PUBLIC PRESCRIPTIVE RIGHTS ACROSS PRIVATE LANDS – REVISITED

The title of this topic alone raises several distinct questions or issues:

What are public prescriptive rights?

Are public prescriptive rights across private lands applicable in Alaska?

What are the requirements to establish prescriptive rights?

What public prescriptive uses can be established?

Are public prescriptive rights available across public lands?

Are public prescriptive rights available across ANCSA lands?

How can a public prescriptive easement be used?

How do you prevent the establishment of prescriptive rights?

As the result of recent cases decided by the Supreme Court and a 2003 change in the Alaska Statutes[1] the law of adverse possession and prescriptive easements, is both more clearly defined and more unsettled than it was in 1994 when the original version of this paper was written. In 1994 the Dillingham Commercial Co.[2] and Swift[3] cases advanced the proposition that public prescriptive easements were available in Alaska, but those cases were decided on other grounds. The more recent Weidner,[4] Interior Trails Preservation Coalition[5] and Price[6] cases all provide guidance on public prescriptive easements. On the other hand the legislative changes in 2003 raise a number of

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[1] Chapter 147 SLA 2003 amended the statue of limitations, AS 09.10.030, and the statute applicable to adverse possession and prescriptive easements AS 09.45.052.

[2] Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 416 (1985).

[3] Swift v. Kniffen, 706 P.2d 296 (1985).

[4] Weidner v. State, 860 P.2d 1205 (Alaska 1993).

[5] Interior Trails Preservation Coalition v. Swope, 115 P.3d 527.

[6] Price v. Eastham, 75 P.3d 1051 (Alaska 2003) and 128 P.3d 725 (Alaska 2006).

questions and in some instances eliminates or calls into question the validity of case law precedence established by the Alaska Supreme Court.

This paper is confined to the establishment of public prescriptive easements; however, the requirements to establish a public prescriptive easement are essentially the same as previously required to establish private prescriptive easements. The bulk of case law in Alaska relates to private prescriptive easements, which in turn rely heavily on Alaskan adverse possession cases to establish the necessary legal elements. With the recent legislative changes to the adverse possession and prescriptive easement laws and the lack of judicial interpretation of those statutory changes the opportunities for differences of opinion abound.

What Are Public Prescriptive Rights?

Public prescriptive rights are the right of the public to use private land for a particular public purpose (an easement). As with any easement, the owner of the land has a servient estate which is subject to the public's easement.

Are Public Prescriptive Rights Across Private Lands Applicable in Alaska?

Traditionally the common law and many states did not recognize the right of the public to establish public rights against private property through adverse use. In those jurisdictions, generally inverse condemnation, ejectment or injunctive relief to eliminate the use were the remedies available to the private owners. Today however, the majority rule in the United States is to recognize the establishment of public rights through adverse use. Alaska follows the majority rule.[7]

The questions of public highway, road or alley easements are the most settled of the types of uses the public may acquire by adverse use. The case of Dillingham Commercial Co. v. City of Dillingham,[8] first recognized the right of the public to create a public prescriptive easement and established that Alaska courts would follow the majority view that a public easement may be acquired by prescription.[9] The City of Dillingham and a private owner litigated the City's claims relating to a public roadway created by RS 2477 and public alleys created by more than 40 years of public use. The roadway issue was resolved in favor of the City. Whether the public's use of the alleys created a prescriptive easement in the City was not decided. The Court ruled that the City's use did not interrupt the continuous use

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7 Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 416 (1985).

8 705 P.2d 410 (1985).

9 Id,. at 416.

and possession of the private owner and was therefore not adverse possession, but it did find as a matter of law that "the right of the public to use land as a public highway may be acquired through public use."[10] On remand the lower court was instructed to determine if the public's use was adverse thereby creating a public easement, or a permissive use meaning the owner's title was not subject to an easement.

An earlier case, Ault v. State,[11] does note that the right of the State to acquire property by adverse possession should be narrowly construed in light of the provisions of Article 1, Section 18 of the Alaska Constitution which provides: "Private property shall not be taken or damaged without just compensation." Prior to statehood, the District Court of Alaska in Clark v. Taylor,[12] found that the Alaska Road Commission could obtain a prescriptive easement across an unpatented mining claim. The width of the easement was limited to the width actually used.

Since Dillingham, other cases have reinforced that principle: Swift v. Kniffen,[13] involved a subdivision road, Weidner v. State[14] affirmed the State of Alaska could establish a public highway by prescription, and the recent Price v. Eastham[15] and Interior Trails Preservation Coalition v Swope[16] cases adjudicated public prescriptive easements. Sections (c) and (d) of AS 09.45.052 explicitly recognize the creation of public rights on behalf of public utilities and the state and local governments.

What Are The Requirements To Establish Prescriptive Rights?

Under prior law an individual could establish a private prescriptive easement that was only for his or her personal benefit or property. Title to the private prescriptive easement vested in the individual or attached as an appurtenance to the individual's land. A public prescriptive easement would be established by the general public's use irregardless of whether a single individual could have established a private easement.[17] According to the Alaska Supreme Court "[t]he only difference is that a public prescriptive easement

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[10] Id., at 412.

[11] 688 P.2d 951, 956, (1984).

[12] 9 Alaska 298, 314 (1938).

[13] 706 P.2d 296 (1985).

[14] Weidner v. State, 860 P.2d 1205 (Alaska 1993).

[15] 75 P.3d 1051 (Alaska 2003) and 128 P.3d 725 (Alaska 2006).

[16] 115 P.3d 527 (Alaska 2005).

[17] Swift v. Kniffen, 706 P.2d 296, 304 (1985).

requires qualifying use by the public, while a private prescriptive easement requires qualifying use only by the private party. A prescriptive easement obtained by a private person gives only that person the right to continued use, whereas a prescriptive easement obtained by the general public gives the right of use to the public at large."[18]

In reality, establishment of a prescriptive easement is the failure of the record owner of the property to file suit or prevent adverse use within the statute of limitations. The record owner must file an action for ejectment of the adverse user prior to the time limits set by AS 09.10.030[19] and AS 09.45.052. [20]

AS 09.10.030 mandates a ten year statute of limitations for the owner to initiate a suit. On the other hand, it is the minimum time the adverse user must use the property to establish the elements necessary to bring a quiet title action to obtain title to the easement.[21]

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18 Interior Trails Preservation Coalition v. Swope, 115 P.3d 527 (Alaska 2005) (Citations omitted.)

19 Sec. 09.10.030. Actions to recover real property.
(a) Except as provided in (b) of this section, a person may not bring an action for the recovery of real property or for the recovery of the possession of it unless the action is commenced within 10 years. An action may not be maintained under this subsection for the recovery unless it appears that the plaintiff, an ancestor, a predecessor, or the grantor of the plaintiff was seized or possessed of the premises in question within 10 years before the commencement of the action.
(b) An action may be brought at any time by a person who was seized or possessed of the real property in question at some time before the commencement of the action or whose grantor or predecessor was seized or possessed of the real property in question at some time before commencement of the action, and whose ownership interest in the real property is recorded under AS 40.17, in order to
(1) quiet title to that real property; or
(2) eject a person from that real property.

20 Sec. 09.45.052. Adverse possession.
(a) The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more, or the uninterrupted adverse notorious possession of real property for 10 years or more because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant, is conclusively presumed to give title to the property except as against the state or the United States. For the purpose of this section, land that is in the trust established by the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, is land owned by the state.
(b) Except for an easement created by Public Land Order 1613, adverse possession will lie against property that is held by a person who holds equitable title from the United States under paragraphs 7 and 8 of Public Land Order 1613 of the Secretary of the Interior (April 7, 1958).
(c) Notwithstanding AS 09.10.030 , the uninterrupted adverse notorious use of real property by a public utility for utility purposes for a period of 10 years or more vests in that utility an easement in that property for that purpose.
(d) Notwithstanding AS 09.10.030 , the uninterrupted adverse notorious use, including construction, management, operation, or maintenance, of private land for public transportation or public access purposes, including highways, streets, roads, or trails, by the public, the state, or a political subdivision of the state, for a period of 10 years or more, vests an appropriate interest in that land in the state or a political subdivision of the state. This subsection does not limit or expand the rights of a state or political subdivision under adverse possession or prescription as the law existed on July 17, 2003.

21 McGill v. Walsh, 839 P.2d 393 (1992).

AS 09.45.052 sets a seven year statute of limitations for individuals claiming adverse possession under color of title; all other claimants including public utilities and public transportation and access users must meet a ten year requirement. Color of title applies to those individuals with a defective deed or document purporting to convey title to them but the instrument is invalid for some reason. For examples of color of title issues see: Hubbard v. Curtiss;[22] Karvonen v. Dyer;[23] Ayers v. Day and Night Fuel Co.;[24] Lott v. Muldoon Road Baptist Church, Inc.;[25] Ault v. State;[26] and Alaska National Bank v. Linck.[27] Other than for claims under color of title, AS 09.45.052 limits adverse possession claims to lands occupied under "a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant."[28] Applying that requirement to prescriptive easements severely limits the potential for an individual to claim a private prescriptive easement.

Once the statute of limitations has elapsed, several legal elements must be established. As early as 1914 in the case of Roberts v. Jaeger,[29] Alaskan courts have required that before an easement by prescription can be created the user must "clearly prove by competent evidence all the elements to such title." In Alaska National Bank v. Linck,[30] the Alaska Supreme Court noted that, while there are numerous elements of adverse possession, it interpreted AS 09.25.050 (the former color of title statute of limitations replaced by AS 09.45.052) as requiring a three concept test:

> (1) the possession must have been continuous and uninterrupted; (2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and (3) the possession must have been reasonably visible to the record owner.

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[22] 684 P.2d 842 (1984).

[23] 261 F.2d 671 (9th Cir. 1958).

[24] 451 P.2d 579 (1969).

[25] 466 P.2d 815 (1970).

[26] 688 P.2d 951 (1984).

[27] 559 P.2d 1049 (1977).

[28] AS 09.45.052(a).

[29] 5 Alaska 190, 192 (1914).

[30] 559 P.2d 1049, 1052 (1977).

The requirement for test (1) is "whether the adverse possessor has used and enjoyed the land as 'an average owner of similar property would use and enjoy it'."[31] "[A]bandonment of possession by the adverse possessor or interruption of possession by a third party or the record owner breaks the continuity of the adverse possession."[32] Once that continuity has been broken, the adverse possessors must start the time again.

For the second requirement, the adverse possessor must act as if he or she owns the land; essentially the adverse possessor's acts are hostile and inconsistent with the rights of the record owners.[33] They must exclude the record owner from any use and enjoyment of the property. Under the statutory provisions in effect at that time, the question of good faith or bad faith was irrelevant under the 10 year statute of limitations if the claimant acted as if he or she owned the land.[34] However; the court in that case went on to indicate that a claimant's possession under the seven year statute of limitations must be in good faith.[35] Although the issue has not been addressed since the change in the statute, it appears good faith will be an element in subsequent cases.

If the use is permissive, the hostility requirement for a claim of adverse possession fails. Hubbard v. Curtiss,[36] addresses the issue of permissive use.

> The whole doctrine of title by adverse possession rests upon the acquiescence of the owner in the hostile acts and claims of the person in possession. The key difference between acquiescence by the true owner and possession with the permission of the true owner is that a permissive use requires the acknowledgment by the possessor that he holds in subordination to the owner's title.

"The possession of a grantee is presumptively adverse to his grantor" as a result of a defective document in a color of title action, under the seven year statute of limitations, AS 09.25.050 [now AS 09.45.052].[37] However, under the 10 year statutue, AS 09.10.030 the

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31 [Citations omitted].

32 Linck, supra at 1052 .

33 Linck, at 1053.

34 Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 830 (1974). Contrast AS 09.45.052: "…the uninterrupted adverse notorious possession of real property for 10 years or more because of a ***good faith*** but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant." [*emphasis added*.]

35 Lott v. Muldoon Road Baptist Church, 466 P.2d 815, 818 (1970).

36 684 P.2d 842, 848 (1984).

37 Hubbard, at 848.

presumption is that the claimant's use is permitted and must be rebutted by clear and convincing evidence presented by the claimant.[38]

The third requirement is that the possession must be "notorious" such that an owner would be on notice of the adverse possessor's claim of occupancy and claim of right. The law presumes a prudent owner would know of such use. The court should take into consideration the character of the land to determine what acts by the adverse possessor are reasonable to establish notoriety.[39] In Nome 2000 v. Fagerstrom,[40] the Alaska Supreme Court stated: "Where as in the present case the land is rural, a lesser exercise of dominion and control may be reasonable." The adverse possessors used a portion of the property for a seasonal home for subsistence and recreation. The Court went on to cite examples from other cases where pasturing of sheep in grazing areas for only three weeks a year, six annual visits to a hunting cabin and timber cutting were sufficient notoriety. "Where physical visibility is established, community repute is also relevant evidence that the true owner was put on notice."[41]

Dillingham Commercial Co. v. City of Dillingham,[42] applied those adverse possession tests to prescriptive easements.

What Public Prescriptive Uses Can Be Established?

Price[43] involved the public's use of a snowmachine trail, Weidner[44] found that relocation of a highway by the Department of Transportation could result in a public prescriptive right, and Interior Trails Preservation Coalition[45] determined that use by the general public could establish a trail. Sections (c) and (d) of AS 09.45.052 legislatively identify uses for which a public prescriptive easement may be claimed.

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[38] Hammerly v. Denton, 359 P.2d 121, 126 (1961); Dillingham, supra at 417; and Curran v. Mount, 657 P.2d 389 (1982).

[39] Linck, at 1053.

[40] 799 P.2d 305, 309 (1990).

[41] [Citations omitted].

[42] 705 P.2d 410, 416 (1985).

[43] 75 P.3d 1051 (Alaska 2003) and 128 P.3d 725 (Alaska 2006).

[44] 860 P.2d 1205 (Alaska 1993).

[45] 115 P.3d 527 (Alaska 2005).

Section (c) specifies a "public utility" may establish an easement for "utility purposes". Public utilities are individuals or entities that provide electrical, telecommunication, water, steam, sewer, natural or manufactured gas, petroleum or petroleum products when no alternative supplier is available, or garbage services to the public for compensation. [46] They must have a certificate of convenience and necessity for each service provided for compensation. [47] Utility purposes are not defined by the statutes.

Under Section (d) adverse use of private lands for "public transportation or public access purposes, including highways, streets, roads, or trails," by "the public, the state, or a political subdivision of the state" may vest "an appropriate interest in that land in the state or a political subdivision of the state…" Adverse use includes the "construction, management, operation, ***or*** maintenance" [emphasis added] for "public transportation or public access purposes". Section (d) goes on to state in the last sentence: "This subsection does not limit or expand the rights of a state or political subdivision under adverse possession or prescription as the law existed on July 17, 2003."

As of this writing, the Supreme Court has not published a case interpreting the 2003 revisions to the adverse possession statutory provisions, but taken together the two sections appear to limit the general public's right to claim public prescriptive easements to "public transportation or public access purposes". It further vests any interest created in the state or political subdivision of the state. Vesting of that interest in the state or political subdivision raises the doctrine of primary jurisdiction issue mentioned in Interior Trails Preservation Coal.[48] The property owners asserted that doctrine would allow only the

[46] Sec. 42.05.990. Definitions. ….
(4) "public utility" or "utility" includes every corporation whether public, cooperative, or otherwise, company, individual, or association of individuals, their lessees, trustees, or receivers appointed by a court, that owns, operates, manages, or controls any plant, pipeline, or system for

(A) furnishing, by generation, transmission, or distribution, electrical service to the public for compensation;

(B) furnishing telecommunications service to the public for compensation;

(C) furnishing water, steam, or sewer service to the public for compensation;

(D) furnishing by transmission or distribution of natural or manufactured gas to the public for compensation;

(E) furnishing for distribution or by distribution petroleum or petroleum products to the public for compensation when the consumer has no alternative in the choice of supplier of a comparable product and service at an equal or lesser price;

(F) furnishing collection and disposal service of garbage, refuse, trash, or other waste material to the public for compensation….

[47] AS 42.05.221 (a) A public utility may not operate and receive compensation for providing a commodity or service without first having obtained from the commission under this chapter a certificate declaring that public convenience and necessity require or will require the service. Where a public utility provides more than one type of utility service, a separate certificate of convenience and necessity is required for each type.

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North Star Borough Advisory Trail Commission to create trails within Fairbanks North Star Borough, not members of the general public; however, the issue was not properly raised on appeal and therefore not decided by the Supreme Court.

Public utilities appear to be limited to establishment of prescriptive easements for utility purposes for which they have a certificate of public use and necessity. By virtue of the last sentence of section (d) the legislature did not place any specific limits on state and local governments' exercise of the rights under the adverse possession or prescription laws.

Are Public Prescriptive Rights Available Across Public Lands?

The short answer is no. AS 09.45.052(a)[49] precludes prescriptive rights against the State, the United States and the Alaska Mental Health Land Trust. The State is also excluded under AS 38.95.010. Municipal governments are exempt under AS 29.71.010. Several cases reach that same result. See, Classen v. State, Department of Highways,[50] for state lands, and Noble v. Melchior,[51] for federal lands.

While the general rule is adverse possession (or prescriptive rights) do not apply to sovereign lands, there is an exception that prescriptive rights may attach against a private entry or possessory interest on such lands, provided the entry is alienable (can be sold or encumbered). That adverse right does not stand against the sovereign, and will fail if the interest is abandoned or fails. While the private interest, such as a mining claim, homestead entry, lease or agricultural right remains in effect the adverse or prescriptive right may be valid against that interest.[52]

Are Public Prescriptive Rights Available Against Lands Granted Under ANCSA?

Public Law 100-241, 101 Stat. 1807, Feb. 3, 1988, amended the Alaska Native Claims Settlement Act, ANCSA, to exempt certain lands conveyed by the act to native corporations or individuals from "adverse possession and similar claims based on estoppel."

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[49] The uninterrupted adverse notorious possession of real property . . . is conclusively presumed to give title to the property except as against the state or the United States. For the purpose of this section, land that is in the trust established by the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, is land owned by the state.

[50] 651 P.2d 15, 17 (1980).

[51] 5 Alaska 729, 733 (1917).

[52] Clark v. Taylor, 9 Alaska 298, 314 (1938); Price v. Eastman, 75 P.3d 1051 (Alaska 2003).

The exemption applies to "land and interests that are not developed or leased or sold to third parties." Exploration for nonrenewable resources; construction of improvements for subsistence and customary or traditional uses; and fees for hunting, fishing, and guiding are not considered developed. Land that has been developed, leased or sold to a third party that reverts to the native corporation or individual and returns to an undeveloped state regains the exemption.

How Can a Public Prescriptive Easement be Used?

The scope of use of a public prescriptive easement is limited to the uses by which the easement was established during the period of prescriptive use. The following quote by the Supreme Court in the first decision in the Price[53] case sets forth the rule:

> The scope of a prescriptive easement is defined narrowly to include only the "use that created the easement and closely related ancillary uses." "Because an easement directly affects ownership rights in the servient tenement, judicial delineation of the extent of an easement by prescription should be undertaken with great caution." According to the Restatement (Third) of Property, determining the extent of a prescriptive easement should focus on the servient estate owner's reasonable expectations: "The relevant inquiry is what a landowner in the position of the owner of the servient estate should reasonably have expected to lose by failing to interrupt the adverse use before the prescriptive period had run." Although the use made of a prescriptive easement may evolve beyond the original prescriptive uses, new uses cannot substantially increase the burden on the servient estate or change the nature and character of the easement's original use. [Citations omitted.]

As a general rule a change in use from that which established the easement is impermissible; however, an adverse use which exceeds the scope of the original easement may establish a new scope of use if the adverse use continues for the duration of the statute of limitations set forth in AS 09.10.030 and AS 09.45.52.

How Do You Prevent the Establishment of Prescriptive Rights?

The most effective way to prevent the establishment of public (or private) prescriptive rights is to initiate an action for ejectment prior to the expiration of the statute of limitations set forth in AS 09.10.030 or AS 09.45.052. Alternatively, the owner must assure that at least one of the elements necessary for an adverse user to prove a claim does not take

[53] 75 P.3d 1051 (Alaska 2003).

place. This may range from making the use permissive through a lease, license or permit or breaking the continuity of use by the adverse user.

What is required to break continuity? It is a factual question to be determined by the trier of fact. At a minimum the act must interrupt the continuous use. The nature and character of the land would be a consideration and the owner should establish visible evidence of his own dominion and control sufficient to break the continuity. A break in the continuity should meet the same standards of notoriety required of an adverse user. Knowledge by the community of those acts of dominion and control would add to owner's defense.[54]

Final Remarks.

From the above information provided, you have enough information to be dangerous. This paper only presents an overview of one person's opinion of the law. The recent legislative changes provide fertile ground for varying interpretations and at worst make the last 48 years of Alaska Supreme Court decisions questionable precedence. Adding to that uncertainty, the facts in every case have a different twist. Minor variations in the application of the law to different factual scenerios can result in different outcomes. In short, consult with your attorney about the facts of your particular case when you are faced with prescription and adverse possession issues.

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[54] Nome 2000 v. Fagerstrom, 799 P.2d 304, 309 (1990). See also Talbot's Inc. v. Cessnun Enterprises, Inc., 566 P.2d 1320, 1322 (1977).