

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

FRIENDS OF THE STEWART PUBLIC)
TRAIL, INC., an Alaska Non-Profit)
Corporation,)
)
Plaintiff,)
vs.)
)
FRANKLIN D. PUGH, Jr., et al.)
)
Defendants.)
_____) Case No. 3AN-19-05746 CI

ORDER REGARDING CASE MOTION #56

Having considered the filings regarding Plaintiff's *Motion for Entry of Judgment* (Case Motion #56), the court GRANTS IN PART Case Motion #56. The court has separately entered a *Final Judgment*.

Friends proposed the following language for Paragraph 5:

Defendants shall do nothing to prevent, intimidate or dissuade members of the public from using the Stewart Trail, including, but not limited to, harassment, physical or verbal intimidation, placing obstacles in the Trail, blocking the Trail with vehicles or equipment, constructing fencing across the Trail, and all other similar conduct whose purpose or effect is to discourage public uses of the Stewart Trail. Defendants shall also refrain from posting signs on or near the Stewart Trail that communicate to Trail users that the Trail itself is private property, or that the Trail is not open to the public for non-motorized uses. In addition, Defendant shall remove the currently-existing signs, including, but not limited to, the signs that say "no public access," "do not enter," and "trespassers will be prosecuted to the fullest extent of the law."

The court modified proposed Paragraph 5 as follows:

Defendants shall refrain from posting signs on or near the Stewart Trail that communicate to Trail users that the Trail itself is private property, or that the Trail is not open to the public for non-motorized uses. To the extent that currently-existing signs communicate to Trail users that the Trail itself is private property or that the Trail is not open to the public for non-motorized uses, the signs must be removed. This includes any signage at the Red Gate providing “No Public Access,” “Do Not Enter,” or similar language.

The court did not include language about intimidation, etc., because it agrees with the Pughs that such language is inappropriate for inclusion in the *Final Judgment*. The court also modified the language about existing signage to parallel the prohibition against posting signage that suggests the Trail is not public. It did not wholesale require removal of currently-existing signs that say things like “no public access” or “do not enter” because, depending on location, such signage may be appropriate. For example, a sign that says “no public access” located substantially away from the Trail could be appropriate, as it would not suggest that the Trail is not public. But, by way of example, a sign located within the 15-foot easement that says “no public access” would need to be removed.¹ Put differently, a blanket prohibition on signage containing particular language could impermissibly burden the Pughs’ property interests.

Friends proposed the following language for Paragraph 4:

¹ The court recognizes that signage located on private property adjacent to the Trail may require a more nuanced analysis. For example, a “No Trespassing – Private Property” sign located a foot away from the Trail and oriented so that Trail users see it arguably suggests that the Trail is private. But a sign that says “This is a Public Trail Located on Private Property – Users of the Trail Must Stay on the Trail” or something similar could be permissible.

Defendants shall have ten (10) days after the date this Final Judgment is entered to remove all physical impediments or barriers that prevent or hinder non-motorized public access to the Stewart Trail, including the removal of the barricade existing on and around the “red gate” that presently precludes non-motorized access to the Stewart Trail. Specifically, the “red gate” shall be returned to the condition it was in when the Pughs purchased the property in 2012, and in any event, the width of the in or around the gate shall be at least 32 inches.

The court modified proposed Paragraph 4 as follows:

Defendants shall have ten (10) days after the date this Final Judgment is entered to remove all physical impediments or barriers that prevent or hinder non-motorized public access to the Stewart Trail, including the removal of all barricades that presently preclude non-motorized access to the Stewart Trail. There shall be an entry point of at least 32 inches providing access to the Trail.

The court did not include language requiring the Pughs to return the “red gate” to the condition it was in when they purchased the property for two reasons: (1) the language was too vague; and (2) as long as modifications to the “red gate” do not prohibit access to the Trail and do not signal that it is private property, the modifications are not problematic.²

As to the scope of the easement, the court agrees with Friends that a 15-foot easement is appropriate and supported by the evidence. The court has separately issued

² The court notes that, in its reply, Friends summarized areas of agreement and disagreement with respect to the proposed judgment, and it indicated that the parties were in agreement as to the “red gate.” The filings suggest otherwise to the court: while the Pughs were amenable to providing access of at least 32 inches in width downhill of the “red gate,” they disagreed with returning it to the condition it was in when the Pughs purchased the property.

Supplemental Findings of Fact and Conclusions of Law supporting the scope of the easement.

The court agrees with Friends that adding language about the implications of a person straying/traveling outside of the easement is inappropriate for inclusion in the *Final Judgment*, which serves only to describe the public easement.

The court rejected the Pughs' request to impose personal liability on Friends and its individual members and to require a specific obligation to maintain the Trail as well as educate the public about its use. The easement belongs to the general public, not Friends.³ There is no basis for the court to impose the Pughs' requests upon Friends.

With respect to maintenance of the Trail, it seems that the State of Alaska has the right, but not the obligation, to manage the Trail. Specifically, when a servitude is acquired for public benefit, but without the participation of a governmental body, the right to control is located in the state, although the state has no obligation to exercise it.⁴ This includes the right to manage the easement.⁵ "Use and control rights are not ordinarily separated in servitudes held for private benefit, but they are necessarily separate when the servitude is created to benefit the public at large. The control rights must be located in an entity capable of exercising them."⁶ However, the location of rights

³ See *Interior Trails Pres. Coal. v. Swope*, 115 P.3d 527, 529 (Alaska 2005).

⁴ See RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.18 Cmt b. (2000).

⁵ See *id.*


⁶ *Id.*

to control the servitude in the state “does not impose any obligation on the state to maintain the servitude or otherwise exercise those rights.”⁷

With respect to the issue of damage or harm arising out of the public’s use of the Trail, it seems that servient estate owners – here, the Pughs and Mattanaw – have recourse if use of the easement results in damage to their property or interferes with their property rights. This is because, in general, an easement holder (here, the public) “is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.”⁸ A suit for private nuisance may offer a remedy.⁹


IT IS SO ORDERED.

DATED at Anchorage, Alaska this 27 February 2023.



Dani Crosby
Superior Court Judge

I certify that on 2/27/23 a copy
of the above was mailed to each of the
following at their address of record:

 W. Falsley, D. Gross, T. Meacham
Judicial Assistant R. Reges, K. Fitzgerald

⁷ *Id.*

⁸ *Price v. Eastham*, 254 P.3d 1121, 1128 (Alaska 2011) (citing RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.10 (2000)).

⁹ *See Windel v. Mat-Su Title Ins. Agency, Inc.*, 305 P.3d 264, 274 (Alaska 2013).

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Attorneys for Plaintiff

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

FRIENDS OF THE STEWART PUBLIC TRAIL,
INC., an Alaska non-profit corporation,

Plaintiff,

v.

FRANKLIN D. PUGH, JR.; OKSANA V. PUGH;
MATTANAW CHRISTOPHER MATTHEW
CAVANAUGH; and all other persons or parties
unknown claiming a right, title, estate, lien, or
interest in the real estate described in the
Complaint in this action,

Defendants.

Case No. 3AN-19-05746CI

SEP 28 2022

(56)

[PROPOSED]

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 1, 2022, the Court issued its Findings of Fact and Conclusions of Law related to the above-captioned matter, wherein it was determined that a public prescriptive easement exists along a portion of the Stewart Homestead Trail ("Stewart

D

Trail"). Because of the requirement that the scope of the easement must be based on the evidence presented at trial, and because the Court must specifically set the scope of the easement, the Court hereby issues this Supplemental Findings of Facts and Conclusions of Law.

Section IV.C – Scope of Easement

In *Eastham I*, it was determined that when a trial court finds the existence of a prescriptive easement, it is required to make a specific finding regarding the scope of that easement.¹ The scope of the easement should be based on the reasonable expectations the landowner had in terms of the historic use of the easement.² In *Eastham II*, the court indicated that the scope of the easement should be based largely on the hostile use of the property, which in that case, was the use of a trail by snowmachines.³ In *Eastman III*, the court affirmed the trial court's conclusion that the width of the easement should be 18 feet, which was sufficient to allow two snowmachines to pass on the trail.⁴ Seven years later, in *Dixon v. State Department of Natural Resources*, the court approved a

¹ *Price v. Eastham*, 75 P.3d 1051, 1058-1059 (Alaska 2003).

² *Id.* The court cited to several cases specifically discussing the scope of an easement, including the following: *Hash v. Sofinowski*, 487 A.2d 32, 36 (Pa.App. 1998) (scope of the prescriptive easement was appropriately the width of the vehicles using the easement); *Johnson v. Roy*, 279 S.W.2d 20, 21 (Ky.App. 1955) (scope of the easement was set at 15 feet because that width was the historic use).

³ *Price v. Eastham*, 128 P.3d 725 (Alaska 2006).

⁴ *Price v. Eastham*, 254 P.3d 1121, 1126-1127 (Alaska 2011). The court limited the scope of the easement to snowmachines because there was inadequate evidence presented at trial regarding the other historic uses of the trail.

prescriptive easement with a width of 20 feet, to allow two cars to pass each other on the road.⁵

With this summary of the law in mind, the trial court will consider the evidence presented at trial in order to set the width of the easement in this case. As discussed in the Court's Decision, the Stewart Trail has historically been used for running, hiking, skiing, skijoring, snowshoeing and biking.⁶ Considering this evidence, the Court concludes that the easement exists all year-round, and has a width of 15 feet. This width is based on the requirement that groups of trail-users needed a safe width of 15 feet when one group met or passed another group on the Trail, or when one large group (such as the Happy Hikers) was using the Trail. In addition, the historic use of the Stewart Trail, as evidenced by footprints, dog tracks and ski tracks seen in several trial exhibits, demonstrated that at least a 15-foot width of the Stewart Trail was regularly used by trail-users. Finally, considering that the Stewart Trail has been consistently used by the public year-round, there will be no limitations of the easement based on the time of year.

⁵ 433 P.3d 1075, 1086 (Alaska 2018).

⁶ See Decision at p. 12 (referencing use of the Stewart Trail as set forth in the 2002 Chugach State Park Access Inventory); p. 13 (Mr. Lewanski testified that he used the Trail for hiking, dog walking, cross-country skiing and mountain running); p. 16 (Ms. Nancy Pease testified that she used the Trail for running); p. 20 (Ms. Spencer testified that she used the Trail for hiking and skiing); p. 23 (Ms. Basinger testified that the Happy Hikers group used the Trail for hiking); p. 26 (Ms. Phelps testified that she hiked and snowshoed on the Trail); p. 28 (Mr. Riley testified that he used the Trail to ski, skijor, bike, walk and hike); p. 30 (Mr. Crimp testified that he used the Trail for hiking and skiing, as well as walking his dog); pp. 31-32 (Ms. Glenn testified that she hiked the Trail in the summer and skied the Trail in the winter); p. 34 (Ms. Caminer testified that she used the Trail for hiking, dog walking, skiing, snowshoeing); p. 40 (Mr. Marks testified that he used the Trail for hiking year-round).

FEB 27 2023

DATED this _____ day of _____ 2022.

Dani Crosby

By:

Dani Crosby
Superior Court Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of December, 2022, at approximately 10:45 a.m./p.m., a true and correct copy of the foregoing **(proposed) Supplemental Findings of Fact and Conclusions of Law (4 pg)** was served on the following via email and believed to be completed without error from email address pcrowe@bhb.com to:

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BIRCH HORTON BITTNER & CHEROT

By: *Peggy S. Crowe*
Peggy S. Crowe

I certify that on 2/27/23 a copy of the following was mailed/faxed/hand-delivered to each of the following at their addresses of record

Cet W. Falsey, D. Gross, T. Meacham
Administrative Assistant R. Reges, K. Fitzgerald

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

FRIENDS OF THE STEWART PUBLIC)
TRAIL, INC., an Alaska Non-Profit)
Corporation,)
)
Plaintiff,)
vs.)
)
FRANKLIN D. PUGH, Jr., et al.)
)
Defendants.)
_____) Case No. 3AN-19-05746 CI

FINAL JUDGMENT

IT IS HEREBY ORDERED that judgment will enter as follows:

Pursuant to the Court’s *Findings of Fact and Conclusions of Law*, dated September 1, 2022, and any *Supplemental Findings of Fact and Conclusions of Law*, it is hereby declared that a public prescriptive easement exists for the Stewart Homestead Trail (“Stewart Trail”) where it traverses the real property belonging to Defendants Franklin D. Pugh and Oksana V. Pugh (“Pughs”), as more fully described as follows:

The East one-half of the Southeast one-quarter (E1/2SE1/4) and the Northwest one-quarter of the Southeast one quarter (NW1/4SE1/4) of Section 11, Township 11 North, Range 3 West, Seward Meridian, according to the official Bureau of Land Management Survey thereon, being located in the Anchorage Recording District, Third Judicial District, State of Alaska.

and the real property belonging to Defendant Christopher Mathew Cavanaugh, also

known as Mattanaw (“Mattanaw”), as more fully described as follows:

Tract 3, POTTER CREEK SUBDIVISION, according to the official plat thereof, filed under Plat Number 71-202, Records of the Anchorage Recording District, Third Judicial District, State of Alaska,

1. The public easement shall start where the Stewart Trail enters the property owned by the Pughs, at the location historically known as the “red gate.” The easement will continue in a southeasterly direction along the center-line or thread of the currently-existing road or Trail, through the real property owned by the Pughs, continuing through the real property owned by Mattanaw, and ending where the Trail exits the easterly boundary of Mattanaw’s real property, as is more fully depicted on the map labeled as Exhibit 1 (attached hereto).

2. Where there is a split or divide in the Stewart Trail near the easterly boundary of Mattanaw’s property, such that the Trail splits into two trails before re-joining, with one split lying northerly of the other, and thus being referred to herein as the “Upper Trail,” and the other split lying southerly of the northerly split and thus being referred to herein as the “Lower Trail,” the public easement shall encompass the Upper Trail only, and not the Lower Trail.

3. Because the Stewart Trail has historically been used by the public for running, hiking, skiing, skijoring, snowshoeing and biking, and because groups of trail-users have both used the Trail and have passed or met each other while on the Trail, the width of the easement shall be fifteen (15) feet (or seven-and-a-half (7 ½) feet on each side of the centerline of the existing road through the Defendants’ real properties). Further,

because the historic public use of the Stewart Trail has been year-round, the temporal scope of the easement will not be confined to any specific time of year.

4. Defendants shall have ten (10) days after the date this Final Judgment is entered to remove all physical impediments or barriers that prevent or hinder non-motorized public access to the Stewart Trail, including the removal of all barricades that presently preclude non-motorized access to the Stewart Trail. There shall be an entry point of at least 32 inches providing access to the Trail.

5. Defendants shall refrain from posting signs on or near the Stewart Trail that communicate to Trail users that the Trail itself is private property, or that the Trail is not open to the public for non-motorized uses. To the extent that currently-existing signs communicate to Trail users that the Trail itself is private property or that the Trail is not open to the public for non-motorized uses, the signs must be removed. This includes any signage at the Red Gate providing “No Public Access,” “Do Not Enter,” or similar language.

6. The Lis Pendens filed on the property belonging to the Pughs (Anchorage Recording District Serial Number 2019-031681-0) is withdrawn. The Lis Pendens filed on the property belonging to Mattanaw (Anchorage Recording District Serial Number 2019-031680-0) is also withdrawn.

7. Plaintiff is hereby declared the prevailing party, and thus is entitled to an award of attorney’s fees pursuant to Alaska Rule of Civil Procedure 82(b)(2), and an award of costs pursuant to Alaska Rule of Civil Procedure 79.

8. Plaintiff will recover from Defendants, on a joint and several basis, and will hereby have final judgment entered against them as follows:

- a. Principal Amount: \$0
- b. Pre-Judgment Interest: \$0
- c. Attorneys' Fees (Rule 82): \$ _____
Date Awarded: _____
Judge: _____
Judge Dani Crosby
- d. Costs (Rule 79): \$ _____
Date Awarded: _____
Clerk: _____
- e. **TOTAL JUDGMENT** \$ _____
- f. Post-Judgment Interest Rate: 3.25%

IT IS SO ORDERED.

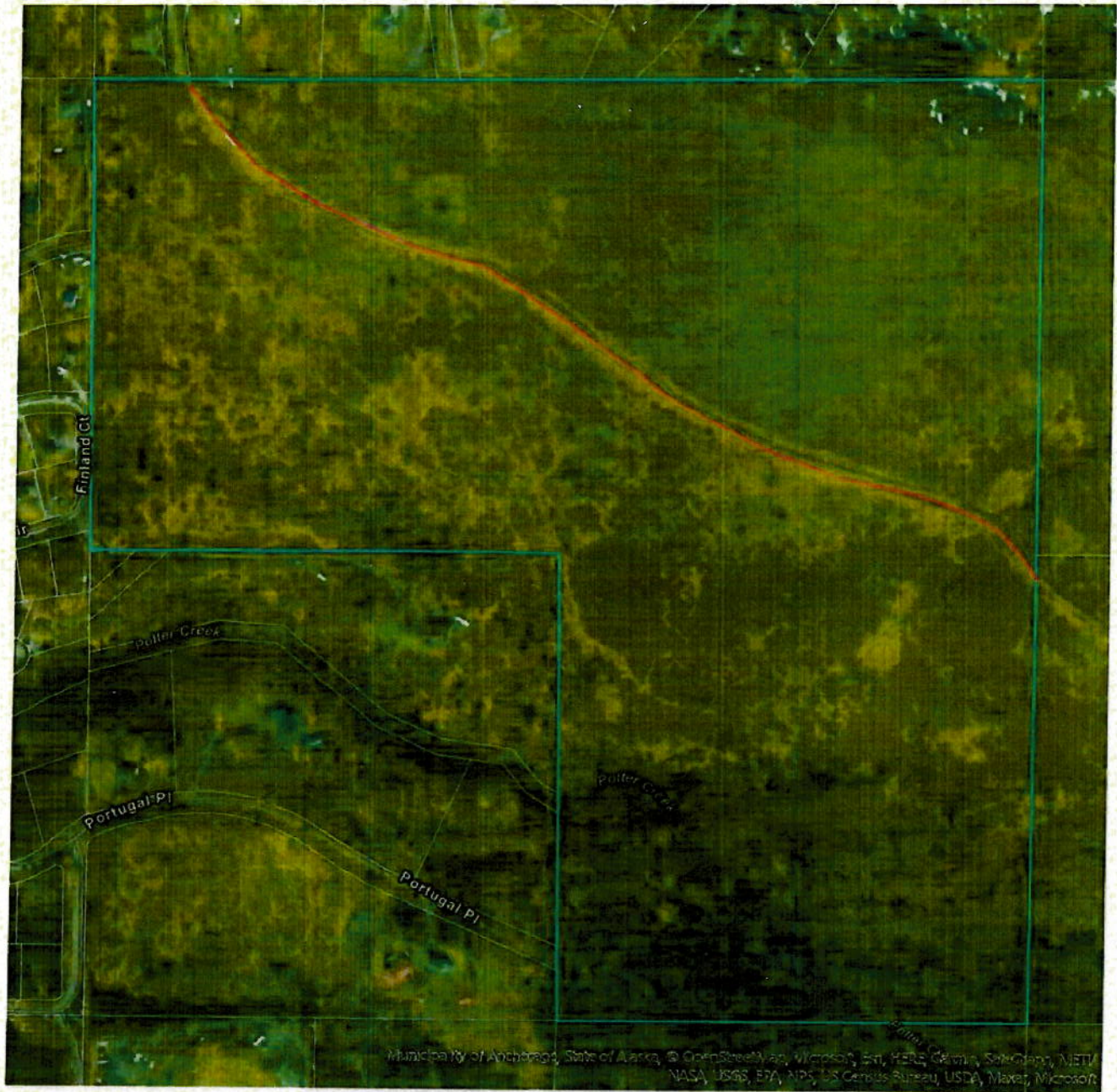
DATED at Anchorage, Alaska this 27 February 2023.

Dani Crosby
Superior Court Judge

I certify that on 2/27/23 a copy of the above was mailed to each of the following at their address of record:

CG
Judicial Assistant
W. Falsy, D. Gross, T. Meacham
R. Reges, K. Fitzgerald

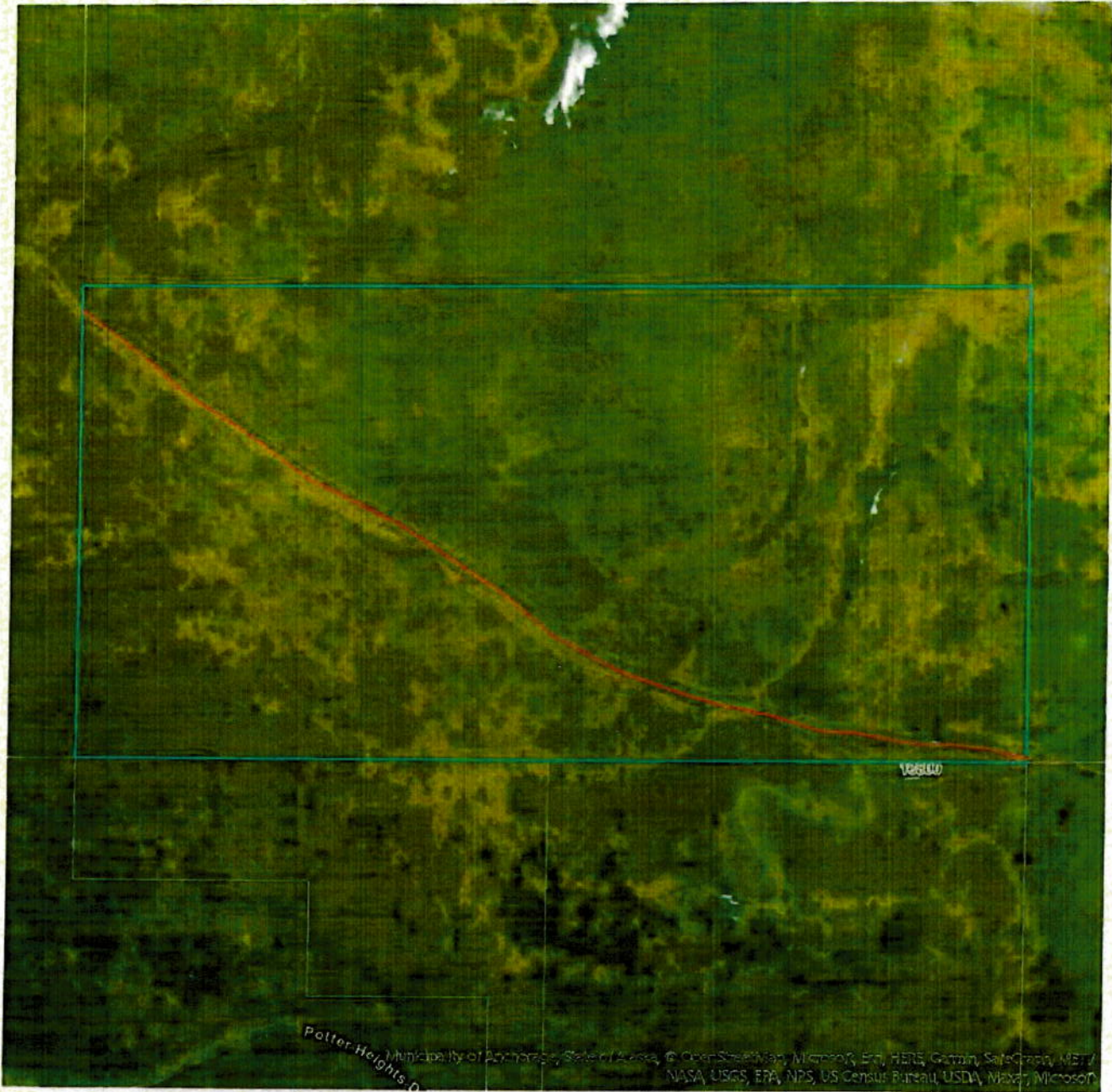
PUGH PARCEL



— = EASEMENT

EXHIBIT 1

MATTANAW PARCEL



 = EASEMENT

EXHIBIT 1

9

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

FRIENDS OF THE STEWART PUBLIC)
TRAIL, INC., an Alaska Non-profit)
Corporation,)
)
Plaintiff,)

v.)

FRANKLIN D. PUGH, Jr., OKSANA)
V. PUGH, CHRISTOPHER MATTHEW)
CAVANAUGH, and all other persons)
or parties unknown claiming a)
right, title, estate, lien, or)
interest in the real estate)
described in the Complaint in)
this action,)
)
Defendants.)

Denying

Case No. 3AN-19-05746 CI

#60

**ORDER GRANTING MOTION TO STAY EXECUTION OF
ORDER PERMITTING EASEMENT INJUNCTION**

Having considered Defendants' Motion to Stay Execution of
Order Permitting Easement Injunction, opposition thereto, and
being otherwise fully apprised,

IT IS HEREBY ORDERED that Defendants' Motion to Stay
Execution of Order Permitting Easement Injunction is GRANTED.

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Friends of the Stewart Public Trail v. Pugh
Case No. 3AN-19-05746 CI
Order Granting Motion to Stay Execution of Order Permitting Easement
Injunction

JAN 19 2023

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FEB 27 2023

Dated the _____ day of January, 2023 at Anchorage, Alaska.

D Crosby

The Honorable Dani R. Crosby
Judge of the Superior Court

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 19th day of January, 2023, a copy of the foregoing was sent to the following via:

- U.S. Mail, First Class
- Hand-Delivery
- Fax
- E-Mail

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certify that on 2/27/23 a copy of the following was mailed/faxed/hand delivered to each of the following at their addresses of record

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s/ Kevin T. Fitzgerald
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Injunction - Order 1.doc

Friends of the Stewart Public Trail v. Pugh
Case No. 3AN-19-05746 CI
Order Granting Motion to Stay Execution of Order Permitting Easement
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