PRESCRIPTIVE EASEMENTS

On July 18, 2003, Chapter 147 SLA 2003 amended:

- AS 09.10.030, the statute of limitations, and
- AS 09.45.052, the statute applicable to adverse possession and prescriptive easements.

Requirements for a Public Prescriptive Easement:

Dillingham Commercial Company, Inc. v. City of Dillingham, 705 P.2d 410, 416–17 (Alaska 1985)

The requirements for establishing a public easement by prescription are nearly identical to the requirements of adverse possession, and the string of adjectives used to describe prescription have a familiar ring and the use must be open, notorious, adverse, hostile, and continuous.... These general requirements have been reduced to a simple statement by this court ...:

(1) the [use] must have been continuous and uninterrupted;

(2) the [user] must have acted as if he were the owner and not merely one acting with the permission of the owner; and

(3) the [use] must have been reasonably visible to the record owner."

- "There is a presumption that the use of land by an alleged easement holding was permissive."

- To rebut the presumption of permissive use the user must show: "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."

- The openness requirement is an objective test: "actual notice is not required; the true owner is charged with knowing what a reasonably diligent owner would have known."

- The openness requirement, then, embodies the principle that a landowner is responsible for knowing the physical encumbrances on and the boundaries of the owner's land. This responsibility includes any changes in existing uses on the land.

- Permission contemplates the servient landowner's right to revoke that permission and prevent further use of the servient owner's land.

- A claim of right, on the other hand, contemplates uninterrupted future use of the property.

- Since access is essential to the beneficial use of one's land, a road providing the *sole* access to a parcel likely contemplates continued use not subject to the permission of another. Thus, the maintenance of a *sole* access, without more, gives notice of a claim of right, rather than use subject to permission.

- The dedication of State resources to the construction and maintenance of a public roadway is not the type of land use which one would subject to the permission of a servient landowner.

- In constructing a road, the government makes a commitment that contemplates continued, unrestricted use of the affected land. In other words, once the State determines a roadway is needed for public access to a certain region, the State surely does not intend such access to be contingent upon the permission of a private landowner.

Scope of Use of a Prescriptive Easement

Price v. Eastham, 75 P.3d 1051 (2003)

- July 1978 Price purchased a DNR AG lease for 160 acres at Head of Kachemak Bay
- January 1988 Received Patent for surface estate in Fee Simple with condition subsequent limiting its use to AG
- November 1998 Price posted no trespassing signs
- September 1999 received a patent with restrictive covenant
- May 1999 Snomads Inc. filed suit alleging use of trail by them and alleged dog-team mushers, campers and hunters had used the trail

since 1956
- Snomads replaced with 91 plaintiffs since Snomads Inc. was formed 1992, less than 10 years from date of suit.

Trial Court:
- denied prescriptive easement
- entered judgment for a RS 2477 right of way.
- after reconsideration ruled public easement by prescription.

Supreme Court:
- overturned RS 2477 - neither side argued it.
- held despite state's interest, prescriptive use could run against Price's less than fee interest
- example from other cases against less than fee interest:
  - leaseholder
  - "present interest subject to divestment if and when the property passes to the holder of a future interest."

Scope of a prescriptive easement:
- narrowly defined - includes only:
  - "use that created the easement"
  - "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."
- "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.

Price v. Eastham, 128 P.3d 725, 2006

Original trial court ruling for RS 2477:
- "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."

Trial Court on remand:

- single sentence finding:
  - width of trail was 16 feet
  - described trail's beginning and ending points.
- No findings of fact or conclusions of law supported the findings.

An issue of change in use arose - Supreme Court questioned:

(1) how to delineate the scope of a prescriptive easement at the moment of perfection; and
(2) whether a given change or expansion in the scope of that easement is permissible.

- "[b]ecause 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."
- "a delicate balance be struck between the needs of the easement beneficiary and the owner of the servient estate."
- "Although generally easements are permitted to evolve along with the properties they serve, the outcome in individual cases may depend on how fast the transition is taking place in the area and whether the easement was created by grant or prescription. The degree of change permitted for a prescriptive easement is generally less than that for an expressly created easement. In balancing the interests of the dominant and servient estate holders, conservation and neighborhood preservation concerns should be relevant as well as developmental concerns."

- "conflicts between the original and new uses frequently present factual issues as to 'how broadly or narrowly the purpose should be defined, whether the proposed change is reasonably necessary, whether it is of the sort that should have been contemplated by the parties, how much damage or interference is likely to ensue, and whether it is reasonable.'"

Back to the trial court---

Price v. Eastham, 254 P.3d 1121, 2011

New Trial Judge found:

- users of the trail included snowmachiners, four-wheelers, hikers, persons training their sled dogs, occupants of three residences along the trail, hunters, skiers, recreational RV users, and berry pickers.
- "[a]ny increase in snowmachine traffic has been reasonable and consistent with traditional uses of the easement area."
- expressly allowed the snowmachiners to remove deadfall along the trail for maintenance and safety, and to place markers and groom the trail to identify the easement's boundaries.
- 18–feet wide—a two foot increased width is "sufficient to permit two snowmachines traveling in opposite directions to pass each other safely."
- Didn't restrict the use of the easement to "winter time" because this would violate the non-snowmachine users' access to the trail.

Supreme Court:

- "a public prescriptive easement requires qualifying use by the public, while a private prescriptive easement requires qualifying use only by the private party."
- "a prescriptive easement obtained by the general public gives the right of use to the public at large."
- But this right of use is not unlimited; rather the "public at large" is constrained to using the easement only for those types of uses that led to its establishment.
- As we explained in Price I, "[t]he scope of a prescriptive easement is defined narrowly to include only the 'use that created the easement and closely related ancillary uses.'
- There was considerable evidence at the first trial supporting the findings necessary to establish a prescriptive snowmachine easement, …
- The public prescriptive easement over Price's land meant that the easement was open to the general public, not just the plaintiffs, for snowmachine use.
- We did not intend to suggest that members of the general public

could use the easement for other uses without clear findings that these users independently satisfied the requirements for establishing a prescriptive easement.

- But other types of users cannot skip the requirement of proving that their use satisfied the elements required for establishing an easement by prescription.
- "[an easement] holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment." But this consideration must be balanced against the principle that "[t]he manner, frequency, and intensity of [an easement's] use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefitted by the servitude."

Price argued:

- Trial Court failed to identify a State agency or political subdivision as the holder of the easement under AS 09.45.052(d).
- AS 09.45.052(d) provides:

> [T]he uninterrupted adverse notorious use ... of private land for ... public access purposes ... by the public, ... 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.

Supreme Court:

- AS 09.45.052(d) did not exist in 1988 when the public easement was perfected
- legislature did not instruct that this statute should be applied retrospectively.

Case once again remanded to determine the seasonal limits of the snowmachiner's use and the width. There was again no finding that explained the width required during the prescriptive use. The 16 feet for two machines to pass came from 16' groomed width that started around 1998.

This case was decided July 2011. When do you expect to see Price 4?

Weidner v State, 860 P.2d 1205, 1993

- Weidner argued granting the State a public prescriptive easement is a violation Article 1, Section 18 of the Alaska Constitution
- Article 1, Section 18: "Private property shall not be taken or damaged for public use without just compensation."

Supreme Court:

- 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—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. In the present case, Weidner's claim for just compensation has been extinguished by expiration of the prescriptive period.

INTERIOR TRAILS PRESERVATION COALITION v. Swope, 115 P.3d 527, 2005

- Coalition formed in 2002 to file the suit for prescriptive easement against Swopes property on Skyline Drive claiming trail had been used since the 1950s.
- Trial court dismissed case based on:
  - Coalition's perceived lack of standing
  - inability to prove continuity
- On reconsideration affidavit was submitted from one of coalition's members that he had used the trail for many years.

Supreme Court:
"The main issue presented for our review is whether a corporate organization like the Coalition can maintain an action for a public prescriptive easement even though the organization has not been in existence long enough to engage in the ten-year period of continuous use needed to establish a prescriptive easement."

Swopes claimed:
Price held that "an organization cannot bring a public prescription claim if it has not been in existence for the ten-year period required to establish continuous adverse use."

Supreme Court clarified the situation in Price stating:

> In the present case, the superior court interpreted this description as a holding; that is, it viewed Price as actually having decided that Snomads, Inc., had to be replaced by individual plaintiffs because a public prescriptive easement could only be established through proof of an individual user's continuous use. But Price did not rule on this proposition. The issue did not arise in Price, and we did not purport to resolve it in our opinion. Although it certainly might have been more clearly stated, Price's description of procedural history was just that--a description--and signified nothing more.

Supreme Court ruled:

- To establish a public prescriptive easement, the Coalition was required to prove continuous use by the public in general, not use by the organization itself or by any individual member.
- The Coalition was not precluded "from relying on and asserting the prescriptive right of the general public."

Swopes advanced alternative arguments:

- Doctrine of primary jurisdiction allows only the North Star Borough Advisory Trail Commission to create trails within the Fairbanks area.
- Article 1, Section 18 of the Alaska Constitution, state courts cannot create public rights by adverse possession without also paying just compensation.

Supreme Court declined to rule upon them since those issues were not raised in the petition for review,

Hansen v. Davis, 220 P.3d 911, 2009
Davis:

- Rodgers sold Davis lot 53A in 1984.
- Reserved an easement across Lot 53A for benefit of Lot 52 which he hoped to buy.
- Reservation: "[s]aid easement shall be only for the benefit of Grantor, his grantees, heirs and assigns."
- Davis claimed they had an attorney opinion in 1985 that easement was invalid.
- Began putting in frames and planting garden in fall of 1985.
- Garden covered the easement by 1987.
- Continued gardening the bulk of the easement until 2003 when they built a greenhouse on the easement area.

Hansen:

- Hansens bought Lot 52 in 2006
- Got limited permission to cross Davis property until January 2007.
- Offered to buy an easement, Davis turned them down.
- Purchased easement from estate of Rodgers.
- After request by Hansen, Davis didn't remove garden frames or greenhouse.
- Hansen removed them and started building road, sewer and water lines.

Davis sued alleging Trespass and invalid easement.

Trial court ruled easement was terminated by adverse possession and that the validity of the easement was moot. Rogers appealed.

Self-Help Remedy

Supreme Court:

- "[E]asement holders should not engage in such "self-help" remedies where the owner of the servient estate in good faith disputes the validity of the easement."
- "The proper remedy for the holder of a disputed easement that has been blocked is to file a quiet title action to establish the validity of the easement and to seek an injunction requiring the clearing of the easement and damages where appropriate."
- "Where the easement is not in dispute, easement holders must still be cautious when clearing the easement themselves."
- "The owner of the dominant estate may enter on the servient estate

for the purpose of doing anything reasonably necessary to the proper exercise of his easement."

Termination by Prescription

Hansens argued:

- Easements may never be extinguished by prescription.
- Cited 2003 legislative amendments curtailing **adverse possession** to argue "[t]ermination of an easement by prescription is contrary to the public policy of the State of Alaska."

Supreme Court on 1993 Legislation:

- In amending the statutes governing **adverse possession**, the Alaska Legislature increased the burden that a litigant bears in proving **adverse possession** of another's land.
- But it did not eliminate **adverse possession** and prescriptive easement claims altogether.
- We ... hold that an easement can be extinguished by prescription.

Supreme Court on when Prescriptive Period Begins:

- The prescriptive period begins to run when the use of the easement by the servient estate owner unreasonably interferes with use of the easement by the easement holder.
- a party claiming that an easement was extinguished by prescription must prove continuous and open and notorious use of the easement area for a ten-year period by clear and convincing evidence.
- The more difficult question is what level of activity in the easement area by the servient estate owner is sufficiently adverse and hostile to trigger the prescriptive period.
- In contrast to a claimant for adverse possession or a prescriptive easement, a party claiming termination of an easement by prescription already has the right to use the area in question.
- [S]o long as the use is consistent with the rights granted in the easement, the owner of a servient estate may make substantial use of the easement area.
- We hold that the prescriptive period is triggered where the use of the easement "unreasonably interfere[s]" with the current or prospective use of the easement by the easement holder. When satisfied, the various requirements of adverse possession, and similarly prescription, serve to "put [the property owner] on notice of the hostile

nature of the possession so that he, the owner, may take steps to vindicate his rights by legal action."

- Use of the easement that unreasonably interferes with the "easement owner's enjoyment of the easement" is adequate "to give notice that the easement is under threat."
- Moreover, such extensive use constitutes a "distinct and positive assertion" by the servient estate owner that his or her use of the easement is hostile to the rights of the easement holder and is not merely a permissive use.
- As a general guideline:
    - temporary improvements to an unused easement area that are easily and cheaply removed will not trigger the prescriptive period;
    - permanent and expensive improvements that are difficult and damaging to remove will trigger the prescriptive period.
- The burden on the servient estate owner to prove unreasonable interference with an unused easement is high, consistent with the policy of the 2003 legislative amendments that curtailed—but did not abolish—claims of adverse possession.

AS 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.

AS 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.