***Hamerly v. Denton***
**359 P.2d 121 (1961)**

## RS 2477 (43 U.S.C.A. sec. 932)

"The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

## Acceptance:

1. "positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or"

2. "there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted."

## Public User Requirements:

"(1) that the alleged highway was located 'over public lands', and”

“(2) that the character of its use was such as to constitute acceptance by the public of the statutory grant."

## Public Lands:

"… lands which are open to settlement or other disposition under the land laws of the United States.  It does not encompass lands in which the rights of the public have passed and which have become subject to individual rights of a settler."

"Where there is a dead end road or trail, running into wild, unenclosed and uncultivated country, the desultory use thereof established in this case does not create a public highway."

## Intent to Dedicate:

“Dedication is not an act or omission to assert a right; mere absence of objection is not sufficient. Passive permission by a landowner is not in itself evidence of intent to dedicate. Intention must be clearly and unequivocally manifested by acts that are decisive in character.”

## Prescriptive Use:

"Use alone for the statutory period - even with the knowledge of the owner - would not establish an easement."

Such use is presumed to be permissive unless the claimant proves the use was "openly adverse to the owner's interest by ... distinct and positive assertion of a right hostile to the owner of the property."

**Dillingham Commercial Company, Inc. v. City of Dillingham**
**705 P.2d 410 (1985)**

Official action such as a homestead entry was required to withdraw the land from the public domain, mere possession did not suffice.

Public use must:

•be for a period of time and under conditions proving the grant had been accepted.

•have specific termini and a definite location.

•once established "it may be used for any purpose consistent with public travel."

Citing Wessells: General Rule in Alaska: "'right of way' is synonymous with 'easement'".

## Adverse Possession:

A prescriptive easement does not require exclusive use. The use makes the property subject to an easement, but it does not divest the owner of the underlying fee title.

## Implied Dedication:

(1) an intent to dedicate the road or easement to a public use, and

(2) an acceptance of that dedication on behalf of the public.

The intent to dedicate must be "clear and unequivocal".

**Shultz v. Department of the Army, United States of America, 10 F.3d 649 (9th Cir. 1993)**

Three major issues:

- standing to bring the quiet title action,
- the validity of the RS 2477 claim,
- the statute of limitations to bring the action.

**STANDING:**

Army claimed:

- Shultz not an abutter to the roads on the base, did not have "a 'special and vital interest' in roads that do not abut his property

Court Ruled:

- has a "particularized" interest in crossing the base to reach roads that lead to his property.

- Not to have access to those roads would "affect [him] in a personal and individual way" by sealing him off from his property.

•Army asserted an unrestricted right to regulate access to Fort Wainwright's roads. A clear causal connection exists between his claim and the restrictions he challenges.

•If the roads to his property are public rights of way a "favorable decision" would resolve his injury (loss of access).

Establishment of “Route”

Due to its geography, its weather, and its sparse and scattered population, Alaska's "highways" frequently have been no more than trails and they have moved with the season and the purpose for the transit--what traveled best in winter could be impassable knee-deep swamp in summer; what best accommodated a sled was not the best route for a wagon or a horse or a person with a pack. By necessity routes shifted as the seasons shifted and the as the uses shifted. What might be considered sporadic use in another context would be consistent or constant use in Alaska. We conclude that as long as the termini of the right of way are fixed (the homesteaders' cabins on one end, Fairbanks on the other), to establish public right

> of way the route in between need not be absolutely fixed (as it might be in other settings).... Right of access is the issue, not the route. [Footnotes omitted].

Although RS 2477 is a federal grant, acceptance of the grant is a matter of state law.

"An RS 2477 right of way comes into existence 'automatically when a public highway [is] established across public lands in accordance with the law of the state.' Whether a right of way has been established is a question of state law." However, doubts to the extent of the RS 2477 right of way must be construed in favor of the government.

A.S. 19.45.001(9) "broadly 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.'"

Lands that have been withdrawn or entered are not public lands available for an RS 2477 claim.

Public user is necessary to create the acceptance.

Although the law of RS 2477 rights of way suggests that "infrequent and sporadic" use is insufficient, Hamerly, 359 P.2d at 125, and that "regular" and "common" use by the public is necessary, Kirk v. Schultz, 110 P.2d 266, 268 (Idaho 1941), and that travel across the route may not be "merely occasional," the test is what is "substantial" under the circumstances, Ball v. Stephens, 158 P.2d 207, 210 (Cal. 1945).

In finding a foot path was sufficient to establish an RS 2477 right of way

“manner of travel (by foot or beast or vehicle) is legally irrelevant to the RS 2477 determination.”

“What matters is that there was travel between two definite points."

Both the judge and the Army clearly misunderstood the import of A.S. 19.45.001(9) for RS 2477 law. Such a right of way need not be "buil[t]" or constructed'. Nor need it be "susceptible to wagon or motor vehicle use". An unimproved trail suffices as a "road" for the purposes of this

law.  The government posed the problem incorrectly.  It argued to the court that "if you're going to find an RS-2477, you have to know not only that he got from Fairbanks to his property, but how he did it."  As long as it is clear that Nissen traveled overland, how he did it is immaterial.

**Quiet Title Action:**

•statute of limitations under 28 § U.S.C. 2409a(g).

•base established in 1937

•No notice to Shultz of disputed use until Army blocked the road in 1981.

**NOTE:**

**This opinion was withdrawn by the 9th Circuit.**

**Short ruling that the case was time barred.**

# Fitzgerald v. Puddicomb, 918 P.2d 1017 (1996)

- “The extent of public use necessary to establish acceptance of the RS 2477 grant depends upon the character of the land and the nature of the use. (… Alaska present[s] unique questions)”

- What might be considered sporadic use in another context would be consistent or constant use in Alaska

- Although “infrequent and sporadic” use is not sufficient to establish public acceptance of the grant, … continuous use is not required.

- Nor does the route need to be significantly developed to qualify as a “highway” for RS 2477 purposes; even a rudimentary trail can qualify.

- “In any event, it is not necessary . . . that the precise path of the trail be proven. It is enough for one claiming an RS 2477 right-of-way to show that there was a generally-followed route across the land in question.”

## McCarrey v. Kaylor, 301 P.3d 559 (2013)

- North side of McCarrey property subject 50 foot Small Tract Act reservation for roads and utilities.

- McCarreys notified Kaylors they would fence their boundary and give Kaylors access on 72 hour notice.

- Trial court granted Kaylors request to enjoin McCarreys from building fence to block their access.  McCarreys appealed.

McCarreys claim:

- 136th Street along north boundary was not a public road
    - (1) the municipality determines what is a public road, municipality did not dedicate or maintain the road

- (2) FLPMA repeal of Small Tract Act terminated the common law roadway dedication because it was not opened prior to 1976

- Argued it was a private road only for Small Tract Owners

Court:

“The Small Tract Act: Guide Book for Managing Existing Small Tract Areas, Instruction Memorandum No. 80–540, the BLM noted that “[t]he classification and accompanying segregation [ ] continue until revoked, even though the [Small Tract Act] has been repealed.” We thus conclude that repeal of the Small Tract Act did not by itself end a small tract classification.”

- FLPMA applies only to federal lands, once patent is issued it doesn’t apply.
- Common law dedication – 2 essential elements:
- owner’s offer of dedication to the public, and
- acceptance by the public
- Remanded to lower court to determine if acceptance by public user or formal acceptance