MEMORANDUM

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State of Alaska
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF RESEARCH & DEVELOPMENT

TO TOM MEACHAM,
Assistant Attorney General
Department of Law

THRU: JEFF HAYNES,
Deputy Commissioner

FROM: REED STOOPS, Director
Div. of Research & Development

DATE December 8, 1980

FILE NO:

TELEPHONE NO: 279-5577

SUBJECT Request For Opinion

The purpose of this memo is to request a formal attorney general's opinion concerning the ability of the State to regulate the use and private improvement of rights-of-ways established or dedicated pursuant to R.S. 2477.

You will recall the November 18, 1980 meeting with yourself and staff from Department of Natural Resources, Department of Transportation and Public Facilities, and the Governor's Office. It was clear from the discussion during this meeting that agency representatives are uncertain as to whether they or any state agency has statutory authority to regulate the use of rights-of-way.

Therefore, I am requesting the following: an attorney general's office opinion on what agencies of the State of Alaska can do with existing statutes to regulate the use of existing rights-of-ways on section lines and "public user rights-of-ways" established under R.S. 2477. I request that the opinion establish whether we need additional statutory authorities or if one or more state agencies currently have statutes which would allow the State to regulate the use of these rights-of-ways.

cc: Kit Duke, Director of Planning & Programming - DOT/PF - Anch
Jim Sandberg - Right-of-Way Section - DOT/PF - Anch.
Sally Rue - Div. of Policy Development & Planning - Juneau

State of Alaska
Department of Natural Resources
Pouch M
Juneau, Alaska 99811

Recd:

RECEIVED
JAN 13 1981
D.O.T. & P.F.
RIGHT OF WAY
ANCHORAGE

ANS	COPY	Central Region RIGHT OF WAY "Hwys"-"Aviation"	DATE RCVD: JAN 13 1981
		RICHARDS, TED	
		SCRATTON, DAN	
		DAVIS, SHIRL	
		APPRAISALS	
		NEGOTIATIONS	
		ENGR/PLANS	
		"Hwys"	
		"Aviation"	
		OTHER: [illegible]	
Remarks:			

02-001A(Rev.10/79)

MEMORANDUM

Jack R.

State of Alaska

TO Reed Stoops, Director
Division of Research and Development
Pouch 7-005
Anchorage, Alaska 99510

DATE: September 14, 1981

FILE NO: A66-404-81

TELEPHONE NO

SUBJECT: Management of R.S. 2477 Rights-of-Way

FROM WILSON L. CONDON
ATTORNEY GENERAL
By:
Barbara J. Miracle
Assistant Attorney General

Thomas E. Meacham
Assistant Attorney General
AGO - Anchorage

RECEIVED
OCT 14 1981
D.O.T. & P.F.
RIGHT OF WAY
ANCHORAGE

By memorandum to this office you have requested an opinion concerning the State's management authority over section line and public-user highways created pursuant to 43 U.S.C. § 932, Revised Statutes 2477.

The short answer to your question is that the Alaska Department of Transportation and Public Facilities has management authority over R.S. 2477 highways where they occur on non-state land. Where such highways occur on state land, the Alaska Department of Transportation and the state agency having management authority over the state land in question have concurrent authority over the highway.

Congress by act of July 26, 1866 granted the right-of-way for construction of highways over unreserved public lands:

> The right-of-way for the construction of highways over public lands not reserved for public uses is hereby granted. 43 U.S.S. § 932, R.S. 2477.

In Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961), the Supreme Court of Alaska stated the general rule regarding acceptance of this federal grant:

> ... before a highway may be created there must be either some positive act on the part of the appropriate public authorities of the state, clearly

ANS	COPY	Central Region RIGHT OF WAY "Hwys"-"Aviation"	DATE RCVD: OCT 14 1981
		RICHARDS, TED ✓	
		SCRATTON, DAN	
		DAVIS, SHIRL	
		APPRAISALS	
		NEGOTIATIONS	
		ENGR/PLANS	
		RELOCATION	
		PREAUDIT	
	✓	RECORDS: "Hwys"	
		RECORDS: "Aviation"	
		OTHER: mc: Ross Kopperud	

Remarks:

02-001 (Rev.10/79)

> manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

Our territorial legislature accepted the federal grant by designating public highways of a specified width on all section lines within the Territory. See Ch. 19, SLA 1923; Ch. 123, SLA 1951; Ch. 35, SLA 1953; 1969 Opinion of the Attorney General No. 7. The state statute accepting the federal grant is presently cofified in AS 19.10.010, which states as follows:

> A tract 100 feet wide between each section of land owned by the state, or acquired from the state, and a tract four rods wide between all other sections in the state, is dedicated for use as public highways. The section line is the center of the dedicated right-of-way. If the highway is vacated, title to this strip inurs to the owner of the tract of which it formed a part of the original survey.

In addition to section line highways created by legislative designation there are numerous highways, not necessarily conforming to section lines, which have been created by public use alone throughout the State of Alaska.

Our Supreme Court, along with a majority of courts which have considered the issue, has stated that roads created pursuant to R.S. 2477, whether by public authority, such as section line rights-of-way, or by public user alone, are public highways. Hamerly, supra at p. 123.

The term "highways", which is used in R.S. 2477, has an accepted meaning. A highway is a way open to the general public at large without distinction, discrimination or restriction except that which is incident to regulations calculated to secure the best practical benefit and enjoyment of the highway to the public. Prillman v. Commonwealth, 100 S.E.2d 4 (Va. 1957). The primary characteristics of a highway are the right of common enjoyment on the part of the public at large (Karl v. City of Bellingham, 377 P.2d 984 (Wash. 1963)) and the duty of

public maintenance. Prillaman, supra. The term "public" highway therefore is tautological. Detroit International Bridge Co. v. American Seed Co., 229 N.W. 791, 793 (Mich. 1930). There is an old line of cases which holds that the R.S. 2477 right-of-way grant is available to privately owned and operated railroads. See Flint & P.M. Railroad Co. v. Gordon, 2 N.W. 648 (Mich. 1879). Most of these cases are very old, and the principle has not been extended beyond railroads to include essentially "private" public utilities or conveyances. See Opinion of the Attorney General of September 7, 1976 at 18.

The State has broad police power to manage its public highways. United States v. Rogge, 10 Alaska 130, 153 (1941); see discussion of state's police power to regulate public highways in Opinion of the Attorney General of September 7, 1976 at 21 - 29. The Alaska Legislature has conferred broad powers upon the Department of Transportation and Public Facilities to regulate the use of public highways, including the control of highways under AS 19.05.030, power to control access to highways under AS 19.05.040, the power to vacate highways under 19.05.070, and the power to close highways under AS 19.10.100.

When an R.S. 2477 highway crosses state land, the Department of Transportation and the state agency having management responsibility for the underlying fee, usually the Department of Natural Resources, have concurrent responsibility for management of the highway.

You have also inquired whether the State has authority to enforce AS 19.40.210 with regard to R.S. 2477 rights-of-way which may exist adjacent to or radiating from the Dalton Highway from the Yukon River to the Arctic Ocean. AS 19.40.210 states,

> Off-road vehicles are prohibited on land within five miles of the right-of-way of the highway. However, this prohibition does not apply to a person who holds a mining claim in the vicinity of the highway and who must use land within five miles of the right-of-way of the highway to gain access to his mining claim.

The term "land" is not defined in the legislation, and must be presumed in this context to include both state and federal public land. (The Legislature could not, of course, authorize

or prohibit vehicular use of private lands without consent of the landowner unless the public health, safety and welfare clearly required it.) The term does not appear to be limited to "state land", since, in the preceeding section, the Legislature specifically addressed the concept of "state land" with regard to its prohibition against land disposals. AS 19.40.200. There is no inherent ambiguity in state regulation of means of access over both state and federal lands, so long as the United States has not, by statute or regulation, adopted inconsistent provisions with regard to its own land. The federal lands in question were not included within the areas of exclusive federal jurisdiction listed in Sections 10 and 11 of the Alaska Statehood Act. However, if the United States were to adopt inconsistent statutes and regulations which permitted, or further restricted, the use of off-road vehicles on federal land adjacent to the Dalton Highway, those statutes or regulations would supercede inconsistent provisions of state law pursuant to the Supremacy Clause of the United States Constitution (Article VI, Section 2) and the property clause of that Constitution (Article IV, Section 3). Kleppe v. New Mexico, 426 U.S. 529 (1976).

The authority of the State to enforce AS 19.40.210 with regard to public use of acknowledged R.S. 2477 rights-of-way should not be in question. The original offer of the United States to the public to create rights-of-way for public highways over public lands (which was made by R.S. 2477 in 1866) did not specify or contemplate any particular means of travel in order to validly establish such a right-of-way; nor did it guarantee that such a right-of-way, once established by public use, could forever remain available for use by any specific means of conveyance. So long as the right-of-way has been validly established by public use and is thereby acknowledged to exist, it remains free for public use, though the means of conveyance of the public over that right-of-way is subject to reasonable regulation to achieve other public purposes, such as minimization of terrain damage, avoidance of wildlife harassment, and other reasonable restrictions to achieve such goals. Notwithstanding the fact that a person may have, in the past, have a certain means of conveyance on an R.S. 2477 right-of-way, subsequent state enactments (including the statute in question) are valid as against that person, so long as the right-of-way continues to be available for public use by whatever reasonable means which are authorized by law or regulation.

Re: Management of R.S. 2477
Rights-of-Way

The proviso in AS 19.40.210 which permits mining claim holders "in the viciniy of the highway" to in essence ignore the off-road vehicle prohibition contained in the remainder of the statute presents particular enforcement problems, as I am sure you are aware. First, the statute gives no guidance as to what is to be considered in the "vicinity" of the highway. Second, it does not require that the mining claim suppporting the exception pre-date the enactment of the statute, or that the claim be a valid one; this could obviously lead to the location of spurious mining claims simply to circumvent the off-road vehicle prohibition. Third, the statute by its terms does not require that the use of land to gain access to the mining claim be reasonable, so as to avoid a proliferation of parallel or duplicate access routes to the same general area, or to otherwise avoid significant terrain damage or wildlife impact. Because the intention of the Legislature in enacting the exception appears to be clear (i.e., that the mining claim is presumed to be bona fide and that the need for access to the claim is to be met by means which are reasonable), this appears to be a subject for appropriate regulations which implement the exception to the off-road vehicle prohibition in a manner which protects the general public interest in the area.

If you have further questions regarding this subject, please contact us at your convenience.

cc: Ross Kopperud
AGO - Anchorage

TED - FYI
george
file

copy for me

MEMORANDUM State of Alaska

TO: Theodore Smith, Director
Division of Forest, Land & Water Management
Dept. of Natural Resources
Anchorage

DATE: February 11, 1981

FILE NO:

TELEPHONE NO: 276-3550

FROM: WILSON L. CONDON
ATTORNEY GENERAL

SUBJECT: Section line easements

By:
Barbara J. Miracle
Assistant Attorney General
Anchorage - AGO

Forest, Land & Water Mgmt.

FEB 20 1981

Director's Office

I thought you would be interested in the recent decision from the Alaska Supreme Court concerning section-line easements, Anderson v. Edwards (No. 2274, Jan. 30, 1981). The defendant in that case, Wrangell Mountain Enterprises, requested a letter of non-objection from DOT to utilize a section line easement over private property. The Department of Transportation gave Wrangell Mountain Enterprises a letter of non-objection and advised it that the section line right-of-way was a hundred feet in width. The private property crossed by the section line was obtained through a conveyance from the State of Alaska. In the state contracts for sale of the private property, the state reserved for "itself, its successors and assigns a 100-foot right-of-way along the section line." Wrangell proceeded to construct a highway along the section line 25 feet in width. However, it cleared the section line, leveling the timber for almost a full 100-food width. Wrangell was sued by the private property owners. The Supreme Court did not consider the issue whether as a matter of law Wrangell had the authority to construct the section line right-of-way because the private property owners failed to preserve this issue on appeal. However, the Court did find that Wrangell could only clear the amount of trees reasonably necessary to construct the roadway.

BJM:dr

THE SUPREME COURT OF THE STATE OF ALASKA

RON C. ANDERSON, d/b/a J & R ENTERPRISES, LYNN CLUFF and EUGENE HAYWORTH, all the named defendants d/b/a/ WRANGELL MOUNTAIN ENTERPRISES, Appellants, JAMES H. EDWARDS and MAXINE D. EDWARDS, Appellees.	File No. 4586 O P I N I O N [No. 2274 - January 30, 1981]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Eben H. Lewis, Judge.

Appearances: Keith A. Christenson, Johnson, Christenson & Associates, Anchorage, for Appellants. Olof K. Hellen, Hellen & Partnow, Anchorage, for Appellees.

Before: Rabinowitz, Chief Justice, Connor, Burke, and Matthews, Justices. [Boochever, Justice, not participating]

CONNOR, Justice

Wrangell Mountain Enterprises [hereinafter Wrangell] appeals a jury verdict against it for wrongfully cutting trees beyond the amount reasonably necessary to construct a roadway within a state reserved section line

easement. Numerous points are raised on appeal, several of which we find meritorious. Consequently, we reverse judgment.

In May, 1975, Wrangell, a development corporation, acquired property in the vicinity of McCarthy, Alaska, adjacent to property owned by appellees [hereinafter Edwardses]. Included in the development plans was the construction of a three mile public road along a section line easement, through property owned by the Edwardses and an adjacent parcel of land jointly owned by Mr. Woods, Schneiders, and Lovernes [hereinafter referred to as Schneider parcel] Both parcels were obtained through a conveyance from the state. In the contracts for sale of these parcels, the state reserved for "itself successors and assigns a 100 foot right-of-way along [the] section line" between the two parcels.[1] Pursuant to AS 19.10.010, the 100-foot tract was dedicated for use as a

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1. The Edwardses do not challenge appellants' characterization of the interest created as an easement. We think this characterization is correct. The language in the conveyance from the state is clearly indicative of an easement and not a fee. See 3 R. Powell, Real Property ¶ 407, at 34-35 (Rev. ed. 1979). In Wessells v. State, 562 P.2d 1042, 1046 n.5 (Alaska 1977), we noted that "[a] 'right of way' is generally considered to be a class of easement." (citations omitted). In Wessells, we also recognized the state's authority to reserve the right to create such easements. Id. at 1046 n.6.

public highway.[2]

Before construction began, Wrangell obtained a letter from the Alaska Department of Natural Resources, Division of Lands, verifying the width of the easement as a maximum of fifty feet on either side of the section line Additionally, Wrangell received a letter from the Alaska Department of Highways stating that it had "no objection to the use of [the] subject section line reservation to construct a public access roadway." The letter also stated however, that the state assumed no liability or responsibility for any damages resulting from the construction and use of an access road. Also, before construction began, Mr. Edwards expressed his concern to Wrangell regarding the impact of the roadway on his property. Wrangell assured him that it "would do as little damage to the area as possible."

In June or July, 1975, Wrangell constructed a roadway along the section line. Although the roadway itself

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2. AS 19.10.010 provides:

> "Dedication of land for public highways. A tract 100 feet wide between each section of land owned by the state, or acquired from the state, and a tract four rods wide between all other sections in the state, is dedicated for use as public highways. The section line is the center of the dedicated right-of-way. If the highway is vacated, title to the strip inures to the owner of the tract of which it formed a part by the original survey."

measured approximately twenty-five feet in width, Wrangell cleared the easement to nearly the full 100-foot width.

The Edwardses filed a complaint alleging that Wrangell had wrongfully cut and carried away trees from the Edwardses' and Schneiders' parcels, depriving them of the economic and esthetic value of the trees and lowering the property value of the parcels. The complaint sought damages in excess of $25,000, as well as treble damages under AS 09.45.730.[3] Wrangell filed four counterclaims, two of which it dropped before jury deliberations.[4] The jury found the two other counterclaims nonmeritorious. The jury returned a verdict in favor of the Edwardses, awarding $25,000.00 in actual damages which was trebled under AS 09.45.730. This appeal followed.

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3. AS 09.45.730 provides in part:

> "Trespass by cutting or injuring trees or shrubs. A person who cuts down, girdles, or otherwise injures or carries off a tree, timber, or shrub on the land of another person or on the street or highway in front of a person's house . . . , without lawful authority is liable to the owner of that land . . . for treble the amount of damages which may be assessed in a civil action."

4. Ron Anderson, a partner in Wrangell, admitted that the two claims were petty and brought out of spite because of the original litigation.

I. AUTHORITY TO CONSTRUCT THE ROADWAY

The trial court granted a partial directed verdict holding that, as a matter of law, Wrangell possessed authority to construct the section line roadway. Edwardses contend in their appellee's brief that this ruling was an error. They did not, however, file a cross-appeal. We refuse to consider appellees' argument since it was not properly raised.[5] Alaska Brick Co. v. McCoy, 400 P.2d 454, 457 (Alaska 1965 compels this conclusion. In McCoy, appellee in its brief sought a modification of the judgment increasing the attorney's fee award. Appellee neither filed a cross-appeal nor a cross-statement of points in appellant's appeal. We held: "Orderly procedure will permit an appellee to attack a judgment for the first time in his brief in the appellant's appeal. Id. Similarly, we will not pass upon this question here

II. THE SCOPE OF THE USE PERMITTED BY THE EASEMENT

Wrangell contends that the trial court erred in ruling that the state's express reservation permitted Wrangell to use the reservation to the extent necessary to construct a roadway and, thus, that it was a jury question

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5. Appellate Rule 9(e) provides that this "court will consider nothing but the points so stated [in the statement of points on appeal]."

whether the use of the easement was reasonable or excessive.[6] Wrangell maintains that "no such requirement of reasonableness exists where there is an expressly reserved and dedicated defined highway right-of-way. " Therefore, it asserts that there is an absolute right to clear the right-of-way within the 100-foot limit of the reservation. The Edwardses, on the other hand, argue that only the amount of trees reasonably necessary to construct the roadway may be cleared. We agree with the Edwardses and hold that the trial court did not commit error.

The general rule regarding the scope of the use of a right-of-way easement was stated in Aladdin Petroleum Corp. v. Gold Crown Properties, 561 P.2d 818, 822 (Kan. 1977)

> "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. The expressed terms of the grant or reservation are controlling in such case and consideration of what may be necessary or reasonable to the present use of the dominant estate are not controlling. If, however, the width, length and location of an

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6. The court instructed the jury:

> "The Court has determined as a matter of law that the defendants had the right to use the right of way to construct a public road, but that the reasonableness of that use is for determination by the jury."

> 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." 7/

sustain [a] contention [that an easement grants the right to use any and all of a strip of land], the plaintiff must point to language in the deed which clearly and definitely fixes the width of the right of way. " Barton's Motel, Inc. v. Saymore Trophy Co., 306 A.2d 774, 775 (N.H. 1973).[8] Moreover, it has been generally stated:

> "A grant or reservation of a right of way 'over' a particular area, strip, or parcel of ground is not ordinarily to be construed as providing for a way as broad as the ground referred to."

Annot., 28 A.L.R.2d 253, 265 (1953)

In Hyland v. Fonda, 129 A.2d 899 (N.J. App. Div 1957 the court considered whether the reservation in a entitled the grantor's assigns to use the entire reserved strip. The deed stated:

> "Reserving, however, unto the party of the first part [Scientific Research Corporation], its successors and assigns the right of ingress and egress for roadway purposes along

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7. See Hyland v. Fonda, 129 A.2d 899, 903-04 (N.J. App. Div. 1957); Barton's Motel, Inc. v. Saymore Trophy Co., 306 A.2d 774, 775-76 (N.H. 1973

8 Accord, 3 Powell, Real Property ¶ 415, at 34-133 Rev ed. 1979)

> a strip 25 feet in width along the entire northerly boundary for roadway purposes, together with the right to dedicate said strip, together with any additional land of the party of the first part for roadway purposes whenever a municipality shall accept the same as a public thoroughfare."

129 A.2d at 901. The court stated:

> "We cannot say there is no ambiguity on the face of the grant here involved concerning the matter of the physical area over which the defendants have a present right of roadway use. The language of the reservation does not specifically describe the intended roadway as 25 feet in width . . . it provides a 'right of ingress and egress for roadway purposes along a strip 25 feet in width,' etc. This kind of ambiguity is frequently found. . . ." (emphasis in original; citation omitted).

129 A.2d at 904. Similarly, here neither the reservation in the contract for sale nor the statutory dedication describe the intended roadway as 100 feet in width. In fact, the statutory dedication states that 100-foot-wide tracts are "dedicated for use as public highways." This is analogous to the grant in Hyland for a right-of-way "for roadway purposes." The express language of the dedication suggests that the legislature intended only that the amount of land necessary for use as public highways be dedicated. Consequently, we believe that the reference to width in the reservation is ambiguous as to whether it refers "to the width of the way, or is merely descriptive of the property over which the grantee may have such a way as may be reason-

ably necessary." Id.[9] Consequently, Wrangell was entitled to make only reasonable use of the right-of-way

Although the result we reach may generate litigation because of disputes over what constitutes reasonable use, the "result will avoid a construction of the grant of a right of way on and over [a] parcel of land that would unduly restrict its use." Alban v. R.K. Co., 239 N.E.2d 22, 25 (Ohio 1968 Moreover, this result will prevent needless destruction of property by insuring that the construction of roadways will be accomplished with care.[10]

III. THE BURDEN OF PROOF

Wrangell contends that the trial court erred in

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9. See Barton's Motel, Inc. v. Saymore Trophy Co., 306 A.2d 774, 775-76 (N.H. 1973) ("the grant of 'a right to pass and repass on foot or by vehicle in common with others . . .. along a strip of land fifty feet (50') in width' fixed the outward limits wherein the right of way was to be exercised, but is ambiguous as to whether the use of the whole 50-foot width was granted for this purpose"); Alban v. R.K. Co., 239 N.E.2d 22, 24 (Ohio 1968) (grant of "right of way on and over" a parcel of real property described by metes and bounds does not create a way over all of the property described); Annot., 28 A.L.R.2d 253, 265-67 (1953). Contra Onorati v. O'Donnell, 326 N.E.2d 367 (Mass. App. 1975) (where description of easement is clear, explicit and free from ambiguity, it is inappropriate to restrict vehicular use to less than the full 20 feet granted).

10. Cf. Wessells v. State Dept. of Highways, 562 P.2d 1042, 1050 (Alaska 1977) (although grant of easement should be interpreted according to the reasonable expectation of the parties, it is not reasonable to think parties intended extensive destruction of the property.)

giving instruction No. 14, which provides in part:

> "[T]he plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove [that] the defendants wrongfully cut trees and removed timber on plaintiff's property and the adjoining property.
>
> The defendants have the burden of establishing by a preponderance of the evidence all of the facts necessary to prove [that] they cleared away only those trees that were reasonable and necessary for the construction of the roadway."

Wrangell argues that the court erred in imposing on it "the burden of proof or persuasion to establish the reasonableness of the cutting and clearing." We agree.

As a general rule, the plaintiff in a tort action has the burden, throughout the trial, of proving the nature of the harm, the defendant's share in causing the harm, the injuries from the harm, and the damages suffered. See generally J. Wigmore, Evidence § 2486, at 275-76 (3d ed 1940); C. McCormick, Law of Evidence § 337, at 785-89 (2d ed. 1972) The Edwardses do not advance any reason, nor do we find any, for not following this rule in this case. Consequently, the burden was on the Edwardses to show that Wrangell committed the alleged acts "without lawful

authority." This burden did not shift to Wrangell.[11]

Instruction No. 14 is internally conflicting in this regard. The instruction initially advises the jury that the burden rests with the plaintiff to show that the defendants wrongfully cut and removed the plaintiffs' timber. This part of the instruction is correct. Nevertheless, since the cutting of the timber was wrongful only to the extent it was unreasonable, it was contradictory to instruct the jury that the defendants had the burden to prove they "cleared only those trees that were reasonable and necessary for construction of the roadway." The burden was on the plaintiffs to show that the defendants' actions were unreasonable. Thus, the trial court committed error

We need not decide, however, whether the error standing alone, would require reversal because, as discussed

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11. In Judkins v. Carpenter, 537 P.2d 737, 738 (Colo. 1975), the court stated:

> "The burden of proof, which rests upon a party to establish the truth of a given proposition, never shifts. Once the person having the burden of proof has established a prima-facie case, the burden of going forward shifts to the other side. '[I]t then becomes the duty of the defendant to go forward with his testimony. But in no sense does such presumption cast a burden [of proof] on the defendant. . . . The burden to establish his case does not shift from the plaintiff to the defendant, but continues throughout the trial.'" (citation omitted).

in section IV of this opinion, reversal is required since an improper measure of damages was utilized. On retrial, damages cannot be calculated without determining anew what clearing was reasonable and necessary, thus, this is not a case where liability and damage issues may be determined separately. See City of Fairbanks v. Nesbett, 432 P.2d 607 (Alaska 1967); Dowling Supply and Equipment v. City of Anchorage, 490 P.2d 907 (Alaska 1971).

IV. THE MEASURE OF DAMAGES

In Instruction No. 21, the trial court informed the jury that the "measure of damages for trespass is the expense of restoring as nearly as reasonably possible the Edwards to the position they enjoyed before the trespass." Wrangell argues that the cost of restoration is an inappropriate measure of damages for this trespass and the correct measure is either the value of the trees as timber or the diminution in value of the land caused by the timber removal. We hold that the trial court erred in using the cost of restoration as the measure of damages in this case.

In Wernberg v. Matanuska Electric Association, 494 P.2d 790, 794-95 (Alaska 1972), this court approved a jury instruction which allowed the jury to apply either the diminution in value or the value of trees measure of damages. This holding, however, did not foreclose the possibility of a cost of restoration instruction in an appropriate case. First, there was no claim in Wernberg

that the severed trees had any special value to plaintiff. Second, although appellant asserted that instruction constituted error, he did not explain what correct legal formula should be.[12] Id. at 794. Accordingly, we were not required to pass upon the propriety of a cost of restoration instruction, but only on the impropriety of a diminution in value or value of trees instruction.

We believe the appropriate rule is that if the cost of restoring the land to its original condition is disproportionate to the diminution in the value of the land caused by the trespass, the restoration measure of damages is inappropriate unless there is a "reason personal to the owner" for restoring the original condition. Restatement Second of Torts § 919, comment (b) (1977 Thus, in G & A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d 1379, 1385 (Alaska 1974) we affirmed the judgment the lower court awarding damages based on a cost of restoration measure of damages. Supporting the award was finding of the trial court that "Greenhouse uses its property for the purposes peculiar to its business," id. at 1382, and that therefore, cost of restoration was appro-

12. Appellant did assert that he should be allowed to recover for "infringement upon the individual pleasure or personal pleasure," Wernberg, 494 P.2d at 795, but this was apparently a generalized claim, not supported by evidence of special value.

priate. The plaintiff's intended use of the damaged property "was to create a showplace in connection with his nursery business." Id. at 1387. This was a "reason personal to the owner" justifying restoration damages.

Although the rationale of G & A allows the recovery of the cost of restoration for damage done to a landowner's property in such appropriate circumstances,[13] we do not believe this presents such a case. This is not an instance where, because of their beauty, location, quality, size or other particular features, the trees were of peculiar value to the landowner. They are not akin to ornamental trees.[14] The severed trees were without special value beyond the fact that they were located on the Edwardses' property. Additionally, this is not a situation where there is a reasonable likelihood that the trees will be restored.[15] Consequently, we hold that the diminution in

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13. See, e.g., Samson Constr. Co. v. Brusowankin, 147 A.2d 430, 433 (Md. App. 1958) (plaintiff's homesite was stripped of trees such that it was "bare as a board but not as smooth"); Schankin v. Buskirk, 93 N.W.2d 293, 296 (Mich. 1958); Rector, Etc. v. C.S. McCrossan, Inc., 235 N.W.2d 609, 610-11 (Minn. 1975); see also D. Dobbs, Remedies § 5.1 at 316 (1973).

14. Edwards did testify that he liked having patches of "nice straight trees" that were not thickly overgrown, but we do not think that this brings this case within the principle of G & A.

15. "[I]f the plaintiff is unlikely to repair for any reason and is likely instead to sell, then diminution in value rather than repair costs would be a more appropriate measure." D. Dobbs, Remedies § 5.1 at 317 (1973).

value of the property or the economic value of the timber cut was the appropriate measure of damages.

V. TREBLE DAMAGES UNDER AS 09.45.730

AS 09.45.730 provides that a "person who cuts down timber . . . without lawful authority, is liable to the owner . . . for treble the amount of damages. . . ." Wrangell contends that "treble damages are appropriate where the damages awarded are based on the lumber or timber value of the trees but are clearly inappropriate where damages are assessed on some other basis." We reject this contention.

We adopt the reasoning of the court in Schankin v. Buskirk, 93 N.W.2d 293, 295-96 (Mich. 1958), which rejected a similar argument:

> "As to the damages involved, it is settled that the damages that are to be trebled under the statute represent not merely the value of the timber cut but damages to the freehold as well. Generally speaking, damages in trespass to land are measured by the difference between the value of the land before the harm and the value after the harm, but there is no fixed, inflexible rule for determining, with mathematical certainty, what sum shall compensate for the invasion of the interests of the owner. Whatever approach is most appropriate to compensate him for his loss in the particular case should be adopted. Thus, the damages awarded in [our previous decision] reflected, in part, the value of the timber taken and, in part, the cost of restoring the land to a condition of usefulness -- by filling up stump holes and cleaning up the toppings and other debris left behind by the trespassers." (citations omitted).

PREJUDGMENT INTEREST ON A VERDICT BASED ON AS 09.45.730

Wrangell contends that it was error to award any

prejudgment interest for the damages awarded under AS 09.45.730. Alternatively, it contends that the interest should be awarded only on the compensatory portion of the award, not the punitive portion. We agree with this latter contention.

Wrangell's initial contention is based on Ventoza v. Anderson, 545 P.2d 1219, 1230 (Wash. App. 1976) In Ventoza, the court held that under a statute very similar to AS 09.45.730, prejudgment interest could not be awarded on either the compensatory or punitive portion of the treble damage award. We believe that holding sweeps too broadly. Punitive damages are not compensation for actual physical harm, and prejudgment interest is generally not awarded on punitive damages Blake v. Grant, 397 P.2d 843, 845 (Wash. 1964 On the other hand, actual damages are compensatory

the interest on this award is of the same character To refuse interest on the compensatory portion would be unfair to the injured party. Beech Aircraft Corp. v. Harvey, 558 P.2d 879, 888 (Alaska 1976 Consequently, we hold that prejudgment interest may be awarded on the compensatory portion of the award but not the punitive portion.[16]

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16. Casto v. Arkansas-Louisiana Gas Co., 562 F.2d 622, 625-26 (10th Cir. 1977), supports our conclusion. In Casto, the trial court awarded interest on a personal injury award and a punitive damage award connected with the injury. The Tenth Circuit affirmed the award of interest on the personal injury part but reversed the award of interest on the punitive damage part.

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VII. THE SCHNEIDER PARCEL

The Edwardses' claim sought damages not only for the injury caused to their parcel by the cutting, but also for injury caused to the Schneider parcel. Wrangell argues that because the Edwardses had no interest, or possession of, the trees on the Schneider side of the section line, the Edwardses could not bring an action for trespass since possession is the basis of such an action. The Edwardses contend that they received a valid assignment of the cause of action from the owners of the Schneider parcel.

Mrs. Schneider testified that after the trees were cut, the Schneiders orally gave Mr. Edwards the rights to the trees. She also agreed that she intended to let Mr. Edwards "have any rights that [she] might have with respect to damages to that property adjoining his." The oral assignment was later confirmed by a letter from the Schneiders stating "we give you [Mr. Edwards] legal consent to take our portion [of the trees]." Thereafter, the owners of the Schneider parcel conveyed by quitclaim "any interest of any kind which they may have in the damages which have been claimed in a Complaint filed by James H. Edwards and Maxine B. Edwards."

It is settled that an assignment may be made of a cause or right of action for trespass on, or injury to,

land.[17] Specifically, a cause of action for the unlawful cutting and removal of timber may be assigned.[18] Moreover, a claim for damages to real property may be assigned without assigning or transferring the title or possession of the property.[19] We see no reason to deviate from these rules. It has been stated that a cause of action can be assigned if it survives.[20] AS 09.55.570 provides in part:

> "All causes of action by one person against another, whether arising on contract or otherwise, except those involving defamation of character, survive to the personal representatives of the former and against the personal representatives of the latter."

Therefore, we hold that the cause of action for unlawful cutting of timber may be assigned even though the owners of the Schneider parcel did not transfer any interest or possession in the land to the Edwardses

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17. United Verde Copper Co. v. Jordan, 14 F.2d 299, 301 (9th Cir.), cert. denied, 273 U.S. 734, 71 L.Ed. 865 (1926); Stapp v. Madera Canal & Irrigation Co., 166 P. 823, 825 (Cal. App. 1917); Peterson v. Lake Superior Dist. Power Co., 39 N.W.2d 706, 708 (Wis. 1949).

18. White v. Gordon, 101 S.E.2d 759, 762 (Ga. 1958); J.H. Leavenworth & Son v. Hunter, 116 So. 593, 595-96 (Miss. 1928).

19. Stapp, 166 P. at 825

20. See generally Olmstead v. Allstate Ins. Co., 320 F.Supp. 1076, 1078 (D. Colo. 1971).

The general rule regarding the creation of an assignment has been stated as follows:

> "The creation and existence of an assignment is to be determined according to the intention of the parties, and that intention is a question of fact to be derived not only from the instruments executed by them, but from the surrounding circumstances as well."

Rivan Die Mold Corp. v. Stewart-Warner Corp., 325 N.E.2d 357, 361 (Ill. App. 1975).[21] Moreover,

> "an assignment may be oral or written and no special form is necessary provided that the transfer is clearly intended as a present assignment of the interest held by assignor."

Matter of Estate of Vaughn, 588 P.2d 1295, 1297 (Ore. App 1979).[22]

We believe that sufficient evidence was presented to create a jury question regarding the formation of an assignment. Mrs. Schneider's testimony regarding an oral assignment and the written documents submitted certainly indicate that there was a present intent to assign the cause of action. Thus, the trial court correctly denied Wrangell's motion for a directed verdict regarding the cause

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21. See generally Lil' Red Barn, Inc. v. Red Barn System, Inc., 322 F.Supp. 98, 106-07 (N.D. Ind. 1970).

22. See also In re King-Porter Co., 446 F.2d 722, 727 n.9 (5th Cir. 1971) ("oral assignment is fully enforceable"); Commodore v. Armour & Co., 441 P.2d 815, 820 (Kan. 1968) (no particular form is necessary to effect a valid assignment).

of action for injury to the Schneider parcel because it cannot "be said that fair-minded jurors in the exercise of reasonable judgment could reach but one conclusion on the issue in controversy." Beaumaster v. Crandall, 576 P.2d 988, 994 (Alaska 1978

VIII. MISCELLANEOUS CONTENTIONS

Wrangell raises the following other contentions (1 that the trial court erred in admitting the depositions of two Wrangell partners; (2 that the trial court erred in admitting testimony regarding evidence of discontent between the parties; (3) that the trial court erred in treating the cause of action as a trespass to land rather than a trespass to chattels; and 4) that the verdict of the jury was based on passion or prejudice and not founded on the evidence. We regard each of these contentions as frivolous and not meriting any further discussion. Wrangell also argues that no attorney's fees should have been awarded or, alternatively that the award was excessive. We need not address this issue since the Edwardses are no longer the prevailing party and, thus, are not entitled to attorney's fees

The judgment is REVERSED and REMANDED to the superior court for further proceedings consistent with this opinion