

## Orth v. Largent - Notes

### 1. RS-2477:

- a. 1866 Mining Law repealed by FLPMA 1976
  - i. Federal land must be unreserved – a valid mining location will reserve lands.
  - ii. Road at question runs E-W through center of claims.
  - iii. Road at date of survey crosses northerly limits of 3 of 4 westerly claims.
  - iv. Speculation as to whether northerly road existed at time of location.
- b. Only plats of USMS 813, 799, & 794 show a road at the time of survey within claim boundaries. MS 1651 is between 799 & 794. All surveyed between December 1911 & September 1913 except MS 1651 surveyed in May, 1933.
- c. USMS 1651 Survey Date: Page 7 of Report - **In error I listed the survey date for USMS 1651 as 10/24/11** – with adjoining surveys performed within months, why did MS 1651 not show a road on Northerly boundary as did adjoining MS 799 & 794? MS 1651 survey date is actually May 17-18, 1933 or 22 years later.
- d. RS2477 Level of Use to create a public highway: *“There simply is not enough evidence of public use to justify the lower court's finding that a public highway was created across Hamerly's homesite. During the periods that the land was not the subject of homesteaders' claims, its use was **infrequent and sporadic**. Those who did use the road had no real interest in the lands to which it gave access. They were merely sightseers, hunters and trappers. The road could not be considered as something that was either necessary or convenient for the accommodation of the public. **Where there is a dead end road or trail, running into wild, unenclosed and uncultivated country, the desultory use thereof established by the evidence in this case does not create a public highway.**”*  
(Desultory – occurring randomly or occasionally)
- e. Topographic mapping: artistic license, sketch quality – USGS Cartographic Engineer Tom Taylor – 1908 map surveyed in 1907 shows road – Claims in west surveyed 1911-1913 show road.

### 2. Prescription:

- a. Was there an opportunity to establish a public prescriptive easement?
- b. Public Prescriptive Easement Termination: (By abandonment or by prescription) With regard to termination by prescription, Bruce & Ely say that *“the generally accepted view is that a public right of way cannot be terminated by adverse possession...in order for the easement to be extinguished by prescription, the servient owner's use or possession must satisfy the same elements required for obtaining an easement by prescription.”* Time doesn't run against the sovereign, so the same prohibition against adversely possessing lands of the State of Alaska (Sec. 09.45.052. Adverse possession) would prohibit the termination of an easement by prescription. Does this concept serve to prevent termination of all easements held by the public, or just all except those initially created by prescription? The next question is whether the public can have an easement

terminated by apparent abandonment. Bruce & Ely say that “*As a general proposition, non-use alone does not constitute abandonment.*” Mere re-alignment of a public road does not imply the intent to terminate or abandon an existing easement. Roads are re-aligned on a regular basis within a right of way corridor consisting of a variety of interests including fee, PLO, RS-2477, prescriptive easements, federal grants and so on. Just because a portion of the right of way corridor is not currently occupied by the physical section of a highway does not imply an intent to abandon, terminate or vacate the public’s interest. We have a statutory process under A.S. 19.05.070. Vacating and disposing of land and rights in land which standardizes the affirmative act required to relinquish an easement through the execution of Commissioner’s Deed of Vacation by the DOT&PF Commissioner.

- c. Private Easement Termination by Prescription - “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. 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.” (Sykes v. Lawless 2020 – See Reeves v. Godspeed 2018)
- d. History of Alaska Public Road Agencies: The Act of January 27, 1905 authorized the Secretary of War to administer the roads and trails in Alaska as the Board of Road Commissioners. In 1917 the Territorial legislature created a Territorial Board of Road Commissioners. In 1925 the annual report of the Board of Road Commissioners was labeled as the “Annual Report of the Alaska Road Commission.” In 1956 the Alaska Road Commission and the Territorial Board of Road Commissioners were merged into the BPR.

### 3. Easements & Reservations:

- a. The 1993 & 1999 deeds from Alaska Gold reserved 50’ easement for “ingress and egress across the conveyed property along the existing roads...” Does this presume that there is no existing easement for public access?
- b. Floating Easement: 50’ road and 30’ utility easement(s) reserved in B1159 P25 are undefined as to number or location.
- c. FNSB Letter – Binder Item #9 – Easement access across USMS 813, 799, 1651, 794 & 1650 as stated in WD July 22, 1999 (B1159 P25 Alaska Gold to Largent & Moore). Concern about extinguishing access easement for the benefit of “any other land owner in the same vicinity **needing** access across the Property”.
- d. OSK v DOT&PF 2012 - “In Fitzgerald v. Puddicombe, we recognized that when a valid **easement exists but its location is not fixed**, the superior court may determine the location.”

- e. Reasonable accommodation of easement rights between dominant and servient estates.  
– (See Reeves v. Godspeed 2022)

#### 4. Expert Witnesses:

- a. The trial will start Monday February 13 at 8:30am. I asked about attending the trial after I testified and John T. told me that there is an exception for Expert Witnesses that allows them to attend the trial unrestricted so they have the opportunity to consider the testimony of others.
- b. How our understanding of ROW/Easements Changes over time - See McCarrey v. Kaylor (2013) Small Tract patent easements are not express reservations, but common law dedication requiring an acceptance. The patent is just providing the offer.
- c. Alaska Photogrammetrists:
  - i. Kodiak Mapping, Inc.
  - ii. Quantum Spatial (NV5) – Old Aeromap/Aerometric
- d. Quasi-Judicial Capacity of Surveyors – Thomas Cooley, Chief Justice Michigan – late 1860's
  - i. Land surveyors must understand, interpret and apply the law of boundaries.
  - ii. A land surveyor must be able to support the basis of their boundary conclusions.
  - iii. Such a conclusion is correct only to the extent to which the courts will uphold it.
  - iv. Cooley reference in AK Supreme Court decisions Collins v. Hall and Lee v. Konrad.

#### 5. Mining General:

- a. Mining claim patent moratorium as of 1994
- b. Multiple Use – Federal Mining Law 1955 “Multiple Surface Use Act” – Access over unpatented claims.
- c. Definitions:
  - i. *Bench Gold Placers* - Bench placers are usually remnants of deposits formed during an earlier stage of stream development and left behind as the stream cuts downward. The abandoned segments, particularly those on the hillsides, are commonly referred to as “bench” gravels.
  - ii. *Bench deposit* - Bench deposits are created when gold reaches a stream bed. Gold accumulations in an old stream bed that are high are called bench deposits. They can be found on higher slopes that drain into valleys.
  - iii. *Drift vs. Adit?* A "drift" is a more general term for any near-horizontal underground passage in a mine. Unlike an adit, a drift need not break out to the surface. Drift mining is the use of drifts to extract ore - in this case the drifts follow the vein.

- iv. *Stoped Ground* an excavation in a mine working or quarry in the form of a step or notch.

**6. Trial Preparation:**

- a. 2/9/23 Telecon with John Tiemessen. He told me that he will just walk me through my report. He believed that Satterberg might focus on the ARC 1924 Report discussing operations and funds spent on Route 7B – Ester Creek Road. JT mentioned that no ARC funds were apparently spent after 1940.
- b. He expects that I will be called the second week between 2/20/23 to 2/24/23 and that I will be contacted the afternoon of the prior day of my testimony.