Vehicle access to subsistence grounds at issue in three-day trial

By **Jillian Rogers, KHNS - Haines** - April 15, 2016

Superior Court Judge Philip Pallenberg heard closing arguments on Wednesday in the case of Rosalie and Reuben Loewen versus the State of Alaska Department of Natural Resources, and co-defendants. The trial centered on vehicular access to a popular hooligan fishing spot on the Chilkoot River owned for seven years by the Loewens.

The issue at the heart of this case is simple.

Tlingit subsistence users say they've had unfettered access to the river for centuries and want to continue their traditional way of life, which has evolved to include the use of vehicles, without interference. The landowners, the Loewens, agree that traditional values and customs are important, but they just don't want trucks driving down to the river for fear of disturbing sensitive habitat. They said fishing is fine with them, if users walk up and down the bank instead of driving. The Loewens testified first in the trial, which took place over three days in Haines and Juneau.

"People can walk down there, we have no problem with pedestrian use,:" said Reuben.

"There are lots of interested parties that come and use this piece of land and it's such a key part for everybody," said Rosalie. "It's a key part for the Natives who have cultural and traditional practices that center around this river. It's huge for tourists and for fishermen … and also, it's our backyard. It's the only land that we own and … I have to do, just the best that I know how to do."

Interveners in the case included three Native agencies. Many local Tlingit subsistence users testified on Monday and Tuesday. Sonny Williams is the president of the local chapter of the Alaska Native Brotherhood. He called the whole issue "heartbreaking."

"The Tlingit people have fished up there for a long time. They've always taken care of the river, before anybody came. It is a pristine place to live," Williams said.

The case shifted from the Loewens' quest to obtain quiet title – a legal process that removes an adverse claim on a property – on part of their land to the issue of vehicle access to the river. Native users said vehicles are necessary for bringing down Elders, and hauling out the thousands of pounds of fish. The defendants also claim there is a state right-of-way that provides open, public access.

Driving down in pickup trucks has become a common occurrence over the past several decades and Native users maintain it is necessary. And while the use of vehicles might be relatively recent, Tim Ackerman said Monday that historically, big pits were dug on the on the banks to store and ferment the hooligan. Nowadays, most of the harvest is hauled to Klukwan. Schlepping the buckets up the bank would be cumbersome and potentially dangerous, Ackerman said.

"We don't block access to the IGA grocery store and say 'You can't go in here anymore, I'm sorry,'" Ackerman told the court.

Reuben Loewen says when he first noticed people driving down a few years ago, he simply went down and asked them to stop. Some did, some didn't. Then, he said, he put up signs asking that people not drive down. But witnesses said in court they never saw the signs. They did however see rocks and logs and eventually, last year, a boulder placed in the middle of the trail. Reuben said he put the boulder on what he thinks is his property. But, with chains and a come-along, the fishermen moved the rock out of the way to access the river.

Klukwan's Sally Burattin testified that she gave the go-ahead to move the boulder. It resulted in an exchange between Burrattin and Rosalie Loewen.

"The language was no good," Burattin testified. "She called me all sorts of bad names."

But Rosalie maintained in court that she worked hard to prevent the situation from escalating.

"I had handled all kinds of aggressive inquiries including those by Sally Burattin to say, pretty calmly, I don't believe what you're doing is right," Rosalie told the court by phone. "And I don't think that's rude. I think that's acceptable."

One of the confusing parts of this case is just how big the state's right-of-way is. Surveys and land plats show a right-of-way of 60-feet. But, some show 30 feet and others show 100. John Bennett, a long time surveyor and right-of-way expert was called to the stand by the co-defendants. He said after copious amounts of research, he deduced that that stretch of road is subject to a 100-foot right of way. If that's the case, only a tiny sliver of the Loewen's land would be on the driving path to the river. But, it's a sliver nonetheless.

Loewen's lawyer, Daniel Bruce, questioned Bennett's conclusion asking why the Department of Transportation paperwork shows a lesser, 60-foot right-of-way.

"All of the official plats and filings by the State, their official position was that it was 60 feet, wasn't it?" Bruce asked.

"That was what they were representing, you know, but sometimes they're incorrect," replied Bennett.

"But in terms of notice to the world and the public, it was 60 feet."

"The notice via the 1983 Lutak Road right-of-way plans was that the department was representing the existing right-of-way to be 60 feet."

In closing arguments on Wednesday, Bruce said that this case isn't about subsistence rights, but about the rights of private land ownership. Miller countered that the trail used to drive down is on a right-of-way and that because of historical use, a public prescriptive easement is warranted on other parts of the Loewen land.

Now it's in the judge's hands. Judge Pallenberg has a maximum of six months to decide whether a public, prescriptive easement will be allowed. He'll also have to decide on a court order for the interveners – the Native groups – that would prohibit the Loewens from interfering in the future.

With hooligan season rapidly approaching, both sides agreed on Tuesday that the subsistence users can use the spot, with vehicles, to harvest hooligan this year. What will happen in future seasons remains to be seen.