Loewen – Lessons Learned
March 12, 2016/jfb

- *Stating conclusion in opening paragraph*: Kristen (Sealaska attorney) commented that I should state my conclusion at the beginning as well as the end. I modified the report to state the conclusion at the beginning and end of the report. This is the old instructor's rule of "tell them what you're going to tell them; tell them; then tell them what you told them". My concern was that upon reading the conclusion at the start of the report, the reader would stop and not absorb the basis for the conclusion. Charlie also suggested that I start with a conclusion when he reviewed by Jensen Road report. Kristen and Charlie are correct and my future reports will start and end with a conclusory statement.

- *Territorial Act of 1917:*
    - Section 13 "The lawful width of right-of-way of all roads or trails shall be sixty feet."
        - Did this Territorial Act have the authority to dedicate a ROW over the entire Territory of Alaska?
        - Can the 1917 Act width only be used as an acceptance of the federal RS-2477 grant based on local law and custom?
        - Dedication by Public Authority: When a formal dedication is made by the state or municipality, no acceptance is necessary? 9/1/48 California v. USA 9th Circuit.
    - 1938 Clark v. Taylor held regarding the 1917 Act width provision: "The sixty-foot width of roads is limited by the Territorial laws to Territorial roads built and/or maintained by the Territorial Board of Road Commissioners either by itself or in cooperation with the Board of Road Commissioners for Alaska."
        - "The Alaska Road Commission (Board of Road Commissioners for Alaska) was created by Act of Congress May 14, 1906."
        - "Chapter 36, Session Laws of Alaska 1917, created a Territorial Board of Road Commissioners for the construction and maintenance of roads, trails, bridges and ferries in the Territory of Alaska…"
        - Chapter 11, Session Laws of Alaska 1919: "That the Territorial Board of Road Commissioners should have the authority to enter into co-operative agreements with the Board of the Road Commissioner of Alaska for the construction and maintenance of roads;"
    - 1962 State of Alaska v. Fowler – The court noted that the State's selection of the 1923 Territorial acceptance for SLEs of 66' was somewhat selective as an alternative would be the Act of 1917 60-foot width. The court did not find the 66' width reflected the local law or custom relating to an RS-2477 trail ROW.
    - 1996 AGO Hatch memo re: Elliott Highway. The 1917 Act would likely be interpreted as an acceptance of the RS-2477 grant at a 60-foot width.
    - 2016 James Sowerwine said that his review of ARC records suggests that nearly all roads and that at one time were under ARC jurisdiction but not subject to Public Land Order ROW could be shown to have been constructed or maintained with some amount of Territorial funds triggering a minimum of a 60' Act of 1917 width for many RS-2477 trails.

- DOT&PF 1983 Lutak Road ROW Plans Right of Way Note: "*The R/W for those portions of Lutak Road which do not have existing platted R/W was developed based upon three conditions;*
    - *1.) Restricted lands for Native Allotments claimed prior to April, 1949 – No existing R/W.* This statement is not correct as an allotment claimed prior to April, 1949 in this area could be subject to an RS-2477 ROW, an Act of 1917 Territorial ROW and an express ROW as was the case for the Robert David allotment. A restricted Native Allotment would not be subject to a claim of a ROW by prescription. It is presumed that the citation of April, 1949 as a controlling date is related to a date of survey by which the public may claim the prescriptive period commenced.
    - *2.) Unrestricted Patented Lands entered upon prior to April, 1949* – A 60 foot wide prescriptive rights R/W centered on the existing gravel road centerline as maintained by D.O.T. /P.F. and located by field survey in 1979 and 1982.* This statement is not entirely correct. An unrestricted parcel (non-native allotment) may also be subject to an ROW by RS-2477, Act of 1917 or a prescriptive easement. Generally, there is no direct link between a claim of an easement by prescription and a 60-foot width. There is a basis by which to assert a claim of a 60-foot width under RS-2477 and the Act of 1917. The footnote (*) suggests that a 60-foot wide easement by prescription could also be applied to restricted Native Allotments claimed after April, 1949 (date of survey?). Not true. Haymond v. Scheer, 543 P.2d 541 (Okla. 1975) explains that adverse possession cannot be asserted against a native allotment just as it cannot be asserted against the federal government.
    - *3.) Those patented lands which were entered upon after April, 1949 – A 100 foot R/W centered on the existing gravel road as granted under Public Land Order 601, effective August 10, 1949, and Department Order 2665 on October 19, 1951.*" Not completely true, patented lands entered upon prior to the effective date of August 10, 1949 (PLO 601) would not be subject to PLO 601. PLO 601 could create a 100-foot wide ROW for "Local" roads across lands not subject to valid entries leading to patent after its effective date.
    - [*"* Or restricted Native Allotments claimed after April 1949."]*