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MEMORANDUM State of Alaska

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SUBJECT: Prescriptive Rights --- Easements by Prescription and Adverse Possession

Easement by prescription is but just one method in acquiring an easement. Other methods include the express grant, which generally is most desirable and ascertainable; the implied easement, which generally arises when a grantor conveys a piece of property which has continually been served by the easement when in possession of the grantor; the easement by necessity, which occurs when the grantor has conveyed a piece of "locked-in" property; and the easement by prescription, which may arise after certain common law and statutory requirements of use have been met. Other methods of acquiring easements can exist, but are less used. Of the enumerated mothods, the easement by grant is the most advisable primarily because it is readily discernible, represents a willingness of all parties to convey, and involves little, if any judicial interference. Conversely, the easement by prescription generally is the most difficult to acquire and results in a number of presumptions or steps which the party seeking to acquire must overcome prior to establishing the easement.

Additionally, at this time it should be noted that an easement does not vest a fee title in the acquirer such as the State of Alaska is accustomed to receiving in condemnation actions. An easement still allows the fee to remain in the original fee holder, but renders the fee holder's land subject to a "user." Such "users" may be limited to certain defined individuals or, as in the case of well-traveled routes such as the portions of the Steese Highway over which the State of Alaska has right-of-way easements, such easements are usable by the public in general. Generally, the grantor of the easement has the power to determine. For most State purposes, therefore, the acquisition of a fee by eminent domain proceedings becomes most desirable by divesting the prior fee owner of any and all control which he might have retained by conveying only an easement. Once the State has obtained the fee, all rights of the prior owner are lost.

Addressing the concept of easements by prescription,, it again should be noted that these are the most difficult to acquire. Additionally, as much as an easement may be acquired by prescription, it also may be lost by prescription.

The conceptual basis underlying the prescriptive theory results out of a conflict of two legal philosophies. The first involves the sacred nature of property ownership and the inviolability of land. The second involves the desire of the State to ascertain just exactly who owns the land. Originally, this all began out of feudal concepts of seisen and responsibility of land ownership to the overlords and, more specifically, the tax collectors. Yes, even then there was property tax. Hence, although land ownership has always been somewhat sacred, the desire of the State to know who owns the land for taxation, which has always been somewhat damned, has given rise to a means of redistributing property ownership when such ownership has become vague. This is the right of an individual, abutting landowner, or the public to claim ownership or use of the land through either adverse possession or easements by prescription.

Adverse possession and easements by prescription are acquired essentially similarly, although the acquired rights differ. In adverse possession, all of the rights of the prior party in interest are acquired to the extent of the acquirer's assertion of ownership. An easement by prescription, however, results only in an easement with the underlying fee remaining in the original party. The requirements of establishing both, however, are essentially similar. Because Alaska does not expressly have any statutes covering easements by prescription, analogies must be drawn to our adverse possession laws.

Alaska Statutes § 09.25.050 provides:

> <u>Conclusive Evidence of Adverse Possession.</u> The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more is conclusively claimed to give title to the property except as against the State or the United States.

Alaska's law is different from other jurisdictions in a number of respects, and such discrepancies should be borne in mind in any considerations of prescriptive easement arguments.

1. Prescriptive easements are not mentioned, although analogies may be drawn.

2. The possession must be for a claim of title and uninterrupted. Hence, the person or entity seeking to adverse possess must be claiming a title interest and such claim must not have been interrupted. Interruption may occur by virtue of abandonment of the possession or by ejectment by the true owner. Easements do not concern titles, which remain in the fee owner, but rather, the right to use another's land.

3. The claim must be adverse and notorious. Traditionally, the statement has been "open, notorious, and hostile," which is somewhat redundant. Essentially, the claim must have been against the interests of the original owner and, more crucially, communicated to the original owner. Until there has been a communication of the hostile, adverse possession, the statutory period of 7 or 10 years (to be discussed) does not run. And, of course, a letter of permission from the original owner may serve to establish a license to use the land (an easement by grant needs a conveyance.- a license is usually what results from an improper easement). There can be no adversity sufficient to justify adverse possession under the statute, when such a letter of permission has been sent.

4. The requirement of color and claim of title is unique in Alaska law. It should be noted that this statute establishes conclusive evidence of adverse possession. Hence, when one has entered under color and claim of title, usually a defective deed or survey, a presumption of good faith arises and a seven year period ensues. Without such color and claim of title, a longer period generally is required. Very seldom will the State have color and claim of title.

5. The seven year requirement pertains to color of title giving rise to a conclusive presumption. (A conclusive presumption, once it arises, may not be rebutted by any evidence.) Originally, the common law required twenty years for adverse possession. This time requirement progressively was reduced from twenty years to ten years, which is still the case when color of title is not asserted, to seven years, when a claim of color of title exists.

For the purposes of attempting to establish any easements by prescription in the State or public, various factors should be borne in mind.

First, the above statute which is the only located statute regarding this general area, is of limited applicability only. What does apply, however, is the concept of uninterrupted user which is open, notorious, and hostile, and communicated. The presumptive period will most likely lie in excess of ten years.

Second, the courts are usually quite reluctant to allow any adverse claim, although such claims will be allowed when a genuine issue of property ownership is involved. An easement by prescription, however, is even more difficult to establish than is outright title by adverse possession. This is because, in adverse possession, full title is conveyed and settled in the new owner. An easement by prescription, however, still allows title to remain in the original owner, but nonetheless renders his land subject to another use and, as such, less valuable. Hence, the attitude of the courts toward those asserting prescriptive easements is often hostile at best, especially when the state is involved as a litigating entity and condemnation is a feasible alternative. Normally, easements by prescription are asserted as between individuals and individual landowners, primarily because of the need for continuous or uninterrupted use for which the public may be hard pressed to prove, coupled with the availability of other alternatives for the public.

Third, in allowing any presecriptive easement, the courts circumscribe the scope, or user, of that easement rigidly. As mentioned, title still remains in the owner, except that the land is subjected to a hitherto uncontemplated use. Because such use also represents generally a diminution in value, the use is limited highly and may be confined to specific individuals, or types of traffic, specific paths, and specific times. It is safe to say that the restrictions of any prescriptive easement will be high. As in the case of a public road, should the court allow a prescriptive easement, the odds are that only a ditch to ditch right of way might result and, moreover, any such use of the roadbed itself could well be limited to the traffic as established or reasonably foreseeable at the time of the order. A multiplicity of court actions every time the user changed could be contemplated if the State were to acquire prescriptive easements.

Fourth, it should be noted that a prescriptive easement does not become an easement per se until it has been judicially resolved, usually in a sort of action to quiet title. Any loss of such an action could result in either condemnation or inverse condemnation.

Fifth, if the State were to assert an easement by prescription, it is conceivable that the State could be thwarted quite easily with a letter of permission from the owners.

At this point, it becomes evident that the route of acquiring easements by prescription is not the most

advisable road to follow for the reasons already set forth. Condemnation is the suggested action and the method provided by the legislature as against individuals by the State. It is a powerful, almost absolute weapon for acquiring property to which a court undoubtedly would refer any prescriptive claims by the State. However, one avenue remains for consideration.

It should be noted that both AS 09.25.050 and AS 38.95.010 provide that adverse possession may not be had as against the State of Alaska and, pursuant to AS 09.25.050, no adverse possession may be had pursuant to that statute as against the federal government.

23 U.S.C. 317 (United States Code), however, eliminates the need of the State or public to possess adversely as against the federal government by allowing highways and right of ways to pass to the State as determined reasonably necessary by the Secretary of Commerce. By virtue of this statute, previously unplanned roads across public lands which developed by virtue of construction and public use were deemed to be in existence and to pass to the State by act of various land orders and the Omnibus Act. Bearing this in mind, if any subject road may be shown to have been constructed across public lands (as opposed to private lands) and in existence and use prior to settlement of any public lands by homesteading, mining claims, or related acts, then such roads are deemed to be in existence and subject to the right of ways as outlined in the land orders - P.L.O. 601 being the most notorious land order. As such, the road and attendant right of way across public lands arises not by prescriptive act, but by virtue of prior existence subsequently approved. Note, however, that a road constructed by a homesteader is not so subjected, if such road is across already settled land. Finally, all rights to land under homestead law freeze at the time of entry and not patent.