IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

AHTNA, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES; STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES; KEITH HJELMSTAD; SANDRA HJELMSTAD; AMY J. HUBBARD; LESTER A. HUBBARD; LUCY E. JORDAN; MICHAEL J. JORDAN; RICHARD A. KOVALSKY; AARON D. MAULDIN; DONNA RUTH MILLER; JOSEPH DONALD MILLER; DEBRA J. SISSOM; KENNETH H. SISSOM; JUDY V. VOORHIS; TONY R. VOORHIS; TERRY TOWNSEND; DEBBIE TOWNSEND; ERIC HELMS; LINDA HELMS; and all other persons or parties unknown claiming a right, title, estate, lien, or interest in the real estate described in the pleadings in this action,	)	
	)	
Defendants.	)	
	)	Case No. 3AN-08-06337 CI

ORDER GRANTING AHTNA, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On December 17, 2015 Plaintiff Ahtna, Inc. ("Ahtna"). filed a motion for partial summary judgment. Ahtna's motion seeks a declaration from this Court that rights-of-way established under Revised Statute ("RS") 2744, 43 U.S.C. § 932, permit ingress and egress, but not campsites, day-use sites, and other uses

unrelated to transportation. The Court heard oral argument on Ahtna's motion on April 14, 2016. The Court now concludes that the rights conveyed to the public under RS 2477 are limited to egress and ingress. Accordingly, Ahtna's motion for partial summary judgment is GRANTED.

A. Background

This action concerns a road, locally known as the Brenwick-Craig Road, which runs approximately 25 miles from Copper Center to the outlet of Klutina Lake. The road occupies a federal highway easement, but the State claims additional rights to the roadway and surrounding property under RS 2477. In addition to the road itself, the State alleges that it obtained rights under RS 2477 to "various spurs and arterials." State of Alaska's Answer at 12, ¶ 84. The State further alleges that these "spurs and arterials" were historically used for "boat launching, camping, [and] day-use sites." *Id.* According to the State, RS 2477 conveyed not only the right-of-way itself, but also the right to incidental public uses such as camping and boat launching.

B. Summary Judgment Standard

Summary judgment is proper when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Civil Rule 56(c); *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 516 (Alaska 2014). Here, the State's interpretation of RS 2477 is, as a matter of law, overbroad. Therefore, Ahtna is entitled to partial summary judgment.

C. RS 2477

Congress passed RS 2477 in 1866. In its entirety, the statute provides: "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." 43 U.S.C. § 932. This grant "was self-executing, meaning that an RS 2477 right-of-way automatically came into existence if a public highway was established across public land in accordance with the law of Alaska." *Price v. Eastham*, 75 P.3d 1051, 1055 (Alaska 2003).

In 1976, Congress enacted the Federal Land Policy and Management Act, which repealed RS 2477. *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 741 (10th Cir. 2005). However, rights-of-way established before the repeal remain valid, and have been frozen "as they were in 1976." *Id.*

To prove that an RS 2477 right-of-way exists, a claimant must show either "some positive act" by the State "clearly manifesting an intention to accept a grant," or continuous public use "for such a period of time and under such conditions as to prove that the grant has been accepted." *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961). A right-of-way created by public use "connotes definite termini." *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 414 (Alaska 1985).

In *Dillingham Commercial*, the City of Dillingham claimed it had obtained fee simple ownership of a right-of-way by operation of RS 2477. 705 P.2d at 415. The Alaska Supreme Court rejected this position, reversing the lower court and holding that "a right of way creates only a right of use." *Id.* More specifically, the Court held that one who proves an RS 2477 right of way gains only the right to pass over the land, or the right of ingress and egress. The dominant estate holder cannot "use the land for any purpose, such as a park." *Id.*

The *Dillingham Commercial* Court's reasoning aligns with the definition of "highway" in the Alaska Statutes. AS 19.59.001(8) defines "highway" to include a "road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof." Thus, RS 2477, which granted rights-of-way for "highways over public lands," conveyed the right to pass over the land, and nothing more. It did not grant easements for recreational uses unrelated to "travel between two definite points." *Shultz v. Dep't of Army*, U.S., 10 F.3d 649, 658 (9th Cir. 1993).

D. Analysis

Paragraph 84 of the State's answer implies that RS 2477 conveyed not only the rights of ingress and egress, but ancillary uses such as "boat launching, camping, [and] day-use sites." While the State's position is partially correct, it is far too inclusive. To the extent that the State claims RS 2477 rights-of-way for "ingress and egress to the Klutina River," the State may prove such rights-of-way through admissible evidence under the standards set forth in Alaska law.[1] But boat launches, campsites, and other recreational uses exceed the maximum rights available to a claimant under RS 2477. Such uses are merely incidental to public travel, and would not have created additional rights-of-way while RS 2477 was in effect. Accordingly, any additional reservation of property rights for recreational uses would constitute new development which, by its nature, would not have existed when Congress repealed RS 2477 in 1976.

RS 2477 rights-of-way may accommodate regular maintenance and changes in technology. *See, e.g., Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988) (holding that RS 2477 permits changes that are "reasonable and necessary to assure safe travel"); *see also* Restatement (Third) of Property (Servitudes) § 4.10, cmt. f. ("The manner, frequency, and intensity of use of the servient estate may change to take advantage of developments in technology and to accommodate normal development of the dominant estate[.]"). They may not, however, expand in scope to accommodate new development unrelated to ingress and egress. To hold otherwise would permit RS 2477 rights-of-way to unreasonably encroach upon the servient estate. *Southern Utah Wilderness*

[1] *See Hamerly*, 359 P.2d at 123; *Dillingham Commercial*, 705 P.2d at 414-15; *Price*, 128 P.3d at 728-29. The State must carry a heavy burden to prove any such right-of-way. The State must show, first, that "the alleged highway was located 'over public lands.'" *Hamerly*, 359 P.2d at 123. Second, the State must prove that "the character of . . . use was such as to constitute acceptance by the public of the statutory grant." *Id.* Whether a right-of-way exists is a question of fact. *Id.* Moreover, a right-of-way "will not be presumed against the owner of the land." *Id.* The burden will rest on the State "to establish [the right-of-way] by proof that is clear and unequivocal." *Id.*

Alliance, 425 F.3d at 747 (holding that RS 2477 rights-of-way are bound by "[t]he principle that [an] easement holder must exercise its rights so as not to interfere unreasonably with the rights of the owner of the servient estate").

The State's position lacks any meaningful limit on the scope of an RS 2477 right-of-way. In its present form, the State's interpretation already goes beyond the statutory definition of "highway." *See* AS 19.59.001(8). And, because it seemingly extends to any uses incident to backcountry travel, the State's view could include within a right-of-way gas stations, lodges, hotels, automotive repair shops, and retail establishments. After all, any sort of long-distance travel brings with it the need to rest and replenish provisions. The Court declines to read so much into so short a statute. RS 2477 granted only the right to pass over public land. It did not—and cannot now, 40 years after its repeal—convey the right to develop that land for recreational and commercial purposes.

E. Conclusion & Order

Because RS 2477 granted only the right of ingress and egress, Ahtna's motion for partial summary judgment is GRANTED. The State may prove, through "clear and unequivocal" evidence, any alleged right of way for "ingress and egress to the Klutina River." *Hamerly*, 359 P.2d at 123; State of Alaska's Answer at 12, ¶ 84. But the State may not include within the scope of its alleged right-of-way "boat launch[es], camping, and day-use sites." *Id.*

ORDERED this 11th day of May, 2016, at Anchorage, Alaska.

Andrew Guidi
ANDREW GUIDI
Superior Court Judge

I certify that on 5/11/2016
a copy of the above was mailed to
each of the following at their addresses of record: or emailed
mailed: Miller, Townsend, Helms, Mauldin
emailed: Haftner, Sullivan, Schechter, Trickey
Singer, Stark, Anjivel

Jackie Kapper, Judicial Assistant