Alaska Rights-of-Way & Boundaries

Terms & Definitions with References to Alaska Court Decisions

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Introduction:

The purpose of this summary is to provide definitions or references for a variety of Alaska related right-of-way and boundary related terms. While definitions for many of these terms can be found in legal dictionaries and professional texts, this list primarily focuses on those terms and definitions that have been referenced in Alaska Supreme Court decisions. Existing glossaries are helpful to obtain a general understanding for many of these terms, however, in order to maintain conformity with Alaska law, definitions and references provided by the Alaska Supreme Court should be given deference. The list of terms is somewhat short given that Alaska is a relatively new state and has little of its own case law relating to boundaries. Certain terms were included that have not yet been associated with any specific Alaska case. These terms may reference an Alaska statute, regulation, federal case law or the case law of another state.

Many of these references have been taken from papers, reports and presentations produced throughout my career. The user should consider this summary to be a guide rather than a complete or comprehensive collection of all relevant terms. The list is not based upon a detailed analysis of the terms or references and the case law and statute quotations should not be applied without a review of the full court decision or statutory text. The text of the cited Alaska cases can be found at https://govt.westlaw.com/akcases/. This summary should be considered a work in progress. Comments, additions, revisions and edits regarding both format and content are welcome.

Disclaimer: I am not a lawyer, I do not offer legal services and this paper is not presented as legal advice. It is offered as a summary of resources and views relating to right-of-way issues that have been collected over many years. Should you require legal advice on these issues, we recommend that you obtain the services of an attorney.

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1. **Adverse Possession - Alaska Railroad Corporation lands**: "No prescription or statute of limitations runs against the title or interest of the corporation to or in land owned by the corporation or under its jurisdiction. Title to or interest in land owned by the corporation or under its jurisdiction may not be acquired by adverse possession or prescription, or in any other manner except by conveyance from or formal vacation by the corporation."[1]

2. **Adverse Possession – ANCSA Lands**: "(A) Notwithstanding any other provision of law or doctrine of equity, all land and interests in land in Alaska conveyed by the Federal

[1] A.S. 42.40.450 Adverse Possession

Government pursuant to the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] to a Native individual or Native Corporation…shall be exempt, so long as such land and interests are not developed or leased or sold to third parties from—(i) adverse possession and similar claims based upon estoppel;"[2]

A 1991 Alaska case considered the term "developed". "This case concerns the meaning of the term 'developed' in the act…In the context of raw land, the common meaning of 'developed' includes subdivided property which is ready for sale....to be within this definition of 'developed' the land must be practically and legally suitable for sale to the ultimate user."[3]

3. **Adverse Possession – Federal/Trust Lands**: "It is well settled that there can be no adverse possession against the federal government which can form the basis of title by estoppel or under the statute of limitation; and it has been held that the same rule applies where the lands involved are lands that have been allotted to Indians with restriction upon alienation…"[4]

4. **Adverse Possession – Municipal Lands**: "A municipality may not be divested of title to real property by adverse possession."[5] "A municipality cannot be divested of title to its streets held in trust for the public by adverse possession."[6]

5. **Adverse Possession – State Lands**: "No prescription or statute of limitations runs against the title or interest of the state to land under the jurisdiction of the state. No title or interest to land under the jurisdiction of the state may be acquired by adverse possession or prescription, or in any other manner except by conveyance from the state."[7]

6. **Adverse Possession - University of Alaska lands**: "(a) Notwithstanding any other provision of law, university-grant land, state replacement land that becomes university-grant land on conveyance to the university, land conveyed to the Board of Regents in trust for the University of Alaska under AS 14.40.365, and any other land owned by the university is not and may not be treated as state public domain land…(b) Title to or interest in land described in (a) of this section may not be acquired by adverse possession, prescription, or in any other manner except by conveyance from the university."[8]

[2] See 43 U.S.C. § 1636(d)(1)(A) 1987 amendments to the Alaska Native Claims Settlement Act. Also see *Snook v. Bowers*, 12 P.3d 771 (Alaska 2000)

[3] *Kenai Peninsula Borough v. Cook Inlet Region, Inc.*, 807 P.2d 487 (Alaska 1991)

[4] *Haymond v. Scheer*, 543 P.2d 541 (Okla. 1975)

[5] *Frost v. Ayojiak*, 957 P.2d 1353 (Alaska 1998) citing A.S. 29.71.010 No adverse possession.

[6] *State v. Simpson*, 397 P.2d 288 (Alaska 1964)

[7] *Price v. Eastham*, 75 P.3d 1051 (Alaska 2003) citing A.S. 38.95.010 State's interest may not be obtained by adverse possession or prescription.

[8] A.S. 14.40.291 Land of the University of Alaska not public domain land.

7. **Adverse Possession**: ["To acquire title by adverse possession under AS 09.45.052(a), the claimant must prove possession of the land that was continuous for the statutory period, open and notorious, and exclusive and hostile to the true owner. (*Prax v. Zalewski, 400 P.3d 116 - Alaska 2017)* The statutory period for a claimant acting on the basis of a good-faith mistake that the disputed land lies within the boundaries of the claimant's own property is ten years. (*AS 09.45.052(a))* An adverse possessor must meet each of these requirements by clear and convincing evidence. (*Curran v. Mount, 657 P.2d 389 – Alaska 1982)* "Continuity, notoriety, and exclusivity of use ... are 'not susceptible to fixed standards,' but rather 'depend on the character of the land in question.' " (*Vezey v. Green, 35 P.3d 14 – Alaska 2001*) Exclusivity is not destroyed by occasional permissive use by the claimant's guests or even trespassers. (*See Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826 – Alaska 1974*) Hostility is not destroyed by a claimant's mistaken belief of holding title to the land, so long as the claimant's use of the *215 land is without the record owner's consent. The underlying purpose of these requirements is "to put the record owner on notice of the existence of an adverse claimant."

   The legislature's 2003 amendments to Alaska's statutory scheme of adverse possession — previously contained in both AS 09.45.052 and AS 09.10.030 — were intended "to eliminate bad faith adverse possession claims." (*Prax v. Zalewski, 400 P.3d 116 - Alaska 2017*) Specifically, the legislature "modified AS 09.10.030 with the intent of abolishing adverse possession in cases where the claimant does not have color of title." (*Cowan, 255 P.3d at 973*) But instead of entirely eliminating adverse possession claims by individuals without color of title, "the legislature relocated the doctrine (with some alterations) to AS 09.45.052." (*Prax, 400 P.3d at 120*) These alterations permitted adverse possession claims for claimants without color of title only when the claimant engages in "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." (*Cowan v. Yeisley, 255 P.3d at 972 – Alaska 2011*) Together, these modifications "limit Alaskans' adverse possession claims to cases where the claimant had either color of title or a good faith but mistaken belief that the claimant owned the land in question." (*Cowan, 255 P.3d at 973*)][9]

   "Prior to 2003, Alaska had two adverse possession statutes. Under former AS 09.45.052(a), claimants with color of title could establish adverse possession by showing that their use of the land was continuous, open and notorious, exclusive, and hostile to the true owners of the land for seven years. Under former AS 09.10.030, claimants without color of title claiming adverse possession had to fulfill the same requirements for ten years."[10]

8. **Adverse Possession – Termination of Easements**: "An easement is terminated by prescription if the party claiming prescription can prove continuous and open and notorious use of the easement area for a 10-year period by clear and convincing evidence.

[9] *Hurd v. Henley, 478 P.3d 208 (Alaska 2020)*
[10] *Cowan v. Yeisley,* 255 P.3d 966 (Alaska 2011)

When an easement is extinguished by prescription, the prescriptive period begins when use of the easement unreasonably interferes with the current or prospective use of the easement by the easement holder."[11] (Westlaw Headnotes)

9. **Boundaries - Acquiescence**: "Boundary by acquiescence is an equitable gap-filling doctrine that may be available where estoppel and adverse possession are unavailable."[12]

   "Most modern legal treatises and courts, however, refer to the doctrine under which a boundary line may be determined by the practical agreement or acquiescence to a particular line as 'boundary by acquiescence' or 'recognition and acquiescence.' We adopt the concise and accurate term 'boundary by acquiescence.' "[13]

   "Accordingly, we hold that a boundary line is established by acquiescence where adjoining landowners (1) whose property is separated by some reasonably marked boundary line (2) mutually recognize and accept that boundary line (3) for seven years or more."[14]

10. **Boundaries – Defined**: "BLACK'S LAW DICTIONARY defines "boundary" as: Every separation, natural or artificial, which marks the confines or line of division of two contiguous properties. Limits or marks of enclosures if possession be without title, or the boundaries or limits stated in title deed if possession be under a title…A boundary is a separation that marks the limits of property."[15]

11. **Boundaries – Determination**: "[T]he determination of a disputed boundary often presents a compound issue involving questions both of law and fact. The relative weight of different types of evidence of disputed boundaries ordinarily presents a question of law, but the credibility of witnesses, including the weight given the opinions of surveyors, the location or existence of physical markers, and the timing of events, are questions of fact."[16]

12. **Boundaries – Evidence**: "Prior surveys and other extrinsic evidence are admissible if they are relevant to show the proper boundaries of a disputed tract of land."[17]

13. **Boundaries – Maps, Plats & Field Notes**: (Original monuments vs. Paper Plats) "Deeds conveying subdivided lots to lot owners and owners' adjoining neighbor were not ambiguous as to boundary line between lots, for purposes of owners' claims against neighbor to quiet title and for trespass; both deeds expressly identified their lot "according

[11] *Sykes v. Lawless*, 474 P.3d 636 (Alaska 2020)
[12] *Lee v. Konrad,* 337 P.3d 510 (Alaska 2014)
[13] Ibid. fn. 16
[14] Ibid. fn. 34 "For consistency we adopt the seven-year statutory prescriptive period for adverse possession under color and claim of title, AS 09.45.052(a), as the time period required to establish boundary by acquiescence."
[15] *Municipality of Anchorage v. Suzuki*, 41 P.3d 147 (Alaska 2002)
[16] *Collins v. Hall,* 453 P.3d 178 (Alaska 2019) citing *Lee v. Konrad,* 337 P.3d 510 (Alaska 2014)
[17] *File v. State*, 593 P.2d 268 (Alaska 1979)

to Plat No. 75-11, U.S. Survey No. 1755," correct point of beginning for Plat 75-11 was single monument created by U.S. Survey 1755 called "Witness Corner to Meander Corner 1" (WCMC1), and Plat 75-11 was paper plat that established no new monuments, but was accurate representation of U.S. Survey 1755, and therefore, monument established by U.S. Survey 1755 was used to locate lots created by Plat 75-11."[18] (Westlaw Headnote)

14. **Boundaries - Monument**: "In the context of a land survey, a "monument" means "(A) a United States public land survey monument; (B) an Alaska state land survey primary monument; (C) an exterior primary monument controlling a recorded survey; (D) a geodetic control monument established by a state or federal agency." AS 34.65.100(3)."[19]

15. **Boundaries – Original Monuments:** Citing the opinion of Michigan Supreme Court Justice Thomas Cooley in the 1878 case, *Diehl v. Zanger*, the Alaska Court acknowledged that "…the original survey should control even if it contained errors…". "Under Cooley's framework, a subsequent surveyor should: '*direct his attention to the ascertainment of the actual location of the original landmarks…, and if those are discovered they must govern. If they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time where the original monuments were presumably in existence and probably well known.'* "[20]

16. **Boundaries – Resurvey:** Until rights are given to private parties the government can change the boundaries of surveyed lands as it pleases."[21]

17. **Boundaries – Water - Accretion**: "Accretion is defined as the process by which an area of land along a waterway is expanded by the gradual deposit of soil there due to the action of contiguous waters. The general rule applied to accretion is that it benefits the riparian owner. The basic justification for the rule is that it protects the riparian owner's interest in his land by assuring him continuing access to the water and the advantages consequent thereto."[22]

    "federal law recognizes the doctrine of accretion whereby the 'grantee of land bounded by a body of navigable water acquires a right to any . . . gradual accretion formed along the shore.' When there is a gradual and imperceptible accumulation of land on a navigable riverbank, by way of alluvion or reliction, the riparian owner is the beneficiary of title to the surfaced land…'…It is well established that the burden of proving accretion rests with the party claiming the benefit thereof…It is likewise settled that accretion may result from artificial causes, provided that the party claiming the benefit did not himself cause the

[18] *Collins v. Hall,* 453 P.3d 178 (Alaska 2019)
[19] *Lee v. Konrad,* 337 P.3d 510 (Alaska 2014) fn. 3
[20] *Collins v. Hall,* 453 P.3d 178 (Alaska 2019)
[21] *File v. State*, 593 P.2d
[22] *Schafer v. Schnabel,* 494 P.2d 802 (Alaska 1972)

artificial accumulation."[23]

18. **Boundaries – Water - Avulsion**: Accretion "…should be distinguished from 'avulsion,' which refers to a sudden and perceptible change in the shoreline… The benefits of accretion inure to the shoreline owner, while avulsion does not change the legal boundary."[24]

19. **Boundaries – Water - Isostatic Rebound**: "…we find that glacio-isostatic uplift falls within the general doctrine of accretion…'Glacio-isostatic uplift,' in simplified terms, refers to the gradual rise of the earth's crust which occurs when the downward pressure exerted by a glacial ice mass diminishes. The result at shorelines is a gradual emergence of land previously submerged."[25]

20. **Boundaries – Water - Littoral**: " 'Littoral' means '[o]f or relating to the coast or shore of an ocean, sea, or lake.' BLACK'S LAW DICTIONARY 952 (8th ed. 2004)."[26]

21. **Boundaries – Water - Meanders**: "Meander lines are straight lines that approximate the sinuosities of the line of mean high tide. While the meander line remains fixed, the line of mean high tide may change over the years due to accretions or deletions. Patented land which extends to the line of mean high tide may be increased in size or diminished according to such accretions or deletions."[27]

    "A "meander line" does not mark the precise boundary line between tidelands and uplands, but rather comprises a series of straight lines marking the general contours of the shoreline."[28]

22. **Boundaries – Water - Nonnavigable Waterway**: "The slough was a nonnavigable waterway subject to the rule that riparian owners along nonnavigable streams own all the land underneath the stream up to the center or thread of the stream…AS 09.25.040 (4) provides that when a nonnavigable stream is the boundary of a parcel of property, the rights of the grantor to the thread of the stream are included in the conveyance, except where the road or bed of the stream is held under another title."[29]

23. **Boundaries – Water - Reliction**: "The counterpart to accretion is 'reliction,' which comes about by an emergence of existing soil… Accretion and reliction, although physically quite different processes, are subject to the same rule regarding title; i.e. the benefit inures to

[23] *State DNR v. Pankratz*, 538 P.2d 984 (Alaska 1975)
[24] *Honsinger v. State*, 642 P.2d 1352 (Alaska 1982)
[25] *Honsinger v. State*, 642 P.2d 1352 (Alaska 1982) and fn. 1
[26] *State, DNR v. Alaska Riverways, Inc.*, 232 P.3d 1203 (Alaska 2010)
[27] *File v. State,* 593 P.2d 268 (Alaska 1979) citing *Hawkins v. Alaska Freight Lines, Inc.*, 410 P.2d 992 (Alaska 1966)
[28] *City of Saint Paul v. State, DNR*, 137 P.3d 261 (Alaska 2006)
[29] *Bentley Family Trust, Bank of California v. Lynx Enterprises, Inc.*, 658 P.2d 761 (Alaska 1983)

the shoreline owner."[30]

24. **Boundaries – Water – Rights of Use**: "The right to wharf out is the means by which riparian or littoral landowner may exercise his right of access to deep or navigable waters, and it may not be unreasonably obstructed, but this right is a qualified right and subject to State regulations.; Alaska Constitution establishes right to common use of public and navigable state waters that protects a riparian and littoral landowner's right to use the water abutting the land. Alaska Const. art. 8, § 16.; Under State Constitution, riparian or littoral landowner has individual property interest in the use of water abutting his land. Alaska Const. art. 8, § 16.; Reasonable use rule allows for riparian or littoral landowner to use the abutting waters in any lawful way so long as that use is reasonable.; Riparian and littoral landowners have the right of reasonable access to and use of adjacent navigable and public waters of the State, as they are defined by the legislature, so long as the access or use is lawful and does not unreasonably interfere with the correlative rights of other riparian or littoral landowners." (Westlaw Headnotes)[31]

25. **Boundaries – Water – Riparian**: "In context of water law, 'riparian' means of, relating to, or located on the bank of a river or stream or occasionally another body of water, such as a lake." (Westlaw Headnotes) "Throughout this opinion, we use the terms 'riparian' and 'littoral' interchangeably. 'Riparian' means '[o]f, relating to, or located on the bank of a river or stream (or occasionally another body of water, such as a lake).' *Riparian*, BLACK'S LAW DICTIONARY (10th ed. 2014)."[32]

26. **Boundaries – Water - Shoreland**: "Shoreland is defined by statute as 'land belonging to the state which is covered by nontidal water that is navigable under the laws of the United States up to ordinary high water mark as modified by accretion, erosion, or reliction.' AS 38.05.965(20)."[33]

27. **Boundaries – Water - Submerged Land**: "Submerged land is 'land covered by tidal water between the line of mean low water and seaward to a distance of three geographical miles.' AS 38.05.965(22)."[34]

28. **Boundaries – Water - Tideland**: " 'Tideland' is 'land that is periodically covered by tidal water between the elevation of mean high water and mean low water.' AS 38.05.965(23)."[35]

[30] *Honsinger v. State*, 642 P.2d 1352 (Alaska 1982)
[31] *McCavit v. Lacher*, 447 P.3d 726 (Alaska 2019)
[32] *McCavit v. Lacher*, 447 P.3d 726 (Alaska 2019)
[33] *State, DNR v. Alaska Riverways, Inc.*, 232 P.3d 1203 (Alaska 2010)
[34] *State, DNR v. Alaska Riverways, Inc.*, 232 P.3d 1203 (Alaska 2010)
[35] *State, DNR v. Alaska Riverways, Inc.*, 232 P.3d 1203 (Alaska 2010)

29. **Boundaries – Water - Tidelands/Uplands**: " 'Uplands' are the areas of land adjacent to and immediately above tidelands, which lie between the elevation of the mean high water line and the mean low water line. Tidelands are the area periodically covered by incoming and outgoing tides. *See* AS 38.05.965(23)."[36]

30. **Boundaries – Water – Watercourse**: "Although there is no uniform definition of 'watercourse,' the courts generally agree on three essential elements: (1) a definite stream of water, (2) flowing in a definite natural channel, and (3) originating from a definite source of supply…The great weight of authority is to the effect that the flow need not be continuous, but must be at least periodic."[37]

31. **Dedication - (a) General**: "Black's Law Dictionary defines 'dedication' as '[t]he donation of land or creation of an easement for public use.' Dedication, BLACK'S LAW DICTIONARY (10th ed. 2014).[38] "The appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public. Such dedication may be express where the appropriation is formally declared, or by implication arising by operation of law from the owner's conduct and the fact and circumstances of the case."[39] "Dedications may be either express or implied. Express dedications can be statutory or common law."[40] "A 'dedication by implication' consists of the assent of the owner, and use by the public; it lacks the formalities and safeguards of formal or statutory dedication."[41] The offer to dedicate may be withdrawn before acceptance.[42] In Alaska, the intent to offer to dedicate must be clear and unequivocal, and must be proven by the party attempting to assert the dedication.[43] The Alaska Supreme Court has confirmed the traditional rule that an acceptance of an offer to dedicate may be through formal official action, public use consistent with the offer to dedicate, or through an act of reliance sufficient to cause an estoppel.[44]

32. **Dedication - (b) Common Law**: "A common law dedication occurs 'when the owner of an interest in land transfers to the public a privilege of use of such interest for a public purpose.' "[45] "There are two essential elements of a common law dedication: (1) an owner's offer of dedication to the public and (2) acceptance by the public."[46] Where there

[36] *City of Saint Paul v. State, DNR*, 137 P.3d 261 (Alaska 2006)
[37] *Fred Pankratz v. State Dept. of Highways*, 652 P.2d 68 (Alaska 1982)
[38] *Reeves v. Godspeed Properties, LLC*, 426 P.3d 845, (Alaska 2018)
[39] Black's Law Dictionary, 5th Ed.
[40] *McCarrey v. Kaylor*, 301 P.3d 559 (Alaska 2013)
[41] *77 Am. Jur. Proof of Facts 3d 1 – Proof of Offer and Acceptance of Dedication of Land to Public Use* – September 2016 Update
[42] *Swift v. Kniffen*, 706 P.2d 296 (Alaska 1985)
[43] *10.958 Acres, more or less v. State*, 762 P.2d 96, (Alaska 1989) (Parrish)
[44] *State v. Fairbanks Lodge No. 1392*, 633 P.2d 1378 (Alaska 1981) (*Moose Lodge*)
[45] *McCarrey v. Kaylor*, 301 P.3d 559, Alaska, March 29, 2013 citing *Swift v. Kniffen*, 706 P.2d 296 (Alaska 1985) and *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961)
[46] Ibid.

has been a common law dedication is usually a factual issue related to the intent of the dedication.[47] Acceptance may also be implied from acts of maintenance by public authorities.[48] Prior to the 1998 legislation appointing the Department of Natural Resources as platting authority in the Unorganized Borough, all subdivision street dedications would be considered common law dedications as there was no available authority to officially accept an offer to dedicate.

33. **Dedication - (c) Statutory**: A statutory dedication is one made under and in conformity with the provision of a statute regulating the subject[49]. Generally, these rights-of-way are created by a formal platting action in which the offer to dedicate is evidenced by a "certificate of dedication" executed by the landowner and acceptance by the public is evidenced by a "certificate of acceptance" executed by an authorized official. "Alaska law allows for the dedication of land for public use through the subdivision process…When an area is subdivided and a plat of the subdivision is approved, filed, and recorded, all streets, alleys, thoroughfares, parks and other public area shown on the plat are considered to be dedicated to public use."[50]

34. **Easement – ANCSA 17(b)**: "The United States Supreme Court has not definitively determined the extent to which the public can use a public easement created pursuant to § 17(b) of ANCSA. In 1977, a federal district court stated that it appeared from ANCSA that 'the public easements were to be reserved to provide access to the lands not selected, and they were not intended to provide the public with a right to use Native lands for recreational lands.' *Alaska Public Easement Defense Fund v. Andrus,* 435 F.Supp. 664, 674 (D.Alaska 1977). However, in 1979, the Secretary of the Interior obviously had another view. In Interim Conveyance No. 159, the Secretary created a coastline easement 'in order to provide access to and along the marine coastline and use of shore for purposes such as beaching of watercraft or aircraft, travel along the shore, recreation and other similar uses.' "[51]

35. **Easement – Appurtenant**: "An easement appurtenant is a right to use a certain parcel, the servient estate, for the benefit of another parcel, the dominant estate."[52] An easement appurtenant passes with the land and is transferred, through a general clause in a deed or automatically to future owners even if it is not specifically mentioned in the conveyance document. Both dominant and servient estates must be identified to create an easement

[47] Ibid.

[48] Bruce & Ely, Law of Easements and Licenses in Land 4.06(3)

[49] A.S. 29.40.070 Platting Regulation *"....platting requirements that may include, but are not limited to, the control of ...(4) dedication of streets, rights-of-way, public utility easements and areas considered necessary by the platting authority for other public uses."*

[50] *Cowan v. Yeisley*, 255 P.3d 966 (Alaska 2011) citing A.S. 40.15.030 Dedication of streets, alleys, and thoroughfares.

[51] *Hakala v. Atxam Corp.,* 753 P.2d 1144 (Alaska 1988)

[52] *SOP, Inc. v. State, Dept. of Natural Resources, Div. of Parks and Outdoor Recreation*, 310 P.3d 962, (Alaska 2013) Citing 25 AM. JUR. 2d *Easements and Licenses § 8* (2004)

appurtenant.[53]

36. **Easement – Express Grant**: An express grant creates an easement over the grantor's property for the benefit of the grantee. "The most common method of creating an easement is by express grant. This is usually accomplished by a deed that satisfies the requirements of the Statute of Frauds."[54] "A grant of an easement is often defined as a conveyance to another party."[55]

37. **Easement – Express Reservation**: "A 'reservation' is defined in cases as a right in favor of the grantor which is created out of or retained in the granted premises."[56]

    "…easements may arise by reservation or exception in a deed of conveyance…a grantor who wishes to retain an easement should use the word 'reserve' because reservation implies the creation of a new interest in the grantor…Deed grantors sometimes use 'subject to' language in an effort to create an easement by reservation. Although, in certain cases, the use of such terminology has been held sufficient to reserve an easement, it should not be employed for this purpose because it does not clearly express the intent of the parties. 'Subject to' language is commonly used in a deed to refer to existing easements, liens and real covenants that the grantor wishes to exclude from warranties of title. However, 'subject to' language coupled with an express reservation is sufficient to establish an easement."[57]

38. **Easement - Floating**: A floating easement is one where there is no fixed location, route, or width to the right-of-way. In 2008 a property owner argued that the court should invalidate and existing blanket easement for an electric transmission line because "…the easement is not limited to a 'specific or definite area' and has 'no reasonable width, length, or access points,'. "*[58]*

39. **Easement – General**: "An easement is an 'interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specified limited purpose.' "[59] "The term 'easement' has been variously defined by legal authorities, but we shall confine ourselves in this case to the definition which states that an easement is the right which the owner of one parcel of land has by reason of such

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[53] See *McCarrey* FN 42 "*The patent did not identify a dominant estate or limit access only to small tract owners."* The patent identifies the servient estate but not a specific parcel of land that was to benefit from the easement. See *Reeves v. Godspeed Properties,* 426 P.3d 845 (Alaska 2018) – *"An appurtenant easement may not be used for the benefit of property other than the dominant estate."* Citing *HP Ltd. Partnership v. Kenai River Airpark,* 270 P.3d 719, (Alaska 2012)

[54] *The Law of Easements and Licenses in Land* – Bruce & Ely 2013 - § 3:6 – 3:8

[55] *Wessells v. State Dept. of Highways*, 562 P.2d 1042 (Alaska 1977) fn.11

[56] *Wessells v. State Dept. of Highways*, 562 P.2d 1042 (Alaska 1977) fn.11

[57] *The Law of Easements and Licenses in Land* – Bruce & Ely 2013 - § 3:6 – 3:8

[58] *Kelley v. Matanuska Elec. Ass'n, Inc.*, Not reported (Alaska 2008)

[59] *Northern Alaska Environmental Center v. State, DNR,* 2P.3d 629 (Alaska 2000) fn.38

ownership to use the land of another for a specific purpose, such use being distinct from the occupation and enjoyment of the land itself. In figurative language, the land subject to the easement is described as a 'servient tenement' and the land enjoying the easement as the 'dominant tenement'. However, it is not necessary that the two tenements be contiguous or adjoining"[60]

40. **Easement – Implied**: "An implied easement arises when there is "(1) a quasi-easement at the time of contract of sale or conveyance, (2) which is apparent, (3) reasonably necessary for the enjoyment of the land retained or the land conveyed, and (4) continuous in nature."[61]

    "An easement will be implied upon the severance of an estate when the use made of the servient parcel is manifest, continuous and reasonably necessary to the enjoyment of the dominant parcel…Once an easement is implied, it runs with the land and is enforceable against subsequent purchasers of the servient estate so long as it retains its continuous and apparent nature and remains reasonably necessary to the enjoyment of the dominant estate."[62]

41. **Easement – In Gross**: The easement in gross is "personal to the holder" and is not connected to or for the benefit of a dominant estate. Where an easement in gross exists, there is a servient estate, but not a dominant estate. "…easements in gross are assigned to a specific person and do not run with the land."[63] Commercial easements in gross such as those for utilities are assignable while non-commercial easements in gross such as a right to hunt or fish on another's land are generally not.

42. **Easement – License**: "A license, it has been said, 'passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it, had been unlawful;'…It is an almost universal rule of law today that a license is not an interest in real property within the terms of the statute of frauds relating to the transfer of interests in real property. The creation of a license requires only express words, or conduct indicating the landowner's consent to the doing of certain acts upon the land."[64]

43. **Easement – Location & Dimensions**: "The law appears to be settled that where the width, length and location of an easement for ingress and egress have been expressly set forth in the instrument the easement is specific and definite…If, however, the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and

[60] *Freightways Terminal Co. v. Industrial & Commercial Const., Inc*, 381 P.2d 977 (Alaska 1963)
[61] *Williams v. Fagnani,* 175 P.3d 38 (Alaska)
[62] *Methonen v. Stone,* 941 P.2d 1248 (Alaska 1997)
[63] *Reeves v. Godspeed Properties, LLC*, 426 P.3d 845, (Alaska 2018)
[64] *Mertz v. J.M. Covington Corp.*, 470 P.2d 532 (Alaska 1970)

location as is sufficient to afford necessary or reasonable ingress and egress."[65]

"…it is not necessary…that the precise path of the trail be proven. It is enough for one claiming an RS 2477 right-of-way to show that there was a generally-followed route across the land in question. *See Shultz,* 10 F.3d at 655."[66]

44. **Easement – Location & Width**: "Other jurisdictions have also held that when a deed conveys an easement but fails to locate it, a court may determine the location of the easement... If, however, the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and location as is sufficient to afford necessary or reasonable ingress and egress."[67]

45. **Easement – Prescriptive (Public)**: "A prescriptive easement is created by use. A party claiming a prescriptive easement 'must show that (1) the use was continuous and uninterrupted for [a] ten-year period ...; (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.' For purposes of creating a public prescriptive easement, it is 'qualifying use by the public' that matters rather than use by a private party."[68]

"The majority view now is that a public easement may be acquired by prescription. 2 J. Grimes, *Thompson on Real Property* § 342, at 209 (1980). We impliedly joined this majority in *Hamerly* and do so explicitly now."[69]

46. **Easement – Prescriptive**: The requirements for a prescriptive easement are the same as those for adverse possession.[70] "The level of use also determines whether a claimant acquires a fee title estate via adverse possession or merely a prescriptive easement…The chief distinction is that in adverse possession the claimant occupies or possesses the disseisee's land, whereas in prescription [the claimant] makes some easement-like use of it...."[71]

47. **Easement – Profit**: "A profit à prendre is an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another. It is referred to as a "profit"…"[72]

[65] *Andersen v. Edwards*, 625 P.2d 282 (Alaska 1981)
[66] *Fitzgerald v. Puddicombe*, 918 P.2d 1017 (Alaska 1996)
[67] *Offshore Systems-Kenai v. State, DOT&PF*, 282 P.3d 348 (Alaska 2012)
[68] *Dickson v. State DNR,* 433 P.3d 1075 (Alaska 2018)
[69] *Dillingham Commercial Co., Inc. v. City of Dillingham,* 705 P.2d 410 (Alaska 1985)
[70] *McGill v. Wahl*, 839 P.2d 393 (Alaska 1992)
[71] *Tenala, Ltd. v. Fowler*, 921 P.2d 1114 (Alaska 1996)
[72] *Laverty v. Alaska R.R. Corp.*, 13 P.3d 725 (Alaska 2000) fn. 51

48. **Easement – Quasi**: "We have defined the term 'quasi-easement' in the following way: 'While a person cannot have an easement over his own land, he may make use of one part of his land for the benefit of another part and thus create what has been denominated a quasi-easement.' "[73]

49. **Easement – Scope of Use, Servient Estate**: "The Restatement (Third) of Property: Servitudes, section 4.9, provides: 'Except as limited by the terms of the servitude ..., the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude.' "[74]

50. **Easement – Scope of Use, Maintenance & Widening**: "Any incidental widening of landowner's roadway easement for ingress and egress over neighbor's property as part of landowner's maintenance activities, which included grading and compacting road and plowing snow and other debris off side of road, was reasonably necessary and did not interfere with enjoyment of neighbor's property, where width of easement was not fixed by deed, neighbor's property was not damaged by landowner's shoving the dirt, gravel, rocks, snow, and ice over edge of road and onto downhill slope, and landowner's maintenance activities were consistent with standard maintenance practices for similar roads."[75] (Westlaw Headnotes)

51. **Easement – Termination by Prescription**: "…we follow the approach adopted by the Restatement (Third) of Property FN8 and many jurisdictions and hold that an easement can be extinguished by prescription...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."[76]

52. **Easement – Third Party Reservation**: A third party reservation is one made in a deed for the benefit of a person who is not a party to the transaction. The common law rule is that a reservation or exception in a deed cannot create rights in third parties. Alaska is among those jurisdictions that find the common law view potentially in conflict with the intent of the grantor, a primary factor in deed interpretation. "The rule clearly conflicts with our general view that a deed should be construed to the effect the intent of the grantor. *Shilts,* 567 P.2d at 773."[77]

53. **Easement by Necessity**: "Such a way may arise where an owner of land conveys to another an inner portion which is entirely surrounded by lands owned by the conveyor or by the conveyor and another. In such a situation a right of access across the retained land of the

[73] *HP Ltd. Partnership v. Kenai River Airpark, LLC*, 270 P.3d 719 (Alaska 2012) citing *Freightways Terminal Co. v. Indus. & Commercial Const., Inc.*, 381 P.2d 977 (Alaska 1963)
[74] *Williams v. Fagnani*, 228 P.3d 71 (Alaska 2010)
[75] *Wayson v. Stevenson*, 514 P.3d 1263 (Alaska 2022)
[76] *Hansen v. Davis*, 220 P.3d 911 (Alaska 2010)
[77] *Aszmus v. Nelson*, 743 P.2d 377, (Alaska 1987)

conveyor is normally found, based upon public policy which is favorable to full utilization of land and presumption that parties do not intend to render land unfit for occupancy…Such a way ceases when the necessity therefor ceases.[78]

54. **Estoppel – Equitable**: Boundary by estoppel is designed to prevent fraud and injustice and to protect innocent landowners who reasonably rely on the representations of their neighbors regarding boundary lines. "The general elements required for the application of the doctrine of equitable estoppel are the assertion of a position by conduct or word, reasonable reliance thereon by another party, and resulting prejudice."[79]

    "When applied to preclude the assertion of title to real property, equitable estoppel has been held to require: first, that the party making the admission by his declaration or conduct, was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge, and fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved."[80]

    "Equitable estoppel is the estoppel normally applied to real property disputes because it gives effect to the policies embodied in the recording acts. Alaska's recording act, AS 40.17.010–40.17.900, charges purchasers of real property with 'constructive notice of the contents of' properly recorded conveyance documents. AS 40.17.080(a). A properly recorded title normally precludes an equitable estoppel against assertion of that title due to the requirement that the party raising the estoppel be ignorant of the true state of title or reasonable means of discovering it."[81]

55. **Estoppel – Government**: The State cannot be estopped from asserting its interest in a public highway where the State recorded its legal interest by filing right-of-way plans and the party claiming estoppel knew or should have known of the State's ownership.[82]

    "We also held that an estoppel claim may not be based on a government employee's statement if the employee is 'not apprised of the true state of the State's title.' "[83]

    Published land orders impart constructive notice of easements, barring "innocent purchaser" estoppel claims.[84]

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[78] *Freightways Terminal Co. v. Industrial & Commercial Const., Inc*, 381 P.2d 977 (Alaska 1963) fn. 16

[79] *Jamison v. Consolidated Utilities, Inc.*, 576 P.2d 97 (Alaska 1978)

[80] *Dressel v. Weeks*, 779 P.2d 324 (Alaska 1989) citing *Jamison v. Consolidated Util., Inc.,* 576 P.2d 97, 102 (Alaska 1978)

[81] *Dressel v. Weeks*, 779 P.2d 324 (Alaska 1989)

[82] *Safeway, Inc. v. State DOT&PF*, 34 P.3d 336 (Alaska 2001)

[83] *Dickson v. State DNR,* 433 P.3d 1075 (Alaska 2018)

[84] *State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983)

At most, the state is required to bring a lawsuit within a reasonable time after its right-of-way is challenged.[85] .

"The failure of municipal and other governmental officers to affirmatively assert governmental rights where the dedicated but as yet unused street was being occupied by appellee and his predecessors cannot serve as a basis for equitable estoppel."[86]

56. **Estoppel - Quasi**: "Quasi estoppel 'precludes a party from taking a position inconsistent with one he [or she] has previously taken where circumstances render assertion of the second position unconscionable.'…In applying the doctrine of quasi estoppel, we will consider 'whether the party asserting the inconsistent position has gained an advantage or produced some disadvantage through the first position; whether the inconsistency was of such significance as to make the present assertion unconscionable; and whether the first assertion was based on full knowledge of the facts.' "[87]

    "Quasi-estoppel differs from other forms of estoppel in that it appeals to the conscience of the court to prevent injustice by precluding a party from asserting a right inconsistent with a position previously taken by him, and does not require ignorance or reliance as essential elements. It is necessary, however, that any representation made to the party claiming quasi-estoppel must have been based with full knowledge of the facts."[88]

57. **Highway**: AS 19.59.001 (8) "highway" includes a highway (whether included in primary or secondary systems), road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof, and further includes a ferry system, whether operated solely inside the state or to connect with a Canadian highway, and any such related facility;[89]

58. **Laches**: "The doctrine of laches 'creates an equitable defense when a party delays asserting a claim for an unconscionable period' " and there is "resulting prejudice."[90]

    In order for the doctrine of laches to be applicable, the moving party must show unreasonable delay and unreasonable harm or prejudice.[91]

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[85] *Keener v. State*, 889 P.2d 1063 (Alaska 1995)

[86] *State v. Simpson*, 397 P.2d 288 (Alaska 1964)

[87] *Keener v. State*, 889 P.2d 1063, (Alaska 1995) citing *Dressel v. Weeks,* 779 P.2d 324 (Alaska 1989) and *Jamison v. Consolidated Utils., Inc.,* 576 P.2d 97 (Alaska 1978)

[88] *U.S. Smelting, Refining and Mining Co. v. Wigger,* 684 P.2d 850 (Alaska 1984)

[89] Cited in *Dickson v. State, DNR*, 433 P.3d 1075, (Alaska 2018)

[90] *Dickson v. State DNR,* 433 P.3d 1075 (Alaska 2018) citing *Offshore Sys.-Kenai v. State, Dep't of Transp. & Pub. Facilities*, 282 P.3d 348, 354 (Alaska 2012) (quoting *State, Dep't of Commerce & Econ. Dev., Div. of Ins. v. Schnell*, 8 P.3d 351, 358-59 (Alaska 2000)).

[91] *City and Borough of Juneau v Breck*, 706 P.2d 313 (Alaska 1985)

59. Land Disposals – Federal - Small Tract Classification Order: An order issued by the Secretary of the Interior to classify lands "…as chiefly valuable as a home, cabin, camp, health, convalescent, recreational, or business site in reasonably compact form and under such rules and regulations as he may prescribe…"[92] The "regional administrator, upon receipt of the application, will proceed to have such studies and investigations made as may be required for a determination as to whether or not it should be classified for small-tract purposes… Each tract will be classified as available either for lease and sale or for lease only."[93]

60. **Land Disposals (Federal) Alaska Native Allotments***:* Act of May 17, 1906, ch. 2469, 34 Stat.197 (1906), Repealed by Pub. L. No. 92-203, §18(a), 85 Stat. 688, 710 (1971) Alaska Native Claims Settlement Act. "Federal law authorizes the Secretary of the Interior to allot certain non-mineral lands to Native Alaskans."[94]

61. **Land Disposals (Federal) Alaska Native Townsites***:* Alaska Native Townsite Act of 1926 - 43 U.S.C. § 733–36, 44 Stat. 629 (1926) - "In 1926, Congress enacted the Alaska Native Townsite Act, extending the provisions of the federal townsite laws to Alaska Natives. Under the Townsite Act, Native townsite residents could receive a restricted deed that was inalienable absent federal approval." Repealed by FLPMA.[95]

62. **Land Disposals (Federal) Federal Mining Claims***:* Act of 10, 1872 (17 Stat. 91), as amended. "Alaska applies federal mining law in the absence of a specific state statute. *See* AS 38.05.185(c)…The 1872 Mining Law provides that 'all valuable mineral deposits in lands belonging to the United States ... shall be free and open to exploration and purchase.' "[96]

63. **Land Disposals (Federal) Headquarters Site***:* Act of March 3, 1927 (43 USC 687a) – Headquarters Site – Also repealed by FLPMA.

64. **Land Disposals (Federal) Homesites***:* Act of May 26, 1934 (48 Stat. 809) – The Alaska Homesite Homesite Law[97] (43 U.S.C. § 687a) – This authority was also repealed by FLPMA.

65. **Land Disposals (Federal) Homesteads***:* Act of May 14, 1898 - (30 Stat. 409), as amended August 23, 1958 (72 Stat. 730; 43 U.S.C. 687a). "*See* 43 U.S.C. §§ 161–263 (1958). The homestead laws of the United States were extended to the District of Alaska prior to statehood with Distric– (and then Territory–) specific provisions, *see* 48 U.S.C. §§ 371–80a (1958), and the provisions relevant to this case continued in force after statehood."[98]

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[92] *Act of June 1, 1938 – To provide for the purchase of public lands for home and other sites.*
[93] *43 CFR 257.8 Classification of Land* (Small Tracts) - 1949
[94] *Nome 2000 v. Fagerstrom*, 799 P.2d 304 (Alaska 1990)
[95] *Hawkins v. Attatayuk*, 322 P.3d 891 (Alaska 2014)
[96] *McGlinchy v. State, DNR,* 354 P.3d 1025 (Alaska 2015)
[97] *Sabo v. Horvath*, 559 P.2d 1038 (Alaska 1976)
[98] *Luker v. Sykes,* 357 P.3d 1911 (Alaska 2015)

Section 702 of the Federal Land Policy and Management Act (FLPMA), effective October 21, 1976 repealed the homestead laws across the U.S. including Alaska. The repeal in Alaska was deferred by a 10-year sunset provision.

66. **Land Disposals (Federal) Small Tracts**: Small Tract Act of June 1, 1938, (52 Stat. 609) as amended. Small Tract leases and sales were made available in Alaska under the Act of July 14, 1945 (59 Stat. 467). "The Small Tract Act 'authorized the sale of public lands classified as valuable for residence, recreation, business or community site purposes.' It was made applicable to Alaska in 1945." [99]

67. **Land Disposals (Federal) Townsites***:* Townsite Act, March 3, 1891 (26 Stat. 1099). The townsite laws were repealed by sec. 703 of FLPMA. "In discussing the purpose of townsite laws as they pertained to Alaska, Judge Wickersham said in *Sawyer v. Van Hook*: These statutory provisions show that it was the intention of Congress to dispose of lots in town sites in Alaska only to those who would possess and use them. Title thereto can be obtained only through settlement occupancy."[100]

68. **Land Disposals (Federal) Trade & Manufacturing Site**: The statutory authority for Trade and Manufacturing Sites is Section 10 of the Act of May 14, 1898 (30 Stat. 413), as amended August 23, 1958 (72 Stat. 730; 43 U.S.C. 687a). The 1898 Act extended the homestead laws to the District of Alaska. The Authority for T&M sites was also repealed by FLPMA in 1976 effective October 21, 1976.

69. **Law - Attorney General's Opinion**: "Opinions may be issued by the attorney general in response to requests by state agency officials and state legislators to help them perform their duties. These opinions are not law, but rather they advise state officials on questions of law and on how the law applies to particular fact situations."[101] "While opinions of the attorney general are entitled to some deference, they are not controlling on matters of statutory interpretation."[102]

70. **Law – Jurisdiction (Federal Patent)**: "Once [a land] patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts."[103]

71. **Law – Regulatory Interpretations**: " 'We review an agency's interpretation of its own regulations under the reasonable and not arbitrary standard' when the agency's interpretation 'implicate[s] special agency expertise or the determination of fundamental

[99] *McCarrey v. Kaylor*, 301 P.3d 559 (Alaska 2013)
[100] *Oswald v. Columbia Lumber Co. of Alaska*, 425 P.2d 240 (Alaska 1967)
[101] Department of Law website at http://law.alaska.gov/doclibrary/opinions_index.html.
[102] *Northern Alaska Environmental Center v. State DNR,* 2 P.3d 629 (Alaska 2000) citing *Cissna v. Stout,* 931 P.2d 363 (Alaska 1996)
[103] *Ray Pursche v. Matanuska-Susitna Borough*, 371 P.3d 251 (Alaska 2016)

policies within the scope of the agency's statutory function.' This 'deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue.' "[104] "An administrative agency's interpretation of its own regulation is normally given effect unless plainly erroneous or inconsistent with the regulation."[105]

72. **Law – Rules of Construction**: "As a general rule, where the language of a public land grant is subject to reasonable doubt such ambiguities are to be resolved strictly against the grantee and in favor of the government."[106]

    "The purpose of rules of construction ... 'is not to ascertain the intent of the parties to the transaction. Rather, it is to resolve a dispute when it is otherwise impossible to ascertain the parties' intent.' "[107]

    "It is well established that the intention to create a servitude must be clear on the face of an instrument; ambiguities are resolved in favor of use of land free of easements."[108]

73. **Law – Statutory Interpretations**: Common sense statutory interpretations by agencies do not require regulations. By contrast, if a statutory interpretation is "expansive or unforeseeable," the agency may be required to promulgate its interpretation through a regulation.[109] "An administrative agency's interpretation of a statute is not binding upon courts since statutory interpretation is within the judiciary's special competency but where the statute is ambiguous, some weight may be given to administrative decisions interpreting it."[110]

74. **Legislation - Act of 1966, Right-of-Way (State of Alaska)**: "Section 2 precludes the State from taking 'privately owned property by the election or exercise of a reservation to the state acquired under [48 U.S.C. § 321d],' and section 3 provides that the Act shall not be construed to divest the State of 'any right-of-way or other interest in real property which was taken by the state, before the effective date of this Act, by the election or exercise of its right to take property through a reservation acquired under [48 U.S.C. § 321d].' The effective date of the Right-of-Way Act of 1966 was April 14, 1966."[111] See Act of July 24, 1947 ('47 Act - 48 U.S.C. § 321d).

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[104] *Alpine Energy, LLC v. Matanuska Elec. Ass'n*, 369 P.3d 245 (Alaska 2016)
[105] *State, Dept. of Highways v. Green*, 586 P.2d 595 (Alaska 1978) fn. 21
[106] *State, Dept. of Highways v. Green*, 586 P.2d 595 (Alaska 1978) fn. 24
[107] *Fink v. Municipality of Anchorage,* 379 P.3d 183 (Alaska 2016) quoting *Norken Corp. v. McGahan*, 823 P.2d 622 (Alaska 1991)
[108] *Methonen v. Stone*, 941 P.2d 1248, (Alaska 1997)
[109] *Squires v. Alaska Bd. Of Architects, Engineers & Land Surveyors*, 205 P.3d 326 (Alaska 2009)
[110] *State, Dept. of Highways v. Green*, 586 P.2d 595 (Alaska 1978) fn. 21
[111] *State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983)

75. **Legislation – Act of January 27, 1905 (Federal)**: "An act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane in Alaska, and for other purposes."[112]

76. **Legislation - Act of July 24, 1947 (Federal)**: The '47 Act, provided in part that: "In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska * * * there shall be expressed that there is reserved, from the lands described in said patent * * * a right-of-way thereon for roads, roadways, highways * * * constructed or to be constructed by or under the authority of the United States or of any State created out of the Territory of Alaska.' this act provided for a reservation be placed in patents issued in Alaska for the construction of roads, tramways, trails, bridges."[113]

77. **Legislation - Act of June 25, 1959 (Federal)**: The Alaska Omnibus Act - "An Act to amend certain laws of the United States in light of the admission of the State of Alaska into the Union, and for other purposes."[114]

78. **Legislation - Act of June 30, 1932 (Federal)**: "Sec. 2. The Secretary of the Interior shall execute or cause to be executed all laws pertaining to the construction and maintenance of roads and trails and other works in Alaska heretofore administered by said board of road commissioners under the direction of the Secretary of War;"[115] This is the authority for subsequent highway right-of-way related public land orders issued by the Department of the Interior.

79. **Legislation - Act of May 14, 1906 (Federal)**: "The Alaska Road Commission (Board of Road Commissioners for Alaska) was created by Act of Congress May 14, 1906, and given power 'to locate, lay out, construct, and maintain wagon roads and pack trails from any point on the navigable waters of said district [Alaska] to any town, mining or other industrial camp or settlement…' "[116]

80. **Legislation - Act of May 17, 1906 (Federal)**: The Alaska Native Allotment Act authorized the Secretary of the Interior to allot individual Alaska Natives a homestead of up to 160 acres of land.[117]

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[112] *State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983) fn. 8 - P.L. 26 – 33 Stat. 616 (48 U.S.C. 321)

[113] *Hillstrand v. State*, 395 P.2d 74 (Alaska 1964); The Act of July 24, 1947 (Ch. 313 P.L. 229 - 61 Stat. 418) (48 U.S C. 321d); The '47 Act was repealed (effective July 1, 1959) by Pub. L. 86–70, § 21(d)(7), 73 Stat. 146.

[114] *Simon v. State*, 996 P.2d 1211 (Alaska) fn. 2 - P.L. 86-70 dated June 25, 1959, 73 Stat. 141.

[115] *State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983) also *State, Dept. of Highways v. Green* 586 P.2d 595 (Alaska 1978) See P.L. 218 Ch. 320, sec. 5, 47 Stat. 446 (48 USC 321a)

[116] *Clark v. Taylor et al.*, 9 Alaska 298 (4th Div. Fairbanks 1938) See ch. 2458, Sec. 2, 34 Stat. 192.

[117] *Nome 2000 v. Fagerstrom*, 799 P.2d 304 (Alaska 1990) *See* Act of May 17, 1906, 34 Stat. 197, as amended, Act of August 2, 1956, 70 Stat. 954; repealed by the Alaska Native Claims Settlement Act, § 18, with a savings clause for applications pending on December 18, 1971, 43 U.S.C. § 1617(a) (1982); modified by the Alaska National Interest Lands Conservation Act, § 905, 43 U.S.C. § 1634 (1982).

81. **Legislation - Act of May 3, 1917 (Territorial)**: "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,…Section 13 thereof provides: 'The Divisional Commission shall classify all public Territorial roads and trails in the divisions as wagon roads, sled roads, or trails… The lawful width of right-of-way of all roads or trials shall be sixty feet.' "[118]

82. **Legislation – Act of May 3, 1917 (Territorial)**: "There is hereby created a Territorial Board of Road Commissioners for the Territory of Alaska for the construction and maintenance of roads, trails, bridges and ferries in the Territory of Alaska…The Divisional Commission shall classify all public Territorial roads and trails in the divisions as wagon roads, sled roads, or trails…The lawful width of right-of-way of all roads or trails shall be sixty feet."[119]

83. **Legislation – Alaska National Interest Lands Conservation Act**: ANILCA[120] was enacted in 1980 to designate certain public lands in Alaska as units of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Wilderness Preservation System and National Forest System. The Act also provides for comprehensive land management for all Alaska federal lands. Title XI of ANILCA provides for inholder or transportation/utility rights-of-way across conservation system units.

84. **Legislation – Alaska Native Claims Settlement Act**: In 1971, ANCSA provided a federal land settlement extinguishing aboriginal claims to the state's 375 million acres of land and territorial waters by providing Alaska Natives with forty-four million acres of land and nearly one billion dollars. One of the most significant features of the bill was the establishment of twelve regional4 and approximately 200 village corporations as owners of the land and recipients of the money.[121]

85. **Legislation – Earthslide Relief Act of 1966 (State of Alaska)**: To resolve boundary issues related to the 1964 earthquake, the Alaska legislature enacted the "Earthslide Relief Act", approved on April 9, 1966. (See AS 9.45.800) "The Act provides: If the boundaries of land ... have been moved by an act of God, consisting of an earthslide, so that they are in a location different from that at which, by solar survey, they were located before the earthslide, an action in rem to recognize the boundaries as they presently exist and to quiet title within the boundaries in the persons judicially found entitled to title ... is authorized...But the lot owners' argument is refuted by *Brown's Boundary Control and Legal Principles*, a learned treatise recognized at trial: 'Where a slide results from ... an [earthquake], the owners undoubtedly own where their bedrock is located. In the Alaskan earthquake the shaking caused land to become fluid, and it ran into the bay. *In such*

[118] *Clark v. Taylor et al.*, 9 Alaska 298 (4th Div. Fairbanks 1938) See Ch. 36 SLA 1917 Section 13.
[119] Sections 1 & 13, Ch. 36 SLA 1917 (Territorial Session Laws)
[120] Pub.L. No. 96–487, 94 Stat. 2371, December 2, 1980
[121] *Ahtna v. State DOT&PF*, 296 P.3d 3 (Alaska 2013) Pub. L. No. 92–203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601–1629h (2006)).

instances land boundaries could not flow with the surface material.' (Emphasis added.) In essence, although the surface of the property shifted, the boundaries of the property itself remained in the same place."[122]

86. **Legislation – Federal Aid Highway Act of 1956**: Section 107(b) transferred the administration of roads in Alaska from the Department of the Interior to the Department of Commerce under the Bureau of Public Roads (BPR).[123]

87. **Legislation – Federal Land Policy and Management Act of 1976**: FLPMA[124] was an acto to provide for the management, administration and development of federal public lands. FLPMA repealed several of the federal land disposal authorities such as homesteads, townsites and small tracts. It also repealed the offer of the RS-2477 right-of-way grant. New rights-of-way are available under FLPMA's Title V.

88. **Legislation – Land Registration Law of 1953 (Territorial)**: "…was adopted by the Territory of Alaska in 1953. Ch. 134, SLA 1953 (codified as amended at AS 34.10.010–.240 (repealed 1978)). The Law required owners to register with the district recorder any real property located outside of organized cities… We believe that two purposes of the Land Registration Law are evident from its terms: (1) to determine ownership of remote parcels, and (2) to return abandoned land to the state."[125]

89. **Mining Claims - Abandonment**: "Abandonment is the intentional relinquishment of a mining claim. *Dodge v. Wilkinson,* 664 P.2d 157, 159 n. 3 (Alaska 1983). It is a voluntary act on the part of a claimant and consists of a subjective intent to abandon coupled with an external and objective act by which that intent is carried into effect."[126]

90. **Mining Claims – Locatable Mineral**: "Alaska generally applies federal mining law. The General Mining Law of 1872, as discussed above, provides that 'all valuable mineral deposits in lands belonging to the United States ... shall be free and open to exploration and purchase.' A mineral deposit may be a 'valuable mineral deposit' if it meets the 'prudent man' test and the marketability test. The prudent man test asks whether the 'discovered deposits [are] of such a character that 'a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.' The marketability test asks whether the mineral can be 'extracted, removed[,] and marketed at a profit.' [127]"

[122] *Fink v. Municipality of Anchorage*, 379 P.3d 183 (Alaska 2016)
[123] Pub.L. No. 84-627, 70 Stat. 374, June 29, 1956.
[124] Pub. L. No. 94-579, 90 Stat. 2743, October 21, 1976
[125] *Foster v. State*, 752 P.2d 459 (Alaska 1988)
[126] *Kile v. Belisle*, 759 P.2d (Alaska 1988) also citing *Harkrader v. Carroll,* 76 F. 474, 475 (D.Alaska 1896); *O'Hanlon v. Ruby Gulch Mining Co.,* 48 Mont. 65, 135 P. 913, 918 (1913).
[127] *McGlinchy v. State DNR,* 354 P.3d 1025 (Alaska 2015)

91. **Mining Claims – Location**: "Under Alaska law, mining rights on state lands are acquired through the process of 'location.' This process entails the discovery and marking of the claim, the posting of a notice at the claim site, and the recording of a certificate of location. Through location, a locator acquires a mining claim priority against subsequent locators to the selected claims."[128]

92. **Right of Entry – Condemnation**: "AS 9.55.280 provides: In all cases where land is required for public use, . . . the public entity . . . having the authority to condemn . . . may enter upon the land and make examination, surveys, and maps and locate boundaries . . .. The entry shall constitute no cause of action in favor of the owners of the land except for injuries resulting from negligence, wantonness, or malice."[129]

93. **Right of Entry - Judicial**: *Sec. 09.45.660. Order for survey and measurement of property.* **"**The court in which the action is pending may allow a party and the party's surveyors to go on the property to make a survey for the purposes of the action."

94. **Right of Entry - Surveys**: *Sec. 34.65.020. Entry upon land for survey purposes.* "(a) A land surveyor or an employee of a land surveyor may enter public or private land or water in the state only to occupy, locate, relocate, install, or replace survey monuments, to locate boundaries, to determine geodetic positions, and to make surveys and maps." See additional paragraphs (b) – (e).

95. **Right of Entry – Trespass – Tree Cutting**: Under AS 9.45.730 *Trespass by cutting or injuring trees or shrubs*, a person who intentionally cuts down or injures a tree on the land of another person, village or municipality is liable for treble the amount damages that may be assessed. However, if the trespass was unintentional or in belief that the land was their own, only actual damages may be recovered. "[A] party who is injured by an invasion of his property not totally destroying its value may choose as damages either the loss in value or reasonable restoration costs." But "reasonable restoration costs are an inappropriate measure of damages when those costs are disproportionately larger than the diminution in the value of the land and there is no reason personal to the owner for restoring the land to its original condition."[130]

96. **Right of Entry - Trespass**: "A trespass is an unauthorized intrusion or invasion of another's land."[131]

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[128] *Moore v. State DNR*, 992 P.2d 576 (Alaska 1999)

[129] *Wickwire v. City and Borough of Juneau*, 557 P.2d 783 (Alaska 1976)

[130] *Chung v. Rora Park*, 339 P.3d 351 (Alaska 2014)

[131] *Lee v. Konrad*, 337 P.3d 510 (Alaska 2014) citing *Mapco Express, Inc. v. Faulk,* 24 P.3d 531, 539 (Alaska 2001) (citing *Parks Hiway Enters., L.L.C. v. CEM Leasing, Inc.,*995 P.2d 657, 664 (Alaska 2000); RESTATEMENT (SECOND) OF TORTS §§ 158, 163).

97. **Right-of-Way – (a) General**: "A right-of-way is a class of easement."[132] We have described a right-of-way as 'primarily a privilege to pass over another's land,' and we have consistently used the phrase right-of-way to refer to strips of land used for passage of people or things.[133] "…unless the parties make it clear that a fee interest is intended, a grant of 'right of way' conveys an easement interest."[134]

98. **Right-of-Way – (b) Public**: The State holds rights-of-way in trust for the people of the state. "…title to streets created by dedication is held by the municipality in trust for the public and not in a proprietary capacity. A municipality cannot be divested of title to its streets held in trust for the public by adverse possession."[135]

99. **Right-of-Way – Public Land Order**: Prior to statehood, highway rights-of-way could be established across public lands, subject to valid existing rights through Public Land Orders issued by the Department of the Interior. "The State claims it has an existing…right-of-way pursuant to Public Land Order ('PLO') 601, PLO 757, Departmental Order ('DO') 2665, PLO 1613, and a 1959 Quitclaim Deed from the United States to the State of Alaska. In advancing its claim the State once again repeats the arguments this court previously rejected in *State v. Alaska Land Title Association,* 667 P.2d 714 (Alaska 1983) and *Resource Investments v. State,* 687 P.2d 280, (Alaska, 1984)."[136]

100. **Right-of-Way – Scope**: "The 'scope' of a right-of-way refers to the bundle of property rights possessed by the holder of the right-of-way. This bundle is defined by the physical boundaries of the right-of-way as well as the uses to which it has been put." *Sierra Club, 848 F.2d at 1079 n.9. An easement holder's use of the easement is also limited by the terms of the easement. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.10 at 592 (AM. L. INST. 1998).*"[137]

101. **Right-of-Way – Vacation**: "Safeway's argument that a municipality has exclusive power to vacate a street is unavailing if the State acquired a right-of-way that included the street. While Alaska law permits city streets to be vacated with the consent of the city council, land or rights in land acquired for State highway purposes can only be vacated by the Department of Transportation and Public Facilities. If the State had acquired a right-of-way over Becharof Street for the New Seward Highway, then the State's right-of-way would not have been eliminated when the Municipality abandoned its rights to Becharof

[132] *Northern Alaska Environmental Center v. State, DNR,* 2P.3d 629 (Alaska 2000) fn.38 citing *Wessells v. State Dept. of Highways,* 562 P.2d 1042 (Alaska 1977); Jon W. Bruce & James W. Ely, Jr. The Law of Easements & Licenses in Land § 1.06 [1] (1988).

[133] *Dias v. State of Alaska*, 240 P.3d 272 (Alaska 2010)

[134] *Cowan v. Yeisley*, 255 P.3d 966 (Alaska 2011)

[135] *State v. Simpson*, 397 P.2d 288 (Alaska 1964)

[136] *State DOT&PF v. First National Bank of Anchorage*, 689 P.2d 483 (Alaska 1984)

[137] *Ahtna v. State of Alaska DNR/DOT&PF,* S-17496 WL 4283097 (Alaska 2022)

Street."[138]

102. **RS-2477 – Authority**: "Section 8 of the Lode Mining Act of 1866 granted 'the right of way for construction of highways over public lands, not reserved for public uses'; these are known as RS 2477 rights of way."[139] 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.' "[140] A valid RS 2477 right of way requires public acceptance of the grant through either public use or the manifestation of official intent: "…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."[141] "Section 8 of the Lode Mining Act was repealed in 1976 when Congress enacted the Federal Land Policy Management Act (FLPMA),[142] but the Act left existing rights of way intact."[143]

Prior to Public Land Order No. 601, effective August 10, 1949, the primary authority for highway ROW was Section 2477 of the Revised Federal Statutes.[144]

103. **RS-2477 – Homestead Entry**: Under the now-repealed homestead laws, a party established a claim to land not when the federal authorities allowed entry but rather when the party took the steps necessary to have entry recognized. " '[Entry] means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim' in the appropriate land office. In Walker's case, that "inceptive right" was acquired when he filed his application for entry. Completing the application requirements and "fil[ing] his application in the United States Land Office" was "all that [an applicant] could possibly do to …[make] a lawful homestead entry".[145]

"Homesteads pass from the public domain to the private as of the date of entry."[146]

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[138] *Safeway, Inc. v. State DOT&PF,*34 P.3d 336 (Alaska 2001) fn. 8 *See* AS 29.40.140(b) ("Vacation of a city street may not be made without the consent of the council."). fn. 9 *See* AS 19.05.070(a) ("The department may vacate land, or part of it, or rights in land acquired for highway purposes, by executing and filing a deed in the appropriate recording district.").

[139] *Dickson v. State, DNR*, 433 P.3d 1075, (Alaska 2018) "Lode Mining Act of July 26, 1866, Ch. 262, § 8, 14 Stat. 251, 253, (codified as 43 U.S.C. § 932 (1925), Revised Statute 2477)

[140] *Price v. Eastham* (*Price I*), 75 P.3d 1051 (Alaska 2003) quoting *Fitzgerald v. Puddicombe*, 918 P.2d 1017 (Alaska 1996)

[141] *Price v. Eastham* (*Price I*), 75 P.3d 1051 (Alaska 2003) quoting *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410 (Alaska 1985)

[142] "Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 (1976)."

[143] *Dickson v. State, DNR*, 433 P.3d 1075, (Alaska 2018)

[144] *State v. Alaska Land Title Ass'n*; 667 P2.s 715, May 27, 1983; Footnote 8 – (RS2477 – 43 U.S.C. sec. 932)

[145] *Luker v. Sykes citing Hillstrand v. State*, 395 P.2d 74, 76 (Alaska, 1964) (quoting *Chotard v. Pope*, 25 U.S. 586, 588 (1827) & *United States v. 348.62 Acres of Land in Anchorage Recording Dist.* 10 Alaska 351, 364 (D. Alaska 1943) see also Hastings & D.R. Co. v. Whitney, 132 U.S. 357, 363 (1889).

[146] *Fitzgerald v. Puddicombe*, 918 P.2d 1017 (Alaska 1996)

"When a citizen has made a valid entry under the homestead laws, the portion covered by the entry is then segregated from the public domain. It has been appropriated to the use of the entryman, and until such time as the entry may be cancelled by the government or relinquished, the land is not included in grants made by Congress under 43 U.S.C.A § 932. Consequently, a highway cannot be established under the statute during the time that the land is subject of a valid and existing homestead claim."[147]

104. **RS-2477 - Public Lands**: "The term 'public lands' means lands which are open to settlement or other disposition under the land laws of the United States. It does not encompass lands in which the rights of the public have passed and which have become subject to individual rights of a settler."[148]

105. **RS-2477 – Scope of Use**: "RS 2477 rights of way are limited in scope. The full text of the statute stated: 'The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.' 'Highways' granted by RS 2477 are rights of ways synonymous with easements, not fee simple interests, and therefore create only a right of use. Subject to the limitations inherent in the federal grant of a highway easement, the scope of the easement's use is defined by, and occasionally limited by, state law. The relevant state law is the law in effect when the offer of RS 2477 grants was withdrawn — not contemporary highway laws and regulations. Federal Public Land Order 4582 withdrew public lands in Alaska and prevented the establishment of new or expanded RS 2477 rights of way after January 17, 1969. Congress then preserved existing rights of way when it repealed RS 2477 on October 21, 1976. The scope of RS 2477 highway easements in Alaska therefore had to be established by January 17, 1969. In 1969 former AS 19.05.130(8) defined 'highway' to include 'a highway (whether included in primary or secondary systems), road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof, ... whether operated solely inside the state or to connect with a Canadian highway, and any such related facility.' "[149]

106. **RS-2477 – Width**: Prior to the 1963 enactment of AS 19.10.015, the width of an RS-2477 was considered similar to "…prescriptive easements, based on "what is reasonably necessary and what was originally intended…But we agree with the superior court that the 100-foot width was dictated both by federal land orders and by AS 19.10.015. Public Land Order 601, 14 Fed. Reg. 5048, 5048-49 (August 10, 1949), and Department Order 2665, 16 Fed. Reg. 10,752 (October 16, 1951), established standard widths for public roads, including 100-foot widths for "local roads," which are broadly defined."[150]

[147] *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961)
[148] *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961)
[149] *Ahtna v. State of Alaska DNR/DOT&PF,* S-17496 WL 4283097 (Alaska 2022)
[150] *Dickson v. State, DNR*, 433 P.3d 1075, (Alaska 2018) See fn. 26 & fn. 27

107. **Section Line Easements – Federal**: The 1866 federal RS-2477 grant was considered an offer to dedicate a right-of-way to the public. The 1923 acceptance by the Alaska Territorial Legislature[151] completed the dedication of a strip, 4-rods (66-feet) wide along each section line within Alaska.

108. **Section Line Easements – Scope of Use**: An SLE is an easement for highway purposes that runs along a section line established as a part of the rectangular survey system. State courts have held that an RS-2477 may be used for "any purpose consistent with public travel" and that "Alaska views the scope of an R.S. 2477 generously".[152] Incidental uses such as a power line or communications line are also allowed under State law. Where an RS-2477 right-of-way crosses land subject to federal law, such as that owned by any federal agency or held in trust as a restricted native allotment, utility use will not be considered to be within the scope of a highway easement.[153] In those cases, the utility will have to obtain a permit from the underlying federal agency.

109. **Section Line Easements – State**: A State SLE is established by legislation that creates a section line easement on lands owned by or acquired from the State or Territory[154] since 1951 or where a section line crosses a navigable body of water. "[a] section-line easement [under AS 19.10.010 and its predecessors] is a statutorily-created public right-of-way owned by the State of Alaska,"[155]

110. **Section Line Easements – University of Alaska**: "…land conveyed to the Board of Regents in trust for the University of Alaska under this section (1) is subject to…(B) AS 19.10.010; (C) any easement, right-of-way, or other access under former 43 U.S.C. 932 (sec. 8, Act of July 26, 1866, 14 Stat. 253);"[156]

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[151] The 4-rod (66 foot) wide federal section line easement is based upon the offer of the RS-2477 grant and the initial acceptance of that grant on April 6, 1923 by the Territorial legislature (Ch 19 SLA 1923) for highway purposes. The acceptance was codified in A.S. 19.10.010 *Dedication of land for public highways*. Also see *1969 Opinions of the Attorney General No. 7* dated December 18, 1969 entitled *Section Line Dedications for Construction of Highways.*

[152] See *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 4110 (Alaska 1985) and *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996).

[153] 23 CFR 645.205(d) "When utilities cross or otherwise occupy the right-of-way of a direct Federal or Federal-aid highway project on Federal lands, and when the right-of-way grant is for highway purposes only, the utility must also obtain and comply with the terms of a right-of-way or other occupancy permit for the Federal agency having jurisdiction over the underlying land."

[154] On March 26, 1951, the legislature enacted § 1 Ch. 123 SLA 1951 which stated that "*A tract 100 feet wide between each section of land owned by the Territory of Alaska or acquired from the Territory, is hereby dedicated for use as public highways...*" Also, see A.S. 19.10.010 *Dedication of land for public highways* and *1969 Opinions of the Attorney General No. 7.*

[155] *Luker v. Sykes,* 357 P.3d 1191 (Alaska 2016) fn. 34

[156] A.S 14.40.365 University Grant Land (g)(1)(B) & (C)

111. **Section Line Easements – Utilities**: A utility may construct a power line on an unused section line easement reserved for highway purposes.[157]

112. **Title – "Excepting from"**: "The phrase 'excepting from,' on the other hand, has generally been interpreted to mean 'reserving.' As used in a deed, most courts have interpreted the terms 'reserving' and 'excepting' to mean that the grantor retains some estate or right in the subject of the grant."[158]

113. **Title – "Subject to"**: "The words 'subject to' are frequently used in conveyances and have historically been interpreted as meaning 'subordinate to,' 'subservient to,' 'limited by,' or 'charged with.' Renner v. Crisman, 80 S.D. 532, 127 N.W.2d 717, 721 (1964). When used in a deed these words are generally regarded as terms of qualification, not contract. They serve to put a purchaser on notice that he is receiving less than a fee simple. There is nothing in their use which connotes a reservation or retention of property rights…Although there are a few cases interpreting this phrase as reserving an interest in the grantor, i. e., not including that interest as part of the conveyance, these cases are exceptions to the general rule. They generally involve facts, in addition to the "subject to" clause, which indicate that the intention of the parties was to retain an interest in the property, or exclude it from the conveyance."[159]

114. **Title – Cloud on**: "…the possibility of a boundary dispute with the State… is not sufficient to create a cloud on title…mere apprehension on the part of a property owner that an adverse claim of title or interest may be asserted against him does not constitute a cloud on title. However, a claim which causes 'reasonable fear that it may be asserted against the owner injuriously' does constitute a cloud on title."[160]

115. **Title - Color of Title**: "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."[161]

116. **Title – Deed Delivery**: In order to be effective a deed must be delivered to the grantee. "The proper transfer of title under a deed must include an actual or symbolic delivery of the deed accompanied by the intention of the grantor to transfer title without any reservation of control…We now adopt the rule that a recorded deed gives rise to a presumption of valid delivery that may be rebutted by the party challenging delivery by

[157] *Fisher v. Golden Valley Elec. Ass'n, Inc.,* 658 P2d 127 (Alaska 1983) - AS 19.25.010 *Use of rights-of-way for utilities*. and 17 AAC 15.031 *Application for Utility Permit on Section Line Rights-of-way*

[158] *Hendrickson v. Freericks*, 620 P.2d 205 (Alaska 1980)

[159] *Hendrickson v. Freericks*, 620 P.2d 205 (Alaska 1980)

[160] *Nielson v. Benton*, 903 P.2d 1049 (Alaska 1995)

[161] *Hubbard v. Curtiss,* 684 P.2d 842 (Alaska 1984)

clear and convincing evidence."[162] Normally, physical possession of a deed by the grantee or the recording of the deed is sufficient to prove delivery.[163]

117. **Title - Deed Interpretation - Ambiguity**: Alaska Statutes provide guidance for sorting out conflicts in real estate descriptions that are a part of conveyance document.[164] These are the rules that tell us the order of priority of conflicting elements such as monuments, distances, directions and areas. These are one category of various "rules of construction" related to interpretation of deeds and in the past, a person interpreting a description often went straight to these rules when faced with conflicting terms. The Alaska Supreme Court has held that these rules should only be consulted as a last resort. "The purpose of rules of construction ... 'is not to ascertain the intent of the parties to the transaction. Rather, it is to resolve a dispute when it is otherwise impossible to ascertain the parties' intent.' "[165]

When we are faced with deed terms where more than one reasonable interpretation exists, the deed may be deemed ambiguous.

*"*It is well established that the intention to create a servitude must be clear on the face of an instrument; ambiguities are resolved in favor of use of land free of easements.*"*[166]

" '[T]he touchstone of deed interpretation is the intent of the parties,' and 'where possible, ... the intentions of the parties [will be] given effect.' " We apply a three-step test to interpret a deed: first, we "look at the four corners of the document to see if it unambiguously presents the parties' intent"; second, "[i]f a deed is ambiguous, the next step is to consider 'the facts and circumstances surrounding the conveyance' to discern the parties' intent"; and finally, "[i]n the event that the parties' intent cannot be determined, we rely on rules of construction." The inquiry under step two "can be broad, looking at 'all of the facts and circumstances of the transaction in which the deed was executed, in connection with the conduct of the parties after its execution.' "[167]

118. **Title – Easement – Ambiguity**: "The meanings of the phrases 'for highway purposes' and, more particularly, 'over and across' are relevant to this analysis…Accordingly, I find that the terms of PLO 1613 are ambiguous so that the State is entitled to reasonable use of the property... Courts consistently find that an easement gives the holder the right to use the land to the extent necessary to serve the purpose of the easement."[168]

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[162] *Rausch v. Devine*, 80 P.3d 733 (Alaska 2003)
[163] *Bennis v. Alexander*, 574 P.2d 450 (Alaska 1978)
[164] *Sec. 09.25.040 Rules for construing real estate descriptions.*
[165] *Estate of Smith v. Spinelli, 216 P.3d 524 (Alaska 2009)*
[166] *Methonen v. Stone,* 941 P.2d 1248, (Alaska 1997)
[167] *Reeves v. Godspeed Properties, LLC*, 411 P.3d 560 (Alaska 2018) citing *Estate of Smith v. Spinelli, 216 P.3d 524 (Alaska 2009)*
[168] *Simon v. State, 996 P.2d 1211* (Alaska 2000)

119. **Title – Junior/Senior Rights**: "Junior and senior rights in property are in part controlled by the Alaska recording statutes. Alaska law provides that a conveyance of real property in the state is void against a 'subsequent innocent purchaser in good faith for valuable consideration' if the subsequent innocent purchaser records first in the recording district where the property is located. Alaska Stat. 40.17.080(b). An unrecorded conveyance is valid as between the parties to it and as against one who has actual notice of it."[169]

120. **Title – Misrecorded Conveyance**: "If a deed is properly presented for recording, but the recording officer incorrectly files it (with the result that there is no notice given to persons examining the title records in the recorder's office), the deed is deemed to be propertly recorded and has priority over later-recorded conveyance despite the lack of notice to those later purchaser."[170]

121. **Title - Omnibus Act Quitclaim Deed**: "Section 21(a) of the Omnibus Act, enacted on June 25, 1959, directed the Secretary of Commerce to transfer all interests in land used by the Bureau of Public Roads in Alaska, with certain exceptions, to the new State of Alaska. On June 30, 1959, the Acting Secretary of Commerce executed a quitclaim deed, conveying the Federal Government's interest to the State of Alaska."[171]

122. **Title - Patent – Federal**: "A 'patent' is the conveyance by which the federal government passes its title to portions of the public domain and is [generally] necessary to accomplish a transfer of ownership from the United States…Once [a land] patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts."[172]

"A patent operates as a deed of the government. 'As a deed its operation is that of a quitclaim…it passes only the title the government has…on the date of the patent'. 63A Am. Jur.2d, *Public Lands* § 77, at 575 (1984). It follows as a general rules that government patents are 'without any covenants of warranty whatever;' "[173]

"Once the patent is issued, any defects in the preliminary steps required by the homestead laws are cured…The government should not be permitted retroactively to invalidate the deliberate actions of its officers after they have been reasonably relied on for 34 years."[174]

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[169] Unresolved Boundaries, Joseph L. Reece, Boundary Law in Alaska, NBI 1994

[170] Unresolved Boundaries, Joseph L. Reece, Boundary Law in Alaska, NBI 1994 citing *Gregor v. City of Fairbanks*, 559 P.2d 743 (Alaska 1979)

[171] *State, DOT&PF v. First Nat. Bank of Anchorage*, 689 P.2d 483 (Alaska 1984)

[172] *Ray Pursche v. Matanuska-Susitna Borough*, 371 P.3d 251 (Alaska 2016)

[173] *North Star Terminal and Stevedore Co., Inc. v. State*, 857 P.2d 335 (Alaska 1993) Also see *City of Anchorage v. Nesbett*, 530 P.2d 1324, Alaska, January 24, 1975 citing *Wilson Cypress Co. v. Del Pozo y Marcos* 236 U.S. 635 (1915)

[174] *State, Dept. of Transp. & Public Facilities v. First Nat. Bank of Anchorage*, 689 P.2d 483 (Alaska 1984)

123. **Title – Plat Notes/Enforcement**: "Plat notes are covenants that run with the land and are enforceable by the municipality against subsequent owners."[175]

124. **Title – Property Description – Legally Sufficient**: "A valid deed must designate the land intended to be conveyed with reasonable certainty….a description is sufficient if it contains information permitting identification of the property to the exclusion of all others."[176]

125. **Title - Property Description – Plat a part of Deed**: "A map, plat, plan, or survey, by virtue of apt reference thereto in a deed, may be treated as part of, and may be construed with, the deed in determining the property conveyed."[177] "The plat, including the surveyor's field notes and descriptions, thus becomes a part of the patent and controls the extent of the lands conveyed."[178]

126. **Title – Quiet Title Action**: "…an unpatented claimant has an equitable claim under AS 09.45.010 for either quiet title or removal of cloud. AS 09.45.010 provides: 'A person in possession ... of real property may bring an action against another who claims an estate or interest in the property adverse to him for the purpose of determining the claim.' "[179]

"Once the plaintiff's claim of title is put in issue by the defendant, the plaintiff can succeed only on the strength of his own title, and not on the weakness of that of his adversary…While it may not be necessary for a plaintiff to have a perfect title, to make out a prima facie case he must at least prove that he has a substantial interest in the property and that his title is better than that of the defendants."[180]

127. **Title - Real Property**: "defining 'real property' as 'land and rights and interests in land, including, without limitation, interests less than full title such as easements, uses, leases, and licenses' "[181]

128. **Title – Selected Lands**: "Alaska case law also supports the proposition that the state acquires present, conveyable rights in lands selected by the state prior to tentative approval or conveyance by the federal government. In *Sabo v. Horvath,* we held that a grantor who had not yet received his patent under the Alaska Homesite Act nevertheless had a sufficient interest to convey the land by quitclaim deed… the Statehood Act does not expressly prohibit the creation of *any* third-party interests in state-selected land prior to tentative approval by the federal government…Moreover, upon selection of lands, the state has complied substantially with applicable laws and regulations. Generally, all that

[175] *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692 (Alaska 2003)
[176] *Shilts v. Young*, 567 P.2d 769 (Alaska 1977)
[177] *Estate of Smith v. Spinelli*, 216 P.3d 524 (Alaska 2009) fn. 12
[178] *File v. State*, 593 P.2d 268 (Alaska 1979)
[179] *Shope v. Sims,* 658 P.2d 1336 (Alaska 1983)
[180] *Shilts v. Young,* 643 P.2d 686 (Alaska 1981)
[181] *Northern Alaska Environmental Center v. State, DNR,* 2P.3d 629 (Alaska 2000) fn.38; citing A.S. 44.88.900(12) as of the date decision.

remains to be done is a land survey, as well as review and approval by the federal government."[182]

129. **Title - Statute of Frauds**: "Statute of Frauds. (a) In the following cases and under the following conditions an agreement, promise, or undertaking is unenforceable unless it or some note or memorandum of it is in writing and subscribed by the party charged or by his agent: * * * (6) an agreement for leasing for a longer period than one year, or for the sale of real property, or of any interest in real property, or to charge or encumber real property; (7) an agreement concerning real property made by an agent of the party sought to be charged unless the authority of the agent is in writing; * * *."[183]

130. **Title – Submerged Lands**: "Under the equal footing doctrine and the Submerged Lands Act, Alaska obtained title to the land beneath all navigable waters within its boundaries upon its admission to statehood in 1959."[184]

131. **Title – Tentative Approval**: A TA is conveyance of selected lands to the State pending issuance of a patent. A patent is issued once the lands have been surveyed and the plat has been approved. "The act of issuing tentative approval constitutes the formal transfer of land management authority from the United States to the State of Alaska regarding any particular Statehood Act land selections."[185]

132. **Title – Unrecorded Conveyance**: Alaska is a race-notice state. "…the Alaska recording laws pertaining to real property void an unrecorded conveyance of real property as against a subsequent bona fide purchaser whose conveyance is first recorded. AS 40.17.080(b). An unrecorded conveyance is valid only as between the parties to the conveyance and those with actual notice of it."[186]

133. **Valid Existing Rights – (a) General**: A valid existing right is any right established before vesting of the entryman's rights and to which a subsequent patent is subject. The lack of an express reservation in a patent identifying a prior existing right does not defeat the right.

"…where a patent contains a general savings clause for valid existing rights, the patentee takes subject to those rights until they are properly adjudicated invalid and specifically canceled."[187]

[182] *Moore v. State DNR*, 992 P.2d 576 (Alaska 1999)
[183] *Mertz v. J. M. Covington Corp.* 470 P.2d 532 (Alaska 1970) fn. 4 citing A.S. 9.25.010 Statute of Frauds.
[184] *Alyeska Pipeline Service Co. v. State*, 288 P.3d 736 (Alaska 2012)
[185] *Moore v. State, DNR*, 992 P.2d 576 (Alaska 1999)
[186] *Graeber v. Hickel Inv. Co.*, 803 P.2d 871 (Alaska 1990)
[187] *Tetlin Native Corp. v State*, 759 P.2d 528 (Alaska 1988)

134. **Valid Existing Rights – (b) PLO**: "…by operation of law, land conveyed by the United States is taken subject to previously established rights-of-way where the instrument of conveyance is silent as to the existence of such rights-of-way. No suit to vacate or annul a patent in order to establish a previously existing right-of-way is necessary because the patent contains an implied-by-law condition that it is subject to such a right-of-way."[188]

A PLO ROW could be applied where a withdrawal or reservation existed, however, its use would be "subject to" the prior valid existing rights. Should the withdrawal or reservation be revoked in the future, the PLO would rise to become the senior right.[189]

"In *Stockley v. United States,* 260 U.S. 532, 544, 43 S.Ct. 186, 189, 67 L.Ed. 390, 395 (1923), the United States Supreme Court recognized that an unperfected homestead entry was within an excepted category of "existing valid claims" excluded from the terms of a government withdrawal order."[190]

135. **Valid Existing Rights – (c) SLE**: "At the outset Girves notes that neither her 'Notice of Allowance', nor her patent contained any express reservation of rights-of-way in favor of any public body. However, the absence of an express reservation of easement does not preclude the borough from showing that a right-of-way was established prior to the issuance of these documents."[191]

136. **Valid Existing Rights – Native Allotments**: Under the relation back doctrine, the IBLA gives priority to an allottee if the allottee's claimed initial use and occupancy of the land predated other uses and rights-of-way, even if the allotment application was submitted after the right-of-way was issued.[192] Prior to 1987, Alaska Native allotments were generally subject to rights-of-way existing when they were approved.[193]

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[188] *State v. Alaska Land Title Ass'n*, 667 P.2d 714, (Alaska 1983)

[189] See *State of Alaska v. David B. Harrison, et al.* – U.S. District Court, Alaska – Case No. A94-0464-CV – Order dated October 28, 1998. This case considers a PLO highway ROW imposed over an existing Railroad Townsite. The townsite was eventually revoked and a native allotment claim filed. The court ruled that the PLO constituted a valid existing right that the allotment would be subject to once the PLO moved into the senior position. The court ruled "…there is no inconsistency or conflict between the railroad townsite withdrawal and Public Land Order 601."

[190] *Resource Investments v. State DOT&PF*, 687 P.2d 280 (Alaska 1984) Also see *State v. First National Bank*, 689 P.2d 483 (Alaska 1984)

[191] *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221 (Alaska 1975)

[192] See, e.g., Golden Valley Electric Ass'n (On Reconsideration), 98 IBLA 203, 207 (1987); State of Alaska, Golden Valley Electric Ass'n, 110 IBLA 224 (1989).

[193] See, e.g., State of Alaska v. Heirs of Dinah Albert (Albert Allotment), 90 IBLA 14 (1985) and Golden Valley Electric Ass'n (Irwin Allotment), 85 IBLA 363 (1985), citing United States v. Flynn, 53 IBLA 208 (1981). According to the IBLA opinion on the Albert allotment, the State of Alaska had represented in a brief that where state right-of-way grants preceded the filing of an allotment application, but postdated the alleged use and occupancy, BLM had, in the past, issued allotment certificates subject to such state rights-of-way. 90 IBLA at 19, n.7. On reconsideration

137. **Valid Existing Rights (d) ANCSA**: "Section 14(g) of ANCSA addresses the preservation of existing rights on lands conveyed to an Alaska Native Corporation and waiver of federal government administration. It states in part: All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a[n] easement ... has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the ... easement, and the right of the ... grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him."[194]

of the Golden Valley Electric case, the IBLA shifted its policy and adopted the relation back rule, voiding the rights-of way. 98 IBLA 203 (1987).

[194] *Ahtna, Inc. v State, DOT&PF*, 296 P3d 3 (Alaska 2013)