

## Prescriptive Easements July 15, 2013

Prescriptive Easements are a rare form of property law that is fairly uncommon, but binding.

### Definition:

#### **Prescriptive Easement**

An easement upon another's real property acquired by continued use without permission of the owner for a period provided by state law to establish the easement. The problems with prescriptive easements are that they do not show up on title reports, and the exact location and/or use of the easement is not always clear and occasionally moves by practice or erosion.

The State of Alaska does not have a statute dedicated to “prescriptive easements.” Rather, the statute regarding Adverse Possession is used to govern prescriptive easements because the legal concepts of each are very similar.

### Alaska Statute:

#### **AS 09.45.052. Adverse Possession.**

(a) The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more, or the 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, is conclusively presumed to give title to the property except as against the state or the United States. For the purpose of this section, land that is in the trust established by the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, is land owned by the state.

(b) Except for an easement created by Public Land Order 1613, adverse possession will lie against property that is held by a person who holds equitable title from the United States under paragraphs 7 and 8 of Public Land Order 1613 of the Secretary of the Interior (April 7, 1958).

(c) Notwithstanding AS 09.10.030, the uninterrupted adverse notorious use of real property by a public utility for utility purposes for a period of 10 years or more vests in that utility an easement in that property for that purpose.

(d) Notwithstanding AS 09.10.030, the uninterrupted adverse notorious use, including construction, management, operation, or maintenance, of private land for public transportation or public access purposes, including highways, streets, roads, or trails, by the public, the state, or a political subdivision of the state, for a period of 10 years or more, vests an appropriate interest in that land in the state or a political subdivision of the state. This subsection does not limit or expand the rights of a state or political subdivision under adverse possession or prescription as the law existed on July 17, 2003.

**AS 09.10.030. Actions to Recover Real Property.**

(a) Except as provided in (b) of this section, a person may not bring an action for the recovery of real property or for the recovery of the possession of it unless the action is commenced within 10 years. An action may not be maintained under this subsection for the recovery unless it appears that the plaintiff, an ancestor, a predecessor, or the grantor of the plaintiff was seized or possessed of the premises in question within 10 years before the commencement of the action.

(b) An action may be brought at any time by a person who was seized or possessed of the real property in question at some time before the commencement of the action or whose grantor or predecessor was seized or possessed of the real property in question at some time before commencement of the action, and whose ownership interest in the real property is recorded under AS 40.17, in order to

(1) quiet title to that real property; or

(2) eject a person from that real property.

Case Law

There have been many legal cases brought forth in the State of Alaska regarding Prescriptive Easements over the years. Two Alaska Supreme Court cases in particular define the basic legal tenants of the law.

Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 416-17 (Alaska 1985) involved a piece of property near the Dillingham Airport that was used by many Dillingham residents and others as a short-cut when traveling to and from town and the airport. Because the disputed corridor had been used for more than 10 years, the court decided that the use resulted in a prescriptive easement. One important finding of the court was the establishment of a 3-pronged test for prescriptive easement rulings. The test is listed below and is the standard used by the court at this time. From the ruling:

A. Permissive Use

We have held that a public way may be created by public Use of private property for the ten-year prescriptive period. Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 416-17 (Alaska 1985).

To establish a prescriptive easement a party must prove that (1) the use of the easement was continuous and uninterrupted; (2) the user acted as if he or she were the owner and not merely one acting with the permission of the owner; and (3) the use was reasonably visible to the record owner.

A second court case established the validity of the 10 year statute of limitations. Weidner v. Dept. of Transportation (10/8/93), 860 P 2d 1205 involves a situation where Alaska Road

Commission originally built a road in 1952 that used a portion of private homestead land for the road. Later the homesteaders left the state, but retained ownership of the property. In 1968 DOT&PF rehabilitated the road, which included moving a section of the footprint about 50 yards to form a new travel corridor for the redesigned road. The owners were absent and unaware of the road's relocation. In 1982 the homesteaders did a survey of the land before subdividing the property. At that time the relocated road was noted and the state was contacted. DOT&PF claimed possession by prescriptive easement. Later that year, Weidner purchased a lot from the homesteaders, and eventually within 2 years, purchased the entire tract.

Weidner brought a lawsuit against the state claiming that DOT&PF had used the land without notifying the homesteader (owner) of the use, or providing compensation for the use. He in-turn, because of his purchase, claimed that the state should either be ordered to move the road to the original location or he should be compensated for the use. The court ruled against those arguments and reaffirmed that the 10 year statute of limitations applies and that it is the burden of the property owner to petition the court within the 10 year period for injunctive relief. They again sided with the language of the statute of limitations and said that claims that arise after 10 years are moot.

Note: The Weidner case also decided other issues that did not pertain to prescriptive easements such as attorney fees from prior litigation.

Weidner v. Dept. of Transportation (10/8/93), 860 P 2d 1205

#### D. Takings Clause

Weidner makes the further argument that a prescriptive easement allows the State to take private property without just compensation in violation of the takings clauses of the federal and Alaska constitutions. This argument misunderstands the nature and operation of a prescriptive easement. The theory of prescriptive easement does not grant the State affirmative authority to take property without just compensation. Rather, the prescriptive period -- as with any statute of limitations requires a private landowner to bring an inverse condemnation action for public use of private property within a specified period of time. At the expiration of the prescriptive period, the landowner's right to bring suit is extinguished, effectively vesting property rights in the adverse user. In the present case, Weidner's claim for just compensation has been extinguished by expiration of the prescriptive period. Thus, as Weidner's predecessors had a right to just compensation for the State's unauthorized use of their land which they failed to assert in a timely manner, Weidner too is barred from bringing suit.

In summation, the use of land by DOT&PF for a road does not require DOT&PF to notify the property owner if the road surface should go beyond the established right-of-way (ROW); rather it is incumbent on the property owner to make claim against the state for the intrusion. That action must occur within 10 years of the establishment of the use or all claims of relief are without foundation.

Additionally, there is no filing or recording documents involved with a prescriptive easement. Once the use has been in place for 10 years, and providing the 3 conditions mentioned in City of

Dillingham have been met, the prescriptive easement is in place and it is valid as long as there is use of the property. A major short-coming of prescriptive easements is that they are not recorded so that when property transfers, the buyer might be unaware of the easement. For DOT&PF and like entities, the only recording should be done on plan sets and as-built drawings that show the original ROW, along with a second line that is marked prescriptive easement.

A simple example to better understand prescriptive easement would be a comparison to people. Once a child lives beyond 12 years, 364 days, they become a teenager. There is no registration process for the event, nor is there a way to not be a teenage; it just is. The same with prescriptive easements; once the 10 year period passes and the 3 prong test is met, there is no retracting the prescriptive easement; it is and there is nothing further to be done that can alter that existence.

## Kake

Currently a proposed pavement rehabilitation project for Keku Road in Kake is in the preliminary planning and design process. The concept of prescriptive easements is an issue with this project as it compares to the Section 4(f) process. The existing pavement extends beyond the established ROW in many locations in the “old village” area of Kake. The original pavement was laid down in a manner that followed the footprint of the existing gravel road, which most likely followed the footprint of walking paths from centuries before. In many locations pavement extends beyond the ROW. Most of those properties are made up of small residential lots, thus there are fair amount of pavement intrusions beyond the ROW.

Section 4(f) states that a use of a park, historic site, and other protected lands may result in an adverse affect to those type properties. If so, mitigation is required, or it must be demonstrated that the use has a de minimis impact. The Kake Village Site is listed in the Alaska Historic Resources Survey (AHRs) database. No determination of eligibility has been done for the site.

**View of Kake Village, unknown date, possible early 1930's**



Examination of the photo shows the traditional routes of the early Kake road system. Notice the bottom, middle section of the photo showing how a shortcut is formed by a path at the intersection of Keku Road and Church Street. The 2005 photo below shows that the shortcut has remained as the footprint of the current road by following the earlier path. The shortcut has become the establish roadway. In other Keku Road locations it can be observed how some structures and located very close to the road, just as they are presently.

## View of Kake Village, 2005



### Key Dates

- 1968 Section 4(f) adopted by FHWA
- 1973 Kake Village Site nominated to the AHRS database (PET-00005)
- 1989 State Project 70061, Kake Paving paves the former gravel Keku road in the village

The question of whether Section 4(f) action for the Kake Village Site is needed for the current proposed project is simply answered with “no.”

The 70061 project was state funded and did not require Section 4(f) actions because of the lack of federal involvement (funding). Without federal funding there was no need to mention or evaluate possible impacts to the Kake Village Site (PET-00005) due to lack of federal jurisdiction regarding project activities.

Because the project took place in 1989, any claims of prescriptive easement (Adverse Possession) must have statutorily occurred by 1999. At the date in 1999 when the use of land for the paving of Keku Road elapsed 10 years, all legal recourse ceased due to the statute of limitations; which is affirmed by the Alaska Supreme Court in Weidner vs. DOT&PF.

The current proposed Keku Road paving project is not to be considered under Section 4(f) jurisdiction because there is no use of Section 4(f) properties. Although the Kake Village Site is located adjacent to Keku Road, there is no use of the site because a prescriptive easement exists meaning DOT&PF owns the land within the ROW, including those area acquired by the prescriptive easement, for almost 15 years. DOT&PF has legal standing to use any property within its ROW and within any locations described as easements, permitted areas, or other legal means without the need to make explanations regarding Section 4(f) since no Section 4(f) use has or would occur.