

June 5, 2019

R&M No. 2739.01

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RE: Vezey v. Carpenter 4FA-18-03111 CI
Prescriptive Easement over Vezey Property

Dear Mr. Vezey:

The following report contains review comments and conclusions regarding an access trail through the Shaw Creek properties owned by you and that are the subject of the above referenced case. This review has been limited to the materials that were provided by you, references from my professional library and documents that were readily available on-line. No field survey was performed for this assignment.

Introduction

The purpose of this report is to assess the status of private or public access through the Shaw Creek properties owned by Allen Vezey. The focus will be on access rights established by prescriptive easement or RS-2477 and their allowable scope of use. My role in this assignment is both as a licensed land surveyor and as a right-of-way professional. Generally, the testimony of an expert witness is limited to the facts. They are not permitted to testify with regard to what the law is as that is for the Court to decide. This report will nonetheless contain references to case law and legal principles upon which I base my judgments when reviewing rights-of-way and boundaries. The intent is to provide the reader with the basis for my opinions.

The property that is served by the subject trail relates to a quiet title action filed by Angela Green against Allen Vezey in 1995.¹ On November 16, 1999, the Court issued a judgment in favor of Angela Green for portions of Government Lot 2 and the Northeast Quarter of the Southwest Quarter of Section 35, Township 7 South, Range 8 East, Fairbanks Meridian. The Court provided access to the Green property with the following statement:

“Together with a **prescriptive easement for ingress to and egress from** (emphasis added) the real properties described above over existing trails on the portion of the Northeast Quarter (NE $\frac{1}{4}$) of the Southwest Quarter (SW $\frac{1}{4}$), Section Thirty-five (35), described above and land lying to the west thereof currently owned by defendant Allen Vezey and known as the Hornbuckle Homestead.”

¹ Angela Green v. Allen Vezey and John H. Harrild Case No. 4FA-95-1383 CI

Location

The subject properties are located within Sections 34 and 35 of Township 7 South, Range 8 East, Fairbanks Meridian. The site is to the north of the Tanana River and the Richardson Highway between approximate Mileposts 286.5 and 287.

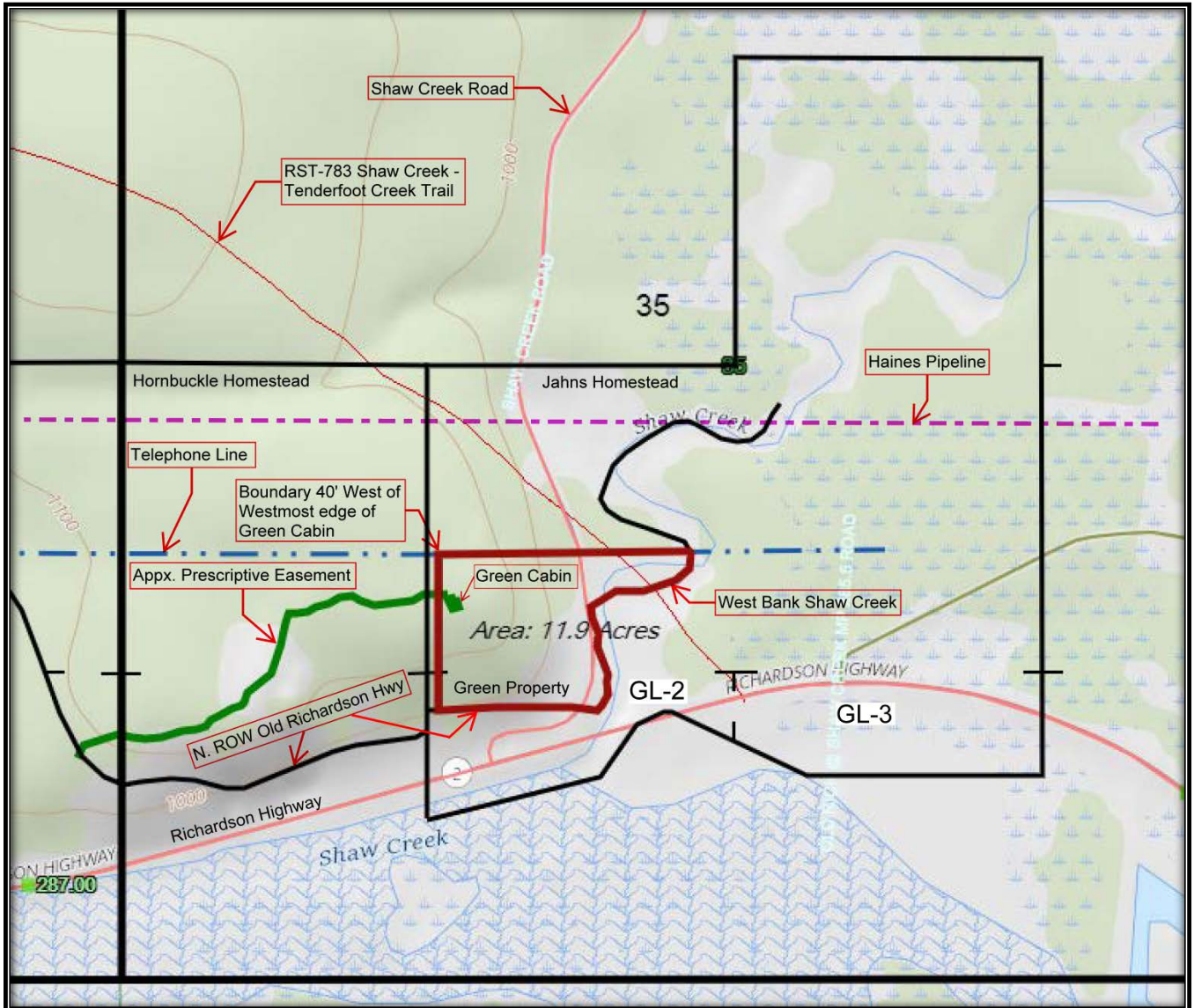


Figure 1 - Shaw Creek Property – Composite Map²

² An accurate map of the subject property currently does not exist. This composite map was compiled from a variety of data sources and is only an approximate representation of the boundary and feature relationships.

Vezey v. Green I

Vezey subsequently appealed the 1999 Superior Court judgment to the Alaska Supreme Court. In 2001³, the Supreme Court issued an opinion affirming the adverse possession ruling in favor of Green and the definition of Green's north, east and south boundaries. The Court questioned whether the definition of the west boundary was supported by Green's actual possession and use. The case was remanded to the trial court for further findings.

The focus of the 2001 appeal was the definition of the property that Green acquired by adverse possession in fee. The opinion references use of the access trail as follows:

In addition, beginning in 1982, Green cleared and used an old road running across the western portion of the claimed property; she put a chain across the road at the border of the neighboring property and mounted "No Trespassing" signs. The road cut up from Old Richardson Highway and across the neighboring property to reach the top of the bluff. Green invested substantial time and labor in clearing the access road: She testified that she removed trees four inches in diameter from a swath wide enough to drive through.

The only reference to the prescriptive easement for access to the Green property is found in the two following sentences of the dissenting opinion:

The record shows that Green's activities on the land in 1982 consisted of clearing the pre-existing access road from the west, clearing a pre-existing trail that went to the bluff at the east of the property, and doing "some" clearing of the property.

To the west, all that was done was clearing the road, stretching a chain across it, and putting up a no trespassing sign. The road work can justify awarding Green an **easement by prescription** (emphasis added) in the road where it crosses land not otherwise possessed by her.

Vezey v. Green II

At the second Superior Court trial in 2003, the initial conclusion of the west boundary being 300-feet west of the west edge of the Green cabin was maintained. This was the only issue on remand and there was no discussion regarding the nature or validity of the prescriptive easement crossing the Vezey property from the Old Richardson Highway to the Green property.

Vezey appealed the failure of the Superior Court to relocate the western boundary of the Green property according to her actual use and possession. The Supreme Court issued an opinion on this issue in 2007.⁴ The Court concluded that the evidence only supported a claim of adverse possession 40-feet to the west of the west edge of the Green cabin.

³ Vezey v. Green, 35 P.3d 14, (Alaska 2001)

⁴ Vezey v. Green, 171 P.3d 1125, (Alaska 2007)

The issue of the prescriptive access easement was only discussed in the context of whether Green could adversely possess a public asset:

Green stipulated at trial that the path from the telephone road to her cabin was “a longstanding public trail.”...Given that the road leading to Green's cabin was a “longstanding public trail,” Green cannot claim title to the trail through adverse possession. Although Green has fee simple title to the land forty feet to the west of her property, including the trail, her property is subject to an easement where the trail passes through her property. And because the easement similarly runs the entire length of the public trail, Green will have use of the trail pursuant to the trail easement that crosses Vezey's land.

The references to a “public trail” creates confusion as to whether the access road from the Old Richardson Highway to the Green property should be considered a public prescriptive easement or a private prescriptive easement in favor of Green as was implied in the 1999 Superior Court judgment. There was no discussion in the record of general public use of the access road from the Old Richardson highway to the Green property. If Green’s reference to “a longstanding public trail” was intended recognize an established public easement, there would have been no reason for the 1999 trial court to quiet title in Green’s favor for a prescriptive easement to her property. Green’s stipulation at trial that the path was a longstanding public trail without evidence in support of general public use, construction or maintenance over the prescriptive period does nothing to qualify the prescriptive easement as public.

Prescriptive Easements – Public or Private

The Alaska Supreme Court has distinguished between public and private prescriptive easements.

The creation of a public prescriptive easement requires the same elements as a private prescriptive easement, except that “a public prescriptive easement requires qualifying use by the public, while a private prescriptive easement requires qualifying use only by the private party.” We have previously held that “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.⁵

Green’s “public trail” stipulation along with the “Attachment A” aerial photo that was made a part of the 2007 Vezey opinion (Vezey II) suggests that the driveway to her cabin branched off from one of two alignments of an existing trail from the Old Richardson Highway to the RCA Alaska Communications System telephone line.⁶ Vezey II refers to the existing trail as the “telephone road”. Generally, the CANOL

⁵ Price v. Eastham, 254 P.3d 1121, (Alaska 2011)

⁶ The telephone facility was transferred from the USA, Department of the Air Force to RCA Alaska Communications, Inc. by Easement Deed on January 8, 1971 and recorded at Book 253, Page 177, on 1/20/71, Fairbanks Recording District. The portion passing through Sections 34 and 35 of Township 7 South, Range 8 East, F.M. is noted on Page 207. BLM Case file for AKF 008691

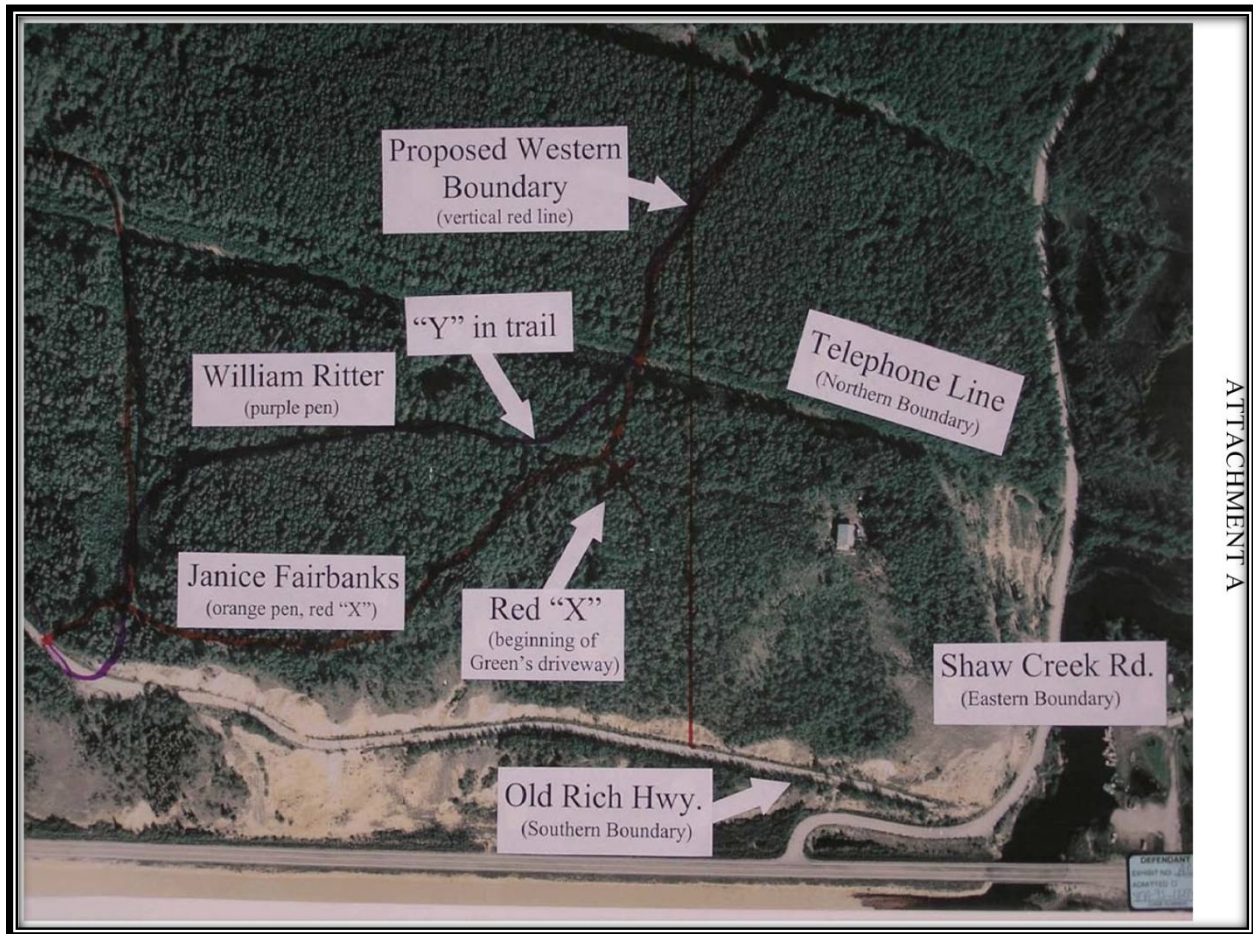


Figure 2 - Attachment A - Vezey v. Green 2007

(Canadian Oil) pipeline ran parallel with the communications line. A review of U.S. Geological Survey (USGS) topographic maps near Shaw Creek⁷ based on aerial photography taken in August of 1949 and revised up to 1975 provide no mapping evidence of a trail north of the Old Richardson Highway within Section 35. The USGS maps do not show the east-west telephone line although a later version labeled "1949 Photo Revised 1975" shows the Haines pipeline alignment that runs east-west through the approximate center of Sections 34 and 35. (See Figure 1 for approximate relative locations of telephone line and Haines pipeline.) It is possible that the "telephone road" was built to provide construction and maintenance access for the telephone line or the CANOL pipeline although this is not reflected in the available record.

identifies a federal 44 LD 513 right-of-way application by the U.S. Corps of Engineers on August 15, 1947. The case file General Remarks includes the following: "TELEPHONE LINE (50 FT) R/W ALONG THE RICHARDSON HIGHWAY FRM BIG DELTA – FBX CONSTRUCTN CMPLTD FEB 1943"

⁷ USGS Big Delta (B-5) Quadrangle; 1:63,360 Series

If one or both of the routes from the Old Richardson Highway to the telephone line were in fact used for maintenance access, further research could indicate a prescriptive easement in favor of the telephone line owner for that continued and specific use. Evidence of general public use of these trails meeting the adverse possession requirements for the prescriptive period could result in the establishment of a public prescriptive easement; however, no evidence of such use has been identified in the record.

Hornbuckle Homestead

The Hornbuckle homestead is located within the southerly portion of Sections 34 and 35 and encompasses the majority of the Green prescriptive easement within Government Lot 8 and the Southwest Quarter of the Northwest Quarter of Section 35. The homestead case⁸ file for Shelby Hornbuckle includes the "Application for Homestead Entry" form that was filed with the Bureau of Land Management (BLM) on June 8, 1953. Hand printed notes at the bottom of the application state "No Gov. Road Crosses This Tract. Land Lies North Of The 150' Richardson Hwy. Right Of Way." The BLM Township plat approved December 10, 1951 is partially shown in Figure 3 below. This plat indicates the relationship between the public lands patented to Hornbuckle, the Old Richardson Highway ROW, the U.S. Coast and Geodetic Survey control monument "Shaw 1942" located on the top of the bluff and the general location of the CANOL pipeline and telephone line that lies to the north of the Green prescriptive easement.

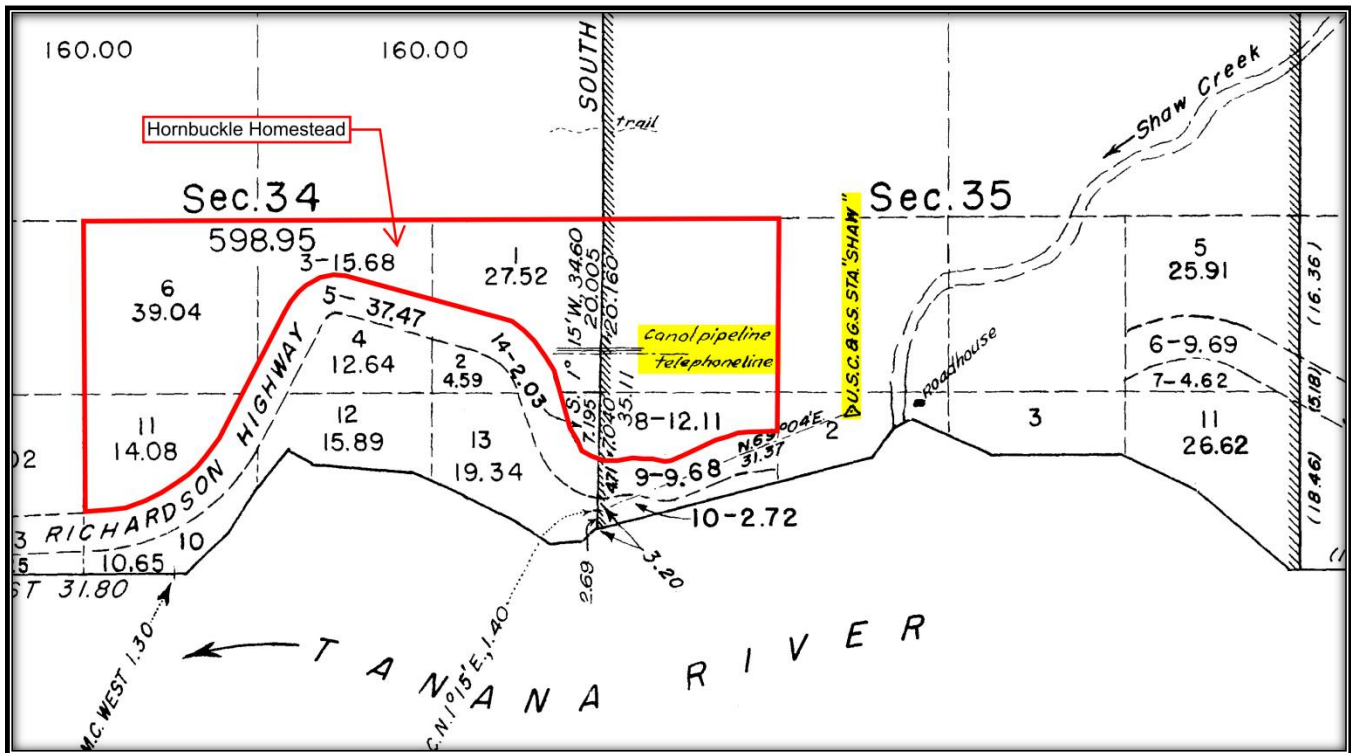


Figure 3 - Hornbuckle Homestead - S34 & S35 T7S, R8E FM

⁸ The Homestead case file for Patent No. 1151422 (Hornbuckle) was obtained from the National Archives by electronic delivery on April 19, 2019. The 44-page file contains all documents from the initial application through final approval.

The Hornbuckle patent No. 1151422 was issued on April 7, 1955. In addition to standard patent reservations, this patent was subject to the following:

Also excepting from this conveyance that certain right of way for pipeline and telephone lines, and all appurtenances thereto, constructed by the United States, through, over, or upon the lands herein described, and the right of the United States, its officers, agents or employees to maintain, operate, repair, or improve the same, so long as needed or used for or by the United States.

This exception relates to a right-of-way under the authority of 44 L.D. 513 for both the CANOL and Haines pipeline and the telephone line adjoining the CANOL line. As these facilities have been retired and are no longer needed or used for or by the United States, these rights-of-way are effectively extinguished.

Public Access to “Shaw 1942”

Another potential argument for a public prescriptive easement crossing the Vezey property relates to a survey control monument established on the bluff in 1942 by the federal U.S. Coast and Geodetic Survey (USC&GS). The triangulation station “Shaw 1942” was set on the bluff to the north of the Old Richardson Highway and west of Shaw Creek at a location that approximately corresponds with the southeast corner of the Green property. The National Geodetic Survey (NGS), successor to the USC&GS, issues “data sheets” for certain control monuments identifying their horizontal and vertical coordinate positions and descriptions of their general location. The data sheet includes access notes from the 1942 establishment as well as station recoveries for 1950, 1959 and 1961. The initial and 1950s access to the monument were made by climbing the bluff. The 1961 recovery described access by four-wheel drive vehicle to a point on the Old Richardson 0.55 miles west of Shaw Creek then easterly and northerly along a trail to the bluff. While this activity may suggest a limited public use of a trail to access the control monument, a single event would not rise to the level of use sufficient to assert a public prescriptive easement. Since the enactment of A.S. 34.65.020 in 1985, Alaska State law provided for access to survey monuments located on private property. This statute titled “Entry upon land for survey purposes” permits a land surveyor to enter upon private land to occupy existing survey monuments, as long as the appropriate notice is provided to the landowner. Access for survey purposes by a condemning authority has been in place since 1962 under A.S. 09.55.280. As a result, access to “Shaw 1942” for survey purposes has been authorized by state statute for over 50 years without the need to assert an easement by prescription.

Prescriptive Easements – Scope of Use

While I conclude that Green’s access over the Vezey property from the Old Richardson highway to her cabin is based on a private prescriptive easement according to the 1999 Superior Court judgment, the scope of use for both public and private prescriptive easements is generally limited.

The scope of a prescriptive easement is defined narrowly to include only the “use that created the easement and closely related ancillary uses.”... 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.⁹

For example, an established public prescriptive easement for a highway may evolve through reasonable maintenance and improvement activities such as grading and even paving in support of increased traffic levels. Widening of a highway's initial one-lane prescriptive use footprint to a two-lane footprint would likely be considered an overburdening of the easement creating an adverse impact to the servient estate beyond the initial prescriptive use. *Price v. Eastham III*¹⁰ recognized that the scope of use for a public prescriptive easement established by snowmachine use is limited to snowmachine use. Other types of users would have to prove that their use satisfied the elements required for establishing an easement by prescription. The Court held that the scope of the prescriptive easement does not need to remain static, but changes in use must remain within the bounds of what a landowner should have reasonably expected to lose. That is, a reasonable increase in snowmachine traffic may be allowed, however "We recognize that an easement holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment."¹¹

An unreasonable change in the scope of use is a primary issue with regard to the Green prescriptive easement crossing the *Vezey* property. According to *Vezey I*, Green's period of prescriptive use was approximately between the summer of 1983 and the summer of 1993. Title automatically vests in the adverse possessor at the end of the statutory period.¹² Green's continued use of the prescriptive easement is generally limited to those uses that Green made of the trail between 1983 and 1993. Restating *Price v. Eastham I*, "New uses cannot substantially increase the burden on the servient estate or change the nature and character of the easement's original use."

The text of *Vezey I and II* contain references to trial court transcripts regarding the work performed by Green on the access road and use of the road by Green in support of her claim of a prescriptive easement. The references include widening the trail, cutting saplings and clearing a turnout along the trail. *Vezey I* stated that "The absence of heavy equipment by her wish caused the work to be longer and harder but, through the use of axes, chainsaws, trucks for stumps, the area of the house and, then the back area for the drive and turn-around area was cleared." There was no discussion of the use of heavy equipment such as dozers or dump trucks to improve the road by placing and grading a gravel surface. The limited level of road construction and maintenance by Green suggests a level of use consistent with light duty vehicles such as pickup trucks and cars or all-terrain vehicles such as snowmachines and 4-wheelers.

On June 23, 2011, Angela Green conveyed her interest in the Shaw Creek property to Carpenter Contracting, Inc. in order to redeem the rights she had lost as a judgment debtor.¹³ In 2016, Carpenter

⁹ *Price v. Eastham* 75 P.3d 1051, (Alaska 2003)

¹⁰ *Price v. Eastham* 254 P.3d 1121, (Alaska 2011)

¹¹ *Ibid.*

¹² *Hubbard v. Curtiss*, 684 P.2d 842, (Alaska 1984)

¹³ Quitclaim Deed recorded as document 2011-011823-0 on 7/5/11, Fairbanks Recording District

Contracting conveyed an undivided 49% interest in the property back to Angela Green.¹⁴ As 51% owner of the Green's Shaw Creek property, Carpenter gained the right to access the site using the trail that was subject to the prescriptive easement across the Vezey property and that Green had secured by adverse possession.

On March 29, 2019, Defendants Carpenter and Green filed Defendants' Initial Disclosures in the current case. In these disclosures, Carpenter states that he has been maintaining the access road since Green won her case against Vezey in 1999. Furthermore, Carpenter stated that he has been crossing the Vezey property since 2000 to reach the top of Shaw Creek in order to determine the best way to mine Shaw Creek rip-rap. Carpenter also admits to placing base rock on the driveway but not to widening the existing trail.

The placement of base rock or gravel and grading to reasonably maintain or improve the existing trail and residential access to the cabin site may be activities that fall within the reasonable use of a prescriptive easement. An increase in the traffic volume of light duty vehicles or all-terrain vehicles using the trail may also be considered as reasonable uses that fall within the scope of the prescriptive easement. If Carpenter's intent is to use the prescriptive easement crossing the Vezey property for heavy equipment and trucks in support of a rip-rap mining operation, my opinion is that this would constitute an unreasonable expansion of the Green prescriptive easement.

Carpenter's disclosures also state that he has used "...the same roadbed access he has been using since the mid 1970's to access the top of Shaw Creek..." If Carpenter's use of the trail since 1970 was sufficient to support an adverse possession claim that goes beyond the scope of the Green residential access assertion, he should have pursued a separate action in his favor. Carpenter's disclosures state that he "...did not expand the road surface." Carpenter does admit that he has used "...his excavator and carefully removed trees off the roadway fallen trees off the road. At times it has been necessary to remove troubled trees that have broken off and are leaning over the roadway." I would agree that removal of trees that impede the use of the Green prescriptive easement would fall within the reasonable maintenance and use of the easement. Removal of trees to facilitate the widening of the road for access by trucks and heavy equipment in support of quarrying operations and rip-rap transport would constitute an unreasonable expansion of the scope of Green's prescriptive easement.

While Carpenter's interest in the Green property secures his right to use the existing prescriptive access easement across the Vezey property, my opinion is that his uses are limited to those that were the basis for Green's adverse possession claim: light duty and personal all-terrain type vehicles.

¹⁴ Quitclaim Deed recorded as document 2016-005489-0 on 4/29/16, Fairbanks Recording District

RS-2477 Rights of Way

An RS-2477¹⁵ based trail easement is one of the predominant authorities for highway rights-of-way (ROW) in Alaska. To my knowledge, there has not been an assertion that the trail crossing the Vezey property to access the Green/Carpenter site constitutes a public highway right-of-way based on RS-2477.

I reviewed the Department of Natural Resources on-line "Alaska Mapper" website in order to find whether the State of Alaska has asserted an RS-2477 trail easement over the Vezey property that may have coincided with the alignment of the Green prescriptive easement. The only trail asserted by DNR within Sections 34 and 35 is listed as RST-783 "Shaw Creek Lodge – Tenderfoot Creek Trail."¹⁶ The on-line case file summary states, "This route qualifies as an RS-2477 right-of-way. According to the Alaska Mapper, this trail commences at the Old Richardson Highway near the northeast corner of Government Lot 2, Section 35 at the old Shaw Creek lodge then heads northwest, crossing Shaw Creek, then southwest to Tenderfoot Creek. The approximate alignment of RST-783 can be viewed in Figure 1.

My conclusion is that while RST-783 appears to graphically cross the northeastern extents of the Green property, the prescriptive easement over the Vezey property from the Old Richardson Highway crosses into the Green property from the west and the two easements do not coincide.

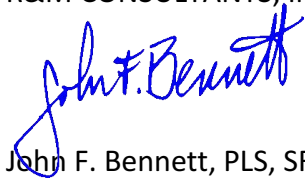
Summary and Conclusion

I have reviewed the basis for a valid public right-of-way across the Vezey property along the existing access road by either public prescriptive easement or RS-2477 and have found none to exist. Your Shaw Creek property continues to be subject to a private prescriptive easement from the Old Richardson Highway to the west boundary of the Green/Carpenter property. The width and uses of that private prescriptive easement are generally limited to those that were the basis for Green's adverse possession claim in 1999. A widening of the easement and use beyond light duty vehicles would be considered an unreasonable expansion of the easement's scope of use.

Should you have any further questions regarding this report, please feel free to contact me at any time.

Sincerely,

R&M CONSULTANTS, INC.



John F. Bennett, PLS, SR/WA
Senior Land Surveyor

¹⁵ The Mining Law of 1866 - Lode and Water Law, July 26, 1866 (Section 8 - 14 Stat. 253) The above referenced Section 8 of the 1866 Mining Law was re-designated as Section 2477 of the Revised Statutes 1878. (43 U.S.C. 932) RS 2477 was repealed by Title VII of the Federal Land Policy and Management Act on October 21, 1976.

¹⁶ See http://dnr.alaska.gov/mlw/trails/rs2477/rst_legal.cfm?FILE_NUMBER=783 for DNR casefile.