point between the Wiest and Nissen homesteads.

33. It would not be possible for a wagon to cross Columbia Slough without a bridge or fill.

34. Some individuals went to the vicinity of Nissen's property in the winter from the Fairbanks Chena Hotsprings Winter Sled Road by travelling along Columbia Slough when frozen.

35. A trail and foot bridge identified by Professor Mendenhall on a 1938 aerial photo were built on land that was at one time part of Nissen's homestead and do not constitute an RS

2477 right-of-way extension from the Wiest homestead to Nissen's homestead.

36. By 1918, Nissen sometimes used Wiest Road to get to Fairbanks, but not for regular transport of his crops. By 1918, Wiest and a number of other homesteaders along Wiest Road had already taken up their homesteads.

37. In approximately 1949, a Mr. Whipple, whose homestead was on the north bank of the Chena River just east of the Nissen homestead, had an automobile on his property. Mr. Whipple did not enter his homestead until 1947, by which time Fort Wainwright and a number of homesteads prevented the creation of any RS-2477 right-of-way to Whipple's property. Mr. Whipple's access was on roads <sup>and possibly</sup> ~~and/or~~ power line clearings created by the military. *pk*

38. If a trail or road had existed to Nissen's homestead in 1911, it is unlikely that the section line calls of the survey of T1S, R1E, Fairbanks Meridian (accepted in 1913), would have missed it.

39. Prior to the establishment of Fort Wainwright, no route susceptible to wagon or motor vehicle use existed between the Wiest and Nissen homesteads.

40. Nissen used the Chena River to get his crop to town.

41. Homestead Road was constructed at some time between 1938 and 1948.

42. Within Fort Wainwright, Homestead Road traverses Lots 3, 4, 5 of Sec. 16, T1S, R1E, Fairbanks Meridian.

43. Lot 3 of Sec. 16, T1S, R1E, Fairbanks Meridian was withdrawn for territorial school purposes in 1915 and has been in a withdrawn status continuously up to the present.

44. James Wiest filed a homestead application with the General Land Office on July 23, 1914 which includes Lots 4 and 5, Sec. 16, T1S, R1E, Fairbanks Meridian and those lots have been continuously out of public domain status since at least that date.

45. No public highway easement exists for that portion of Homestead Road on Fort Wainwright under RS 2477 or otherwise.

V. FINDINGS RELATING TO ACCESS TO THE VICINITY OF CORTNEY RANCH.

46. There was no established trail of fixed location from the Fairbanks Chena Hotsprings Winter Sled Road, LaZelle Road or Wiest Road to the vicinity of Cortney Ranch (SE 1/4 of SW 1/4 and Lots 4, 5, 6 of Sec. 6, T1S, R2E, Fairbanks Meridian) prior to the time that portions of the intervening land now within Fort Wainwright had been taken up by homestead entries or acquired by the military.

47. Overland travel to Cortney Ranch from Fairbanks traversed swamp land and wooded areas with numerous wood roads. Consequently, it was not necessary to establish a definite route to Cortney Ranch.

48. A summer road to Cortney Ranch was unfeasible because of the swamp land.

Courtney, not Costney

1/2

49. No summer road appeared in the vicinity of Cortney Ranch on the 1938 aerial photos. If a summer road had existed in 1938, it would have been clearly visible.

50. Travel in winter to Cortney Ranch occurred opportunistically anywhere across the frozen, treeless swamp.

51. No individual route to Cortney Ranch ever experienced sufficient use to create an RS 2477 right-of-way by public users.

52. During the 1920's, Mr. Buzby travelled to Cortney Ranch, at which time the whole area was criss-crossed with wood trails.

53. Wood haulers moved wood using Wiest Road and other roads and then took off to the east along wood trails on various changing routes.

54. The 1938 aerial photos indicate trail fragments to the vicinity of Cortney Ranch which traverse the northernmost portion of the Nissen homestead. Nissen did not use that route to get to Fairbanks.

55. In the 1938 aerial photos, the Fairbanks Chena Hotsprings Winter Sled Road is cleared to a width of 12' to 16'; Wiest Road is 10' to 12' wide, while the fragments of trails leading to the vicinity of Cortney Ranch are considerably thinner and less distinct.

56. By the time Mr. Wigger observed regular traffic on the trail to the vicinity of Cortney Ranch, the military reservation had already come into existence.

57. No right-of-way under RS 2477 or otherwise exists across Fort Wainwright to the vicinity of Cortney Ranch.

VI. FINDINGS RELATING TO LAZELLE ROAD.

58. LaZelle Road has been continuously blocked by a locked gate and fence surrounding the Fort Wainwright oil tank farm and by the tank farm itself at a point on the western boundary of Fort Wainwright for a period of time exceeding twelve years prior to the institution of this action.

59. LaZelle Road has been blocked by a ski tow cable at the Fort Wainwright ski area for a period in excess of twelve years prior to the institution of this action.

60. By virtue of these blockages, plaintiff and his predecessors knew or should have known of the military's claim, and adjudication of LaZelle Road is barred by the statute of limitations in 28 U.S.C. § 2409a(g).

61. LaZelle Road was built in stages. An extension of LaZelle Road in Sections 3 and 4, T1S, R1E, Fairbanks Meridian was constructed by the military in 1950 or 1951 after most of the land in the extension was unavailable for the creation of an RS 2477 right-of-way either because it had been withdrawn or acquired by the military, or because it had been taken up by homesteads.

62. LaZelle Road does not overlap the Fairbanks Chena Hotsprings Winter Sled Road and is located in excess of 100' from the sled road.

63. In Sections 3 and 4, T1S, R1E, Fairbanks Meridian, Lazelle Road is cut into the hillside.

64. The cut does not appear on aerial photos until after 1949.

65. Mr. Kalen confirmed with a tape measure, by measuring from LaZelle Road to the Fairbanks Chena Hotsprings Winter Sled Road, that the latter is in the flats more than 100' from LaZelle Road.

66. A sled trail could not have existed in the location of LaZelle Road in the absence of a cut because the natural slope is such that sleds could not stay on a trail without the cut.

67. Neither LaZelle Road nor the Fairbanks Chena Hotsprings Winter Sled Road went to plaintiff's property.

68. In order for there to be an RS 2477 right-of-way to plaintiff's property, plaintiff would have to establish the existence of an RS 2477 right-of-way from LaZelle Road or the Fairbanks Chena Hotsprings Winter Sled Road to plaintiff's property.

69. There was no trail or road right-of-way from LaZelle Road or Fairbanks Chena Hotsprings Winter Sled Road to plaintiff's property established under RS 2477 or otherwise.



VII. FINDINGS RELATING TO FAIRBANKS  
CHENA HOTSPRINGS WINTER SLED ROAD.

70. A "sled road" is a winter trail wide enough to accommodate a large horse drawn bob sled such as might be used to haul wood or passengers.

71. Fairbanks Chena Winter Sled Road acquired its present location in approximately 1923.

72. Tree ring counts indicate that the Fairbanks Chena ~~Hot Springs~~ <sup>used for occasional recreational snow machine use on other</sup> Winter Sled Road has not been used since approximately 1950-1951. This is circumstantial evidence from which the court infers blockage of the winter sled road for a period in excess of twelve years prior to the filing of the complaint in this case.

73. Fairbanks Chena Hot Springs Winter Sled Road has been continuously blocked for several hundred feet by the Fort Wainwright sanitary landfill for a period of time in excess of twelve years prior to the filing of the complaint in this action.

74. By virtue of this blockage, plaintiff and his predecessors in interest knew or should have known that the government claimed the right to restrict access along the Fairbanks Chena Hot Springs Winter Sled Road for a period in excess of twelve years prior to the filing of the complaint in this action.

75. Adjudication of the Fairbanks Chena Hot Springs Winter Sled Road is barred by the statute of limitations in 28 U.S.C. § 2409a(g).

VIII. FINDINGS RELATING TO FAIRBANKS SMALLWOOD ROAD.

76. Fairbanks Smallwood Road has been continuously blocked by a fence near the western boundary of Fort Wainwright for a period in excess of twelve years prior to the filing of the complaint in this action.

77. The Fairbanks Smallwood Road does not overlap or come within 100' of the Trainer Road/River Road/Homestead Road route used by plaintiff to access his property.

78. By virtue of the blockage by the fence, plaintiff and his predecessors in interest knew or should have known of the government's claim and adjudication of the Fairbanks Smallwood Road is, therefore, barred by the statute of limitations in 28 U.S.C. § 2409a(g).

IX. FINDINGS RELATING TO SAGE HILL ROAD.

79. Sage Hill Road is a road running in a northeasterly direction from River Road in Sec. 8, T1S, R1E, Fairbanks Meridian to LaZelle Road in Sec. 4, T1S, R1E, Fairbanks Meridian.

80. Sage Hill Road was built by the military after the military had acquired the land traversed thereby and is not a public right-of-way established under RS 2477 or otherwise.

81. Aerial photos taken in 1938 reveal a number of trail fragments in the vicinity of the present location of Sage Hill Road. None of the trail fragments constitute an established route of travel with sufficient use to establish an RS 2477 right-of-way.

X. FINDINGS RELATING TO TRAINER ROAD.

82. Government control of Trainer Gate during the period from 1974-76 was intermittent and insufficient to put plaintiff or his predecessors in interest on notice that the United States claimed an interest in controlling access on the road.

83. During the period from 1974-76, security measures by Alyeska at Trainer Gate were designed to protect Alyeska's private property kept on Fort Wainwright.

84. During the period 1974-1976, there existed long periods of time when one could drive through an open gate with no guards and an apparently boarded up guard house.

85. Trainer Road was built by the military after acquisition of the land traversed. *I infer this mainly from the time it came into existence.*

86. Trainer Road does not appear on the 1938 aerial photos of Fort Wainwright.

87. Trainer Road is neither congruent with nor within 100' of the location of roads or trails pre-existing the creation of Fort Wainwright.

88. In 1944, the military blocked a number of routes across Fort Wainwright and suggested two alternate routes to Steele Creek and vicinity. One of those alternate routes included the present location of Trainer Road.

89. In rerouting traffic along the alternate routes, the military neither dedicated the alternate routes as public

rights-of-way nor offered to create a public right-of-way along either of the alternate routes.

90. Trainer Road is not a public right-of-way under RS 2477 or otherwise.

*CONCLUSIONS OF LAW*

~~XI. GENERAL FINDINGS.~~

91. Plaintiff has failed to prove the existence of any RS 2477 right-of-way or other right-of-way across Fort Wainwright which either alone or in combination with other rights-of-way provide access to plaintiff's property east of Fort Wainwright.

92. In the alternative, the interest claimed by plaintiff to use public highways to his property is not an interest within the scope of 28 U.S.C. § 2409a(g), and this court is without jurisdiction under the Tenth Circuit's holding in Kinscherff v. United States, 586 F.2d 159 (10th Cir. 1978). *79*

DATED this 25 day of November, 1991.

Copies to:  
Sheehan  
Landon(DOJ)  
Cooper  
12-11-91 cpb

*[Signature]*  
ANDREW J. KLEINFELD  
United States District Judge

*92. To the extent that any ~~rights~~ R.S. 2477 rights of way ever provided access to plaintiff's property, plaintiff's action is nevertheless barred by 28 USC § 2409a(g).*