PRESCRIPTIVE EASEMENTS IN ALASKA LAW

STATUTES

AS 09.10.030

ALASKA STATUTES
Title 9. Code of Civil Procedure.
Chapter 10. Limitations of Actions.

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.

FN5. Alaska Statute 09.45.010 reads as follows:

Action to quiet title. A person in possession of real property, or a tenant of that person, may bring an action against another who claims an adverse estate or interest in the property for the purpose of determining the claim.

FN6. Alaska Statute 09.45.630 reads as follows:

Actions for recovery of real property. A person who has a legal estate in real property and has a present right to the possession of the property may bring an action to recover the possession of the property with damages for withholding it; however, recovery of possession from a tenant shall be made under AS 09.45.060-09.45.160.

(§ 1.03 ch 101 SLA 1962; am §§ 1, 2 ch 147 SLA 2003)
Alaska Statute 09.10.030 not only establishes a time limit during which an action to recover real property may be maintained, but also constitutes the *method* by which a claimant may establish title through adverse possession. *Bentley Family Trust v. Lynx Enter.*, 658 P.2d 761, 765 n. 10 (Alaska 1983). We believe that the statute also constitutes a method for establishing an easement through prescription. *See Hamerly v. Denton*, 359 P.2d 121, 125 (Alaska 1961) (holding that the statute of limitations may be "used as a basis" of establishing an easement). Although originally the statute was interpreted as merely the basis of "an appropriate action," *Ringstad v. Grannis*, 12 Alaska 190, 196 (9th Cir.1948) (serving as basis of an ejectment action), we have not required the use of another statute as the actual method of acquiring title. *See, e.g., Bentley Family Trust*, 658 P.2d at 766 (recognizing title by adverse possession without reference to the statute for quieting title); *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826, 830 n. 13 (Alaska 1974); *Ayers v. Day & Night Fuel Co.*, 451 P.2d 579, 581 (Alaska 1969).

Thus the party claiming a prescriptive easement need not bring the action as either an action to quiet title, AS 09.45.010, [FN5] or an ejectment, AS 09.45.630.[FN6]

This section is a statute of repose. Roberts v. Jaeger, 5 Alaska 190 (1914).

This section presupposes that there never has been a deed. Roberts v. Jaeger, 5 Alaska 190 (1914).

Section may be basis of new title. -- While this statute purports only to bar the remedy, it is clear that it can be the basis of a new title, which may be asserted offensively as well as defensively. Ringstad v. Grannis, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).
This section can be utilized as the basis of a new title. Ayers v. Day & Night Fuel Co., 451 P.2d 579 (Alaska 1969).
This statute not only establishes a time limit within which an action to recover real property must be brought, but also constitutes the method by which a claimant may establish a new title through adverse possession. Bentley Family Trust v. Lynx Enters., Inc., 658 P.2d 761 (Alaska 1983).

Such as right of way. -- While this section purports only to bar a remedy, it may be used as the basis of establishing an easement of right of way across another's land. Hamerly v. Denton, 359 P.2d 121 (Alaska 1961).

Possessory right may be protected by action. -- In Noble v. Melchoir, 5 Alaska 729 (1917), the court said: "The possessory right thus acquired by defendant is a property right, for the protection of which an appropriate action may be maintained by the occupant." Ringstad v. Grannis, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948). See notes under analysis line II, "Adverse Possession".

Applicability of provision requiring possession or seizure within 10 years. -- The provision of this section that no action may be maintained unless it appears that the plaintiff or his predecessor was seized or possessed of the premises within 10 years is not inapplicable to any party except a plaintiff. Juneau Indep. Sch. Dist. v. Smith, 13 Alaska 1, 92 F. Supp. 617 (D. Alaska 1950).

Differences between claim under color of title and one without color. -- Essential difference between requirements for claim under color of title and one without such color of title is in the number of years of possession required. In both cases, there must be uninterrupted, adverse and notorious possession, but only seven years is required under AS 09.25.050 (now AS 09.45.052) as opposed to 10 years under this section. Shilts v. Young, 567 P.2d 769 (Alaska 1977).

When the land claimed is not the land described in the deed, the doctrine of color of title does not apply and the 10-year period of this section must be met. Hubbard v. Curtiss, 684 P.2d 842 (Alaska 1984).

A trust once established is not within the statute of limitations. Alaska N. Ry. v. Alaska Cent. Ry., 5 Alaska 304 (1915).
If defendants were holding land as trustees for the plaintiff or its grantor, the statute would not run, until there was some act of disavowal done by said trustees which showed unequivocally that they were holding adversely to the alleged cestui que trust. Alaska N. Ry. v. Alaska Cent. Ry., 5 Alaska 304 (1915).

Possession of trustee is presumed to be possession of cestui que trust. -- See Alaska N. Ry. v. Alaska Cent. Ry., 5 Alaska 304 (1915).

Clear proof of surrender of owner's rights required. -- Before a court would be justified in interfering with an owner's enjoyment of his own land, it ought to be satisfied by the clearest kind of proof that the owner has surrendered that absolute jus disponendi which the law

guarantees to him. Roberts v. Jaeger, 5 Alaska 190 (1914).

Statute does not run until plaintiff acquires title. -- The statute of limitations begins to run against a grantee under the general land laws of the United States only from the date when he acquires the title, and an occupancy by another prior to that time will not be deemed adverse to the title of such grantee. Tyee Consol. Mining Co. v. Langstedt, 136 F. 124 (9th Cir. 1905).
To start the statute of limitations running against a plaintiff, who relied on a townsite trustee's deed, he must have been disseized, and in order to be disseized he must have at some time have been seized of title, either of fee or freehold, and until the issuance of patent to him he was not so seized. Alaska & N.W.T.T. Co. v. Bernhoffer, 4 Alaska 99 (1910); Valentine v. McGrath, 4 Alaska 102 (1910).
It is the delay, the duration of time after title seized, that raises the bar of the statute; this may not be by relation, else one ought be barred before time seized. Valentine v. McGrath, 4 Alaska 102 (1910).

Running against claimant of mining claim. -- The statute of limitations does not begin to run against the claimant of a mining claim before his patent issues. Tyee Consol. Mining Co. v. Langstedt, 136 F. 124 (9th Cir. 1905).

Alaska has two adverse possession statutes. Under AS 09.25.050 [FN3] the statutory period is seven years when the possession is accompanied by a claim and color of title. In other cases, under AS 09.10.030 [FN4] the statutory period is ten years.

AS 09.25.050 states:

The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more is conclusively presumed to give title to the property except as against the state or the United States.

[2] [3] Color of title exists only by virtue of a written instrument which purports to pass title to the claimant, but which is ineffective because of a defect in the means of conveyance or because the grantor did not actually own the land he sought to convey. *Karvonen v. Dyer*, 261 F.2d 671, 674 (9th Cir.1958). The supposed conveyance must accurately describe the land claimed and it is the description, not the physical use of the land by the claimant, that determines the boundaries of the land that may be acquired by adverse possession under color of title. *Lott v. Muldoon Baptist Church, Inc.*, 466 P.2d 815, 817-18 (Alaska 1970). In cases such as this one, when the land claimed is not the land described ***848** in the deed, the doctrine of color of title does not apply and the ten year period of AS 09.10.030 must be met.

[4] In order to acquire title to land by adverse possession, the possessor must show that his use of the land was continuous, open and notorious, exclusive and hostile to the true owner. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974). We have stated that an objective test should be used to determine the existence of the requisite degree of hostility.

The question is whether or not the claimant acted toward the land as if he owned it. His beliefs as to the true legal ownership of the land, his good faith or bad faith in entering into possession *i.e.*, whether he claimed a legal right to enter, or avowed himself a wrongdoer), are all irrelevant.

Id. at 832. In other words, the fact that possession was taken under mistake or ignorance of the true boundary lines is immaterial.[FN5] *Norgard v. Busher*, 220 Or. 297, 349 P.2d 490 (Ore.1960).

CASES

McGill v. Wahl
839 P.2d 393
Alaska,1992.
September 18, 1992 (Approx. 10 pages)

B. PRESCRIPTIVE EASEMENT

[7] To establish a prescriptive easement a party must prove that (1) the use of the easement was continuous and uninterrupted; (2) the user acted as if he or she were the owner and not merely one acting with the permission of the owner; and (3) the use was reasonably visible to the record owner. *Swift v. Kniffen,* 706 P.2d 296, 302 (Alaska 1985) (quoting *Alaska Nat'l Bank v. Linck,* 559 P.2d 1049, 1052 (Alaska 1977)). These are the same requirements to make out a claim of adverse possession.[FN8] *Id.* The required period of adverse use is ten years. *Id.;* AS 09.10.030.

FN8. Adverse possession however focuses on "possession" rather than "use." *Linck,* 559 P.2d at 1052.

[8] The Wahl's continuous and clearly visible use of the property is not disputed.[FN9] The McGills claim that the Wahls failed to establish the second element, also known as the hostility element, for the required period of prescription.

FN9. The superior court found that the prescriptive period ran from October 1975 when the Wahls purchased lot 11 from the Biekers until August 1989 when David McGill blocked the roadway.

The trial court found "That Plaintiffs have acted as if they were the owners and not merely acting with the permission of the owner." This finding is not clearly erroneous.[FN10] There is a presumption that the use of land by an alleged easement holding was permissive. Ordinarily, this presumption is overcome only by " 'proof of a distinct and positive assertion of a right hostile to the owner.' " *Dillingham Commercial Co. v. City of Dillingham,* 705 P.2d 410, 417 (Alaska 1985) (quoting *Hamerly v. Denton,* 359 P.2d 121, 126 (Alaska 1961)).

FN10. This court has previously characterized the findings of the elements of prescriptive easements as factual ones. *Swift,* 706 P.2d at 303. This court will overturn such findings only if they are clearly erroneous and there exists a definite and firm conviction that a mistake has been made. *Donnybrook Bldg. Supply v. Interior City Branch, First Nat'l Bank of Anchorage,* 798 P.2d 1263, 1266 (Alaska 1990).

[9] However, in this case it would be inappropriate for us to presume that the Wahls were acting as merely permitted users of the roadway. Such a presumption does not arise where a roadway was not established by the owner of the servient ***398** estate for its own use but was for many years the only means of passage to the dominant estate. *Richardson v. Brennan,* 92 Nev. 236, 548 P.2d 1370, 1372 (1976).[FN11]

FN11. The facts of *Richardson* are very similar to the case before us. In *Richardson,* a driveway across the servient estate was used by the owners of the dominant estate since the inception of the dominant estate. The driveway was in existence and being used by the tenants on the dominant estate when the owners of the servient estate were assigned their lease to the land. Originally, the driveway was the only access to the dominant estate. 548 P.2d at 1372.

The roadway originally was and continuously has been used as access to the lots behind the McGills' property. The roadway existed and was used by the Nels Wahls before the McGills came to the property. Although other lot owners now use Highway 1 to get to their lots, the use of the roadway has never changed with respect to lot 11. The McGills, having come to land burdened by the roadway, cannot now claim that the users of the roadway were acting merely with their permission. Likewise, the McGills without any affirmative action cannot now claim that they intended to permit the use of the road by the other landowners.[FN12]

FN12. We have held before that in some cases the landowner's intent to permit or acquiesce to the use of an easement was the dispositive determination. *See Swift,* 706 P.2d at 304.

We reject the suggestion that the Wahls' nonexclusive use of the roadway precludes a prescriptive easement. Besides the McGills, Olson used the roadway to access his property when he was developing it. Also, until Fred Wahl blocked the access across lot 12, the roadway was used occasionally by others to travel from Highway 1 to Dillingham Airport Road.

[10] Exclusivity of use is not generally a requirement for a prescriptive easement as it is for a claim of adverse possession. 2 John S. Grimes, *Thompson on the Modern Law of Real Property* § 343, at 215-16 (1980 rep.). However, exclusive use will be a factor in determining whether a use was under a claim of right.

D. Takings Clause

[15] [16] [17] Weidner makes the further argument that a prescriptive easement allows the State to take private property without just compensation in violation of takings clauses of the federal and Alaska constitutions [FN5] This argument misunderstands the nature and operation of a prescriptive easement. The theory of prescriptive easement does *not* grant the State affirmative authority to take property without just compensation. Rather, the prescriptive period-as with any statute of limitations [FN6]-requires a private landowner to bring an inverse condemnation action for public use of private property within a specified period of time. At the expiration of the prescriptive period, the landowner's right to bring suit is extinguished, effectively vesting property rights in the adverse user. [FN7] In the present case, Weidner's claim for just compensation has been extinguished by expiration of the prescriptive period. Thus, as Weidner's predecessors had a right to just compensation for the State's unauthorized use of their land which they failed to assert in a timely manner, Weidner too is barred from bringing suit.

FN5. Alaska Const. art. I, § 18 ("Private property shall not be taken or damaged for public use without just compensation.").

Swift v. Kniffen
706 P.2d 296
Alaska,1985.
September 13, 1985 (Approx. 12 pages)

Owners of property in subdivision filed suit against subdivider to obtain an easement to a disputed roadway in subdivision. The Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., entered judgment against owners on all theories submitted by them, and owners appealed. The Supreme Court, Burke, J., held that: (1) owners did not have a right to use disputed roadway on theory of common-law dedication since, even assuming an intent to dedicate could be established from act of subdivider in filing a preliminary plat, subdivider engaged in sufficient activities to negate any presumed intent to dedicate roadway to public; (2) a private easement by estoppel was not established in absence of allegations that subdivider made an oral grant of easement to use disputed roadway or that owners relied on a belief that roadway was public; (3) right to a private prescriptive easement could be established if owners could show that use was continuous and uninterrupted, was adverse and hostile, and was notorious in its own right, not dependent on a similar right in others; (4) owners were also entitled to assert a claim to a public easement by prescription; (5) appearance of impropriety required that another judge be assigned to case on remand; and (6) award of attorney fees would be vacated so that issue could be redetermined on remand in view of prevailing party or parties.
Reversed and remanded.

I. BACKGROUND

In 1968 Marjorie and Darrell Kniffen purchased a tract of undeveloped land near Fairbanks. The Kniffens held the land until it was subdivided. Ownership was then transferred to Fairhill, Inc., (Fairhill) a development corporation controlled by the Kniffens. Fairhill immediately began to develop the parcel by building roadways.

A number of preliminary plats were submitted to the North Star Borough Planning and Zoning Commission. The Borough rejected one plat, which reflected the disputed roadway as the main access to the subdivision, because the road was not compatible with grade requirements. Consequently, in another plat Fairhill dedicated Fairhill Road, approximately 900 feet north of the disputed road, as access to the subdivision.

The disputed roadway was partially built at the time the Borough rejected it as an access road. The uphill section, between Gruening Way and Peters Road, was subsequently reseeded and is not part of this dispute. At issue here is the downhill portion, between City Lights Boulevard and Gruening Way, which already had tailings on it and could not be reseeded. Fairhill left the road as a driveway to two undeveloped lots and continued to pay taxes on it.

The Kniffens, the subdivision's first residents, moved to Peters Road in 1971. The subdivision's second residents, Bill and Anna Swift, purchased Lots 26 and 27 and began clearing them in early August 1971. They began constructing their home in the spring of 1972 and moved into it in the spring of 1973. David and Ellen Dahl first came to Fairhill in 1973 or 1974 and used the roadway frequently. They purchased Lot 2 in 1981. A number of other people have purchased lots since Fairhill began selling them in 1969.

Many of the subdivision's residents used the disputed roadway daily or a few times each week, especially when Fairhill Road was impassable. Use increased as more people purchased lots and built homes in the subdivision. Mr. Swift recalled first driving on the roadway in 1969. From the time the Swifts bought their lot in 1971 to the time they moved into their new home in 1973,

they claim to have used the roadway anywhere from several times a day to several times a week. Once they were living in the subdivision they claim to have used ***300*** the roadway often. The general public used the roadway periodically as an access road to visit subdivision residents and for recreational vehicle use. Marjorie Kniffen testified that she and her husband used the road once in awhile.

The residents who testified maintained that Fairhill did nothing to suggest to them that the disputed road was not public until 1981. No resident claimed that the Kniffens or any other agent of Fairhill told them that they could use the roadway, but most testified that they had never been told they could not use it. They claim that while other private areas of the subdivision were posted against trespassing, the disputed road never was. They claim that while the Kniffens confronted trespassers on other private areas of the subdivision, the Kniffens never reprimanded people for using the road.

Marjorie Kniffen testified that she stopped trespassers on the road, although she admits she never stopped the Dahls or Swifts. She claims to have posted the road repeatedly against trespassing before 1972, but ceased posting because no property was being damaged and the signs were always ripped up quickly anyway. No residents recalled seeing these postings; however, none except the Swifts lived in the subdivision during those years. In 1972, when use of the road and the surrounding area resulted in property damage, Marjorie Kniffen ran an ad for three months in the local newspaper announcing that snowmachines, motorcycles and cross country vehicles were prohibited in the area and warning the public against future trespassing on the road and in the vicinity. Appellants contend that this ad gave no notice that Fairhill sought to prevent normal vehicular use of the disputed roadway. Marjorie Kniffen also claimed to have blocked the road with snow berms, but none of the witnesses recalled her having done this.

Marjorie Kniffen acknowledged that she was aware that people were using the road in the early 1970s, but she did not believe they were subdivision residents. She claims she never saw the Swifts use the road and had no reason to believe they used it regularly before they moved into the subdivision in 1973. However, she admitted that by 1974 she thought the Swifts were using the road and that Mr. Swift had plowed it.

In 1981 several residents informed Marjorie Kniffen that they were pooling their resources to upgrade the subdivision roads and that they planned to grade the disputed road. Marjorie Kniffen objected, claiming it was private property. Fairhill physically blocked the road in October 1981.

Residents of the subdivision, the Wilsons, Slaters, Dahls, and Swifts, filed a complaint in May 1982 against Mr. and Mrs. Kniffen and Fairhill,[FN1] seeking an easement to the disputed road. Fairhill's answer raised a trespass counterclaim. In December 1982, the Wilsons and Slaters obtained an order dismissing their complaint without prejudice. The counterclaim against them was eventually dismissed in December 1983, just days before the trial commenced.

The superior court rejected the Swifts' claim because "[s]uch periodic use is insufficient to show, by clear and convincing evidence, that the use by the plaintiffs was either continuous or sufficiently notorious to give the required notice to defendant to establish a prescriptive easement."

[10] We find the superior court's factual findings on the issue of private prescriptive easement inadequate for purposes of our review. We remand the case for factual findings on all three elements of prescriptive easement, so that we may have a clear understanding of the basis of the superior court's decision.

A. *Continuity*

The key Alaska case defining the continuity requirement in the context of adverse possession is *Alaska National Bank v. Linck,* 559 P.2d 1049, 1052 (Alaska 1977). In *Linck* we stated:

The nature of possession sufficient to meet this requirement depends on the character of the property. One test is whether the adverse possessor has used and enjoyed the land as "an average owner of similar property would use and enjoy it."

An interruption of possession caused by the record owner or third parties, or abandonment by the possessor, tolls the running of the statute of limitations.

Id. at 1052 (emphasis added) (citations omitted).

[11] [12] [13] [14] The superior court appears to have misapplied the test for continuity. The fact that the road was sometimes unplowed and impassable for weeks at a time does not signify either abandonment or interrupted use. First, to establish abandonment the period of non-use must indicate that the adverse user had ceased his use and claim. Failure to plow and use a road for a few weeks in winter in Fairbanks does not demonstrate that the Swifts no longer intended to use the road as an alternative route to their property. Second, interruption of possession or use must be caused by the record owner or third parties. *Id.* The Swifts' use of the roadway was not interrupted until the fall of 1981, when the Kniffens physically blocked the roadway. Prior to that time, the Kniffens apparently posted signs warning against trespassing and ran an advertisement. These acts, however, were not sufficient by themselves to interrupt the Swifts' adverse use.[FN8] The roadway's closure due to snowfall cannot be considered an interruption because it was not caused by the Kniffens or Fairhill.[FN9]

FN8. If anything, the Kniffens' acts merely add support to the Swifts' claim that their use was hostile, an issue that is discussed in the following section of this opinion.

FN9. We do not hold that the continuity requirement has been met. On remand, other factual findings might indicate that the Swifts' use of the roadway was not continuous.

B. *Hostility*

[15] In *Linck,* we interpreted hostility as requiring the adverse possessor to show that he acted as if he were the owner and not merely one acting with the owner's permission. 559 P.2d at 1053. In the easement context, the user must have acted as if he were claiming a permanent right to the easement. *City of Anchorage v. Nesbett,* 530 P.2d 1324, 1331 (Alaska 1975).

[16] The sort of permission which would negate the claim of an adverse user is not mere acquiescence because:

***304** [T]he 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.

Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d at 833; 4 H. Tiffany, *supra,* § 1196, at 984 (3d ed. 1975); 2 G. Thompson, & J. Grimes, *Commentaries on the Modern Law of Real Property,* § 341, at 203 (1980). In the context of adverse possession we have consistently held:

When one assumes possession of another's property, there is a presumption that he does so with the rightful owner's permission and in subordination to his title. "This presumption is overcome only by showing that such use of another's land was not only continuous and uninterrupted, but was openly adverse to the owner's interest, i.e., by proof of a distinct and positive assertion of a

right hostile to the owner of the property."

Ayers v. Day and Night Fuel Co., 451 P.2d 579, 581 (Alaska 1969) (quoting *Hamerly*, 359 P.2d at 126); *Peters*, 519 P.2d at 833. This presumption has been applied to easement disputes as well. *Dillingham*, 705 P.2d at 415 (Alaska 1985); *Nesbett*, 530 P.2d at 1330 n. 16.

[17] In rejecting the Swifts' claim for prescriptive easement, the trial court made no findings of fact or conclusions of law regarding the hostility requirement. The hostility element turns on the distinction between acquiescence and permission. On remand the trial court must determine if Fairhill intended to permit use of the roadway or whether the Swifts' use was the result of Fairhill's acquiescence. If the latter is found, then the Swifts' use of the roadway was adverse and hostile.

C. *Notoriety*

[18] In *Linck* we held that in order to satisfy the notoriety requirement, the adverse possessor (here the adverse user) need not show that the record owner had actual knowledge of the adverse party's presence. Rather, the owner is charged with knowing what a duly alert owner would have known. 559 P.2d at 1053; *see also Shilts v. Young*, 567 P.2d 769, 776 (Alaska 1977). What a duly alert owner is expected to know depends on the nature of the property:

[A]s with the other elements of adverse possession, to determine what constitutes sufficient notoriety we must consider the character of the land. We cannot expect the possessor of uninhabited and forested land to do what the possessor of urban residential land would do before we charge the record owner with notice.

Linck, 559 P.2d at 1053.

The Swifts claim that they used the disputed roadway regularly since 1969, and that Fairhill was aware that members of the public sporadically used the road even at that time. The Swifts' use, however, must be notorious in its own right, and not dependent on a similar right in others. *See Nordin v. Kuno*, 287 N.W.2d 923, 926 (Minn.1980). When a claimant's use is in common with the public's use, the claimant must perform some act with the owner's knowledge clearly indicating his own individual claim of right. *Saunders Point Association v. Cannon*, 177 Conn. 413, 418 A.2d 70, 73 (1979); 2 G. Thompson & J. Grimes, *supra*, § 341, at 203.

The superior court concluded that the Swifts' use had not been notorious, but made no factual findings on the issue. A remand is necessary to determine if a duly alert owner would have known that the Swifts were regularly using the roadway, at least since 1971.

[19] One further aspect of the prescriptive easement issue deserves our attention. The Swifts are the only parties who claim to have established a private prescriptive easement over the disputed roadway, however, a number of other Fairhill residents and members of the public appear to have also adversely used it. In an attempt to gain a public easement, appellants argue the theory of implied dedication. They are unsuccessful on this theory because Fairhill made no offer of dedication. *See supra* section II. This, however, does not end the inquiry. A closely related theory ***305** remains a viable alternative. In a recent decision, *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 415, we explicitly held that a public easement may be acquired by prescription.[FN10] The rule in *Dillingham* was announced while this appeal was pending, long after appellants filed their initial complaints and submitted their appellate briefs. On remand, appellants may ask leave of the trial court to amend their pleadings to include a claim to a public easement by prescription.[FN11] The trial court may entertain such a motion, applying the rules that govern the amendment of pleadings.

FN10. While implied dedication and prescriptive easement are both theories commonly used to establish the public's right to use land as a public highway, there are important distinctions between the two. Implied dedication cannot be established through an owner's acquiescence to the public's use of his land. A manifest intent to dedicate is required. *Hamerly,* 359 P.2d at 125. Prescription, however, is created not when the land is used with the owner's permission, but instead when he acquiesces to the public's use for the statutory time period. *Peters,* 519 P.2d at 833.

FN11. Amendment to the pleadings may be proper on remand. *See City of Columbia v. Paul N. Howard Co.,* 707 F.2d 338, 341 (8th Cir.1983), *cert. denied,* 464 U.S. 893, 104 S.Ct. 238, 78 L.Ed.2d 229 (1983) (interpreting Fed.R.Civ.P. 15(a)); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1489, at 449-50 (1971); 3 J. Moore, Moore's Federal Practice ¶ 15.11, at 15-150 (1984).

Subdivider's posting of signs warning against trespassing was insufficient to interrupt adverse use of road in subdivision by owners of property claiming a private prescriptive easement. Presumption that party assuming possession of property does so with rightful owner's permission is overcome in context of a private prescriptive easement only by showing that such use was not only continuous and uninterrupted, but was openly adverse to owner's interest.

A party claiming a private prescriptive easement need not show that record owner had actual knowledge of adverse party's presence, but when his use is as common with public's use, he must perform some act with owner's knowledge clearly indicating his own individual claim of right.

It is generally held that the use and enjoyment which will give title by prescription to an easement or other incorporeal right is substantially the same in quality and characteristics as the adverse possession which will give title to real estate,[FN9] although it has also been held that the proof necessary to establish a prescriptive easement to use land is not the same as that to establish a claim of title by adverse possession.[FN10] The prerequisites for the acquisition of a prescriptive easement are designed to insure that the owner of the property which is being encroached upon has actual or constructive notice of the adverse use, and to provide sufficient time to take action to prevent such adverse use from ripening into a prescriptive easement.[FN11] Prescriptive easements may be proved by public or private use, although the party claiming the right must show the requisite elements in either case.[FN12]

A prescriptive right cannot be acquired unless the use defines its bounds with reasonable certainty.[FN13] Accordingly, it has been held that the law requires a prescriptive easement to be clearly definable and precisely measured;[FN14] or to be for a definite, certain, and particular line or path of use.[FN15] An alleged prescriptive easement that is too indefinite for a determinate description cannot be established by a court of equity.[FN16]

The character of claimant's use will establish a prescriptive easement where the necessary conditions are satisfied.[FN17] However, a prescriptive right is not looked on with favor by the law;[FN18] and it is essential that all of the required elements of use and enjoyment concur in order to create an easement by prescription,[FN19] so that the lack of any of the necessary features will preclude the creation of a prescriptive easement.[FN20] Doubt as to the character of the use is to be resolved in favor of the free and untrammeled use of the land.[FN21]

On the other hand, the establishment of a prescriptive easement is not precluded by the absence of elements that are not essential to its creation,[FN22] such as hardship or necessity of use,[FN23] a physical injury to the land,[FN24-25] or the payment of taxes.[FN26] A person does not have to know that the property that he is using belongs to another in order to establish

a prescriptive easement,[FN27] claimant's state of mind being irrelevant in determining whether a private prescriptive easement has been established.[FN28]

Price v. Eastham
128 P.3d 725
Alaska,2006.
February 03, 2006 (Approx. 9 pages)

Background: Snowmachiners sued landowner, claiming they had perfected a prescriptive easement over landowner's property, and landowner counterclaimed for injunctive relief. After a bench trial, the Superior Court, Third Judicial District, Homer, Harold M. Brown, J., found that a right-of-way existed under federal right-of-way statute, and that a prescriptive easement existed over landowner's property. Landowner appealed. The Supreme Court, 75 P.3d 1051, found that a public easement had been established, and remanded to the superior court for a determination of the easement's scope. On remand, the superior court issued an order stating that the easement was to 16 feet in width, and landowner appealed.

This case concerns the scope of an easement along a seismic trail crossing the property of Thomas E. Price. The trail was used without incident for many years (since at least 1956) until the late 1990s when trail traffic increased to the point of interfering with Price's quiet enjoyment of his land. Price posted the trail with "No Trespassing" signs in the winter of 1998-99. He replaced the signs each time unknown persons removed them. A group of snowmachine drivers eventually sued Price to settle the dispute.[FN5]

FN5. The plaintiff in the trial court was originally the organization Snomads, Inc. Michael Eastham's amended complaint substituted ninety-one individual plaintiffs for the Snomads.

In its February 9, 2000 decision, the superior court found that a right-of-way existed under 43 U.S.C. § 932, Revised Statute (RS) 2477 and, in the alternative, that a prescriptive **easement** existed over Price's property. [FN6] ***727** The RS 2477 issue had not been raised by the parties at trial.[FN7] Regarding the scope of the RS 2477 right-of-way, the superior court stated only the general direction of the trail; clarified that it may be used for any purpose consistent with public travel; and declared its width to be "that width established by the traditional use of the trail, but in no place is the right of way narrower than is safe for two snowmachines to pass each other, nor wider than the original width of the seismic trail."

FN6. To clarify, the trial court did not discuss the prescriptive easement or its scope in its initial decision of February 9, 2000. However, it did hold that a prescriptive easement existed over Price's land in its denial of Price's motion for reconsideration on the original RS 2477 ruling. *Price,* 75 P.3d at 1053.

FN7. *Id.*

In *Price I,* we held that the superior court's failure to give the parties notice and an opportunity to be heard at trial on the RS 2477 issue violated due process rights and we therefore reversed the superior court's finding of an RS 2477 right-of-way.[FN8] But we concluded that a public prescriptive easement had been established over Price's property.

Supreme Court of Alaska.
INTERIOR TRAILS PRESERVATION COALITION, Petitioner,
v.
Greg SWOPE and Donna Swope, Respondents.
No. S-11323.
June 24, 2005.

Background: Nonprofit organization brought action against landowners claiming public prescriptive easement over the land for recreational use. The Superior Court, Fourth Judicial District, Fairbanks, Randy M. Olsen, J., dismissed action on ground that coalition had not been in existence for 10-year period to establish prescriptive easement. Nonprofit organization petitioned for review.

Holding: The Supreme Court, Bryner, C.J., held that corporation could maintain action for public prescriptive easement.

To succeed on a prescriptive easement claim, a claimant must show by clear and convincing evidence that (1) the use was continuous and uninterrupted for the same 10-year period that applies to adverse possession, (2) the claimant acted as an owner and not merely as a person having the permission of the owner, and (3) the use was reasonably visible to the record owner.

***528** Michael C. Kramer, Cook Schuhmann & Groseclose, Inc., and David F. Leonard, Law Office of David F. Leonard, Fairbanks, for Petitioner.
Peter J. Aschenbrenner, Aschenbrenner Law Offices, Inc., Fairbanks, for Respondents.

Obtaining rights in another's property by prescription is similar to obtaining rights by adverse possession.[FN2] "Both doctrines permit acquisition of property rights through the passage of time, if certain conditions are met, but prescription is applied to servitudes while adverse possession is applied to possessory estates." [FN3] Thus, the focus in a prescriptive easement claim is on "use," whereas the focus in an adverse possession case is on "possession." [FN4]

FN2. *See* RESTATEMENT (THIRD) OF PROP: SERVITUDES § 2.17, cmt. a (2000).

FN3. *Id.*

FN4. *See McGill v. Wahl,* 839 P.2d 393, 397 n. 8 (Alaska 1992) ("Adverse possession however focuses on 'possession' rather than 'use.' ").

[3] The two doctrines differ slightly in other respects as well. [FN5] To acquire an interest through adverse possession, the claimant ordinarily must prove ten years of adverse and exclusive possession.[FN6] In contrast, while a prescriptive easement similarly requires ten years of continuous use,[FN7] "[t]he use need not be, and frequently is not, exclusive" for prescription.[FN8]

FN5. RESTATEMENT (THIRD) OF PROP: SERVITUDES § 2.17, cmt. a (2000).

FN6. *See* AS 09.10.030 (establishing ten-year period for adverse possession absent color of title).

FN7. *See McGill,* 839 P.2d at 397 (noting that "[t]he required period of adverse use is ten years" for an adverse possession claim under AS 09.10.030, which is the same for prescription).

FN8. RESTATEMENT (THIRD) OF PROP: SERVITUDES § 2.17, cmt. a (2000); *see also* *McGill*, 839 P.2d at 398 ("Exclusivity of use is not generally a requirement for a prescriptive easement as it is for a claim of adverse possession.").

[4] [5] Prescriptive easements may be obtained either by private individuals or by the general public.[FN9] "The required elements are the same for public and private prescriptive easements. The only difference is that a public prescriptive easement requires qualifying use by the public, while a private prescriptive easement requires qualifying use only by the private party." [FN10] A prescriptive easement obtained by a private person gives only that person the right to continued use,[FN11] ***530** whereas a prescriptive easement obtained by the general public gives the right of use to the public at large.[FN12]

FN9. *See* Jon W. Bruce and James W. Ely, Jr., *The Law of* Easements *and Licenses in Land* § 5:24 (2004).

FN10. *Brimstone Mining, Inc. v. Glaus*, 317 Mont. 236, 77 P.3d 175, 181 (2003) (internal citations omitted).

FN11. *J.F. Gioia, Inc. v. Cardinal American Corp.*, 23 Ohio App.3d 33, 491 N.E.2d 325, 330 (1985) ("A landowner obtains an easement by prescription for a specific use of his neighbor's property when he uses that property in that manner" sufficient to satisfy the elements of a prescriptive easement.).

FN12. *See* *Elmer v. Rodgers*, 106 N.H. 512, 214 A.2d 750 (1965) (holding that public established a prescriptive easement over church's property even where plaintiff, in his own right, would not be able to satisfy requirements for prescription).

[6] Alaska courts have long recognized prescriptive easement claims brought on behalf of the general public as well as private individuals.[FN13] To succeed on a prescriptive easement claim, a claimant must show that (1) the use was continuous and uninterrupted for the same ten-year period that applies to adverse possession; (2) the claimant acted as an owner and not merely as a person having the permission of the owner; and (3) the use was reasonably visible to the record owner.[FN14] The claimant must prove each element by clear and convincing evidence.[FN15]

FN13. *Compare* *McDonald v. Harris*, 978 P.2d 81 (Alaska 1999) (upholding a private prescriptive easement), *with* *Price v. Eastham*, 75 P.3d 1051 (Alaska 2003) (upholding a public prescriptive easement).

FN14. *Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410, 416-17 (Alaska 1985) (citing *Alaska Nat'l Bank v. Linck*, 559 P.2d 1049, 1052 (Alaska 1977)).

FN15. *McDonald*, 978 P.2d at 83.

Price v. Eastham
75 P.3d 1051
Alaska,2003.
August 15, 2003 (Approx. 12 pages)

A. The Trial Court Erred in Determining that Price's Property Is Subject to a Public Right-of-Way Under Former 43 U.S.C. § 932, Revised Statute (RS) 2477.

1. Background on RS 2477

[5] [6] The superior court held that a public right-of-way existed over Price's property under 43 U.S.C. § 932, Revised Statute (RS) 2477. Congress enacted this provision, commonly referred to as RS 2477, in 1866 as part of the Lode Mining Act.[FN6] Under RS 2477, the federal government granted rights-of-way, providing: "[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." [FN7] The 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." [FN8] Although Congress repealed RS 2477 in 1976, the statute governs this case because the claimed right-of-way would have existed before then.[FN9]

FN6. Leroy K. Latta, Jr., *Public Access Over Alaska Public Lands as Granted by Section 8 of the Lode Mining Act of 1866,* 28 SANTA CLARA L.REV. 811, 811 (1988).

FN7. *Fitzgerald,* 918 P.2d at 1019 (quoting 43 U.S.C. § 932, *repealed by* Pub.L. No. 94-579, Title VII, § 706(a), 90 Stat. 2793 (1976), *quoted in Hamerly v. Denton,* 359 P.2d 121, 123 (Alaska 1961)).

FN8. *Id.*

FN9. *See id.* (citing *Dillingham Commercial Co. v. City of Dillingham,* 705 P.2d 410, 413 (Alaska 1985)).

[7] We have noted that "[t]he operation of § 932 is not obvious from its terms." [FN10] Indeed, the statute itself is simply an offer to dedicate land to public use.[FN11] To effect the grant of a right-of-way, either the public or the appropriate state authorities must take positive action. [FN12] Specifically, the public must use the land "for such a period of time and under such conditions as to prove that the grant has been accepted," or appropriate public authorities of the state must act in a way that clearly manifests their intention to accept the grant.[FN13]

FN10. *Dillingham,* 705 P.2d at 413.

FN11. *Id.*

FN12. *Id.* (citing *Hamerly,* 359 P.2d at 123).

FN13. *Id.* at 413-14.

[8]

43 U.S.C.A. § 932

United States Code Annotated Currentness

Title 43. Public Lands (Refs & Annos)

Chapter 22. Rights-Of-Way and Other Easements in Public Lands
§ 932. Repealed. Pub.L. 94-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793

HISTORICAL AND STATUTORY NOTES

Section, R.S. § 2477, authorized rights-of-way for the construction of highways over public lands not reserved for public uses.

Effective Date of Repeal

Section 706(a) of Pub.L. 94-579 provided in part that this section is repealed effective on and after Oct. 21, 1976.

RS 2477 specified that it provided for the construction of highways over federal "public lands, not reserved for public uses." FN14 ***1056** "Public lands" means lands open to settlement or other disposition under federal land laws.FN15 Therefore, a valid RS 2477 claim could only have been made on the land in question before December 29, 1959, when the State of Alaska filed a land selection application with the Bureau of Land Management for lands encompassing Price's land. As soon as the state filed its application, the lands it selected were "segregated from all applications and appropriations under the public land laws." We therefore must determine whether the trial court erred in holding that an RS 2477 right-of-way existed prior to 1959.

FN14. *Fitzgerald,* 918 P.2d at 1019 (quoting 43 U.S.C. § 932, *repealed by* Pub.L. No. 94-579, Title VII, § 706(a), 90 Stat. 2793 (1976), *quoted in Hamerly,* 359 P.2d at 123); *Humboldt County v. United States,* 684 F.2d 1276, 1280 (9th Cir.1982).

FN15. *Hamerly,* 359 P.2d at 123. AS 38.95.010 which provides:

No prescription or statute of limitations runs against the title or interest of the state to land under the jurisdiction of the ***1057** state. No title or interest to land under the jurisdiction of the state may be acquired by adverse possession or prescription, or in any manner except by conveyance from the state.

A prescriptive easement may be claimed against an individual who holds less than a fee simple interest in the land, such as a leaseholder.FN24 The Superior Court of New Jersey addressed this issue in *Ludwig v. Gosline.*FN25 In *Ludwig,* the Gosline family claimed that they had acquired a prescriptive easement over a portion of their neighbors' property.FN26 Both the Goslines and their neighbors leased their properties.FN27 In holding that the easement existed, the court noted that the servient property holder need not own the fee.FN28 "An **easement** by prescription may be obtained against the holder of a present interest subject to divestment if and when the property passes to the holder of a future interest." FN29

FN23. *Ludwig v. Gosline,* 191 N.J.Super. 188, 465 A.2d 946, 947 (1983).

Charles FAGERSTROM and Peggy Fagerstrom, Appellees.
No. S-3409.
Sept. 21, 1990.

Ejectment action was filed by landowner. Claimants counterclaimed for adverse possession. After jury trial, the Superior Court, Second Judicial District , Nome , Paul B. Jones, J., entered judgment in favor of claimants. Landowner appealed. The Supreme Court, Matthews, C.J., held that: (1) claimant's use of northerly portion of rural parcel as seasonal home site for subsistence and recreational activities was sufficient to establish continuous, notorious, and exclusive possession requirements for adverse possession; (2) what claimants believed or intended with respect to their ownership of land had nothing to do with question whether their possession was hostile for purposes of adverse possession; (3) claimants' use of trails and picking up of litter in southerly portion of parcel did not establish adverse possession of southerly portion; and (4) award of attorney fees to claimants was vacated in view of Supreme Court's decision that claimants failed to establish adverse possession with respect to entire parcel.
Affirmed in part; reversed in part and remanded.