

## **PUBLIC PRESCRIPTIVE RIGHTS ACROSS PRIVATE LANDS**

*(Reprinted by permission of Daniel W. Beardsley, SR/WA, Attorney at Law and former Chief Right of Way Agent for the Central Region of the Department of Transportation and Public Facilities.)*

The title of this topic alone raises several distinct questions or issues:

What are public prescriptive rights?

What are the requirements to establish prescriptive rights?

Are public prescriptive rights across private lands applicable in Alaska?

What public prescriptive uses can be established?

Are public prescriptive rights available across public lands?

How do you prevent the establishment of prescriptive rights?

### **What Are Public Prescriptive Rights?**

The right of the public to use private land for a particular public purpose (an easement). With any easement the owner of the land has the servient estate which is then subject to the public's easement. As the subject of our seminar is Public Easements in Alaska, the discussion will be confined primarily to the establishment of public prescriptive easements; however, the requirements to establish a public prescriptive easement are essentially the same as private easements. Correspondingly, the bulk of case law in Alaska relates to private prescriptive easements, which in turn rely heavily on Alaskan cases on adverse possession to establish the necessary legal elements.

### **What Are The Requirements To Establish Prescriptive Rights?**

Under a private prescriptive easement an individual will establish an easement that is only for his or her personal benefit or property and title to that easement will vest in the individual or attach to the individual's land. A public easement would be established by the public at large's use irregardless of whether a single individual could establish a private easement. Swift v. Kniffen, 706 P.2d 296, 204 (1985).

In reality, establishment of a prescriptive easement is failure of the record owner of the property to file suit against an adverse user within the statute of limitations. The record owner must file

an action for ejectment of the adverse user prior to the time limits set by AS 09.10.030 and AS 09.25.050.

AS 09.10.030 mandates a ten year statute of limitations for the owner to initiate a suit to remove the adverse user. On the other hand it is the minimum time the adverse user must meet the requirements for establishing the necessary prerequisites to bring a quiet title action to obtain title to the easement.

AS 09.25.050 sets a seven year statute of limitations that applies to those individuals that have a defective deed or document purporting to convey title to them but is invalid for some reason. For examples of color of title issues see Hubbard v. Curtiss, 684 P.2d 842 (1984); Karvonen v. Dyer, 261 F.2d 671 (9th Cir. 1958); Ayers v. Day and Night Fuel Co., 451 P.2d 579 (1969); Lott v. Muldoon Road Baptist Church, Inc., 466 P.2d 815 (1970); Ault v. State, 688 P.2d 951 (1984); and Alaska National Bank v. Linck, 559 P.2d 1049 (1977).

Once the statute of limitations has elapsed, several legal elements must be established. As early as 1914 in the case of Roberts v. Jaeger, 5 Ak 190, 192 (1914), Alaskan courts have required that before an easement by prescription can be created the user must "clearly prove by competent evidence all the elements to such title." More recently our Alaskan Supreme Court in Alaska National Bank v. Linck, 559 P.2d 1049, 1052 (1977), noted that while there were numerous elements of adverse possession it interpreted AS 09.25.050 (the color of title statute of limitations) as requiring a three concept test:

(1) the possession must have been continuous and uninterrupted; (2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and (3) the possession must have been reasonably visible to the record owner.

Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 416 (1985), applies those adverse possession tests to prescriptive easements.

The requirements for test (1) is "whether the adverse possessor has used and enjoyed the land as 'an average owner of similar property would use and enjoy it'." [Citations omitted] "[A]bandonment of possession by the adverse possessor or interruption of possession by a third party or the record owner breaks the continuity of the adverse possession. Linck, supra at 1052. Once that continuity has been broken, the adverse possessors must start the time again.

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<sup>1/</sup> No person may bring an action for the recovery of real property, or for the recovery of the possession of it unless commenced within 10 years. No action may be maintained for the recovery unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within 10 years before the commencement of the action."

<sup>2/</sup> The uninterrupted adverse notorious possession of real property under color of title and claim of title for seven years or more is conclusively presumed to give title to the property except as against the state or the United States.

For the second requirement, the adverse possessor must act as if he or she owns the land; essentially the adverse possessor's acts are hostile and inconsistent with the rights of the record owners. Linck, at 1053. They must exclude the record owner from any use and enjoyment of the property and the question of good faith or bad faith is irrelevant under the 10 year statute of limitations if the claimant acted as if he or she owned the land. Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 830 (1974). A claimant's possession under the seven year statute of limitations must be in good faith. Lott v. Muldoon Road Baptist Church, 466 P.2d 815, 818 (1970).

If the use is permissive the hostility requirement for a claim of adverse possession fails. Hubbard, at 848, addresses the requirement for permissive use.

The whole doctrine of title by adverse possession rests upon the acquiescence of the owner in the hostile acts and claims of the person in possession. The key difference between acquiescence by the true owner and possession with the permission of the true owner is that a permissive use requires the acknowledgement by the possessor that he holds in subordination to the owner's title.

"The possession of a grantee is presumptively adverse to his grantor" as a result of a defective document in a color of title action, under AS 09.25.050. Hubbard, at 848. However, under AS 09.10.030 the presumption is that the claimant's use is permitted and must be rebutted by clear and convincing evidence presented by the claimant. Hammerly v. Denton, 359 P.2d 121, 126 (1961); Dillingham, supra at 417; and Curran v. Mount, 657 P.2d 389 (1982).

The third requirement is that the possession must be "notorious" such that an owner would be on notice of the adverse possessor's claim of occupancy and claim of right. The law presumes a prudent owner would know of such use. The court should take into consideration the character of the land to determine what acts by the adverse possessor are reasonable to establish notoriety. Linck, at 1053. In Nome 2000 v. Fagerstrom, 799 P.2d 305, 309 (1990), the Alaska Supreme Court stated: "Where as in the present case the land is rural, a lesser exercise of dominion and control may be reasonable." The adverse possessors used a portion of the property for a seasonal home for subsistence and recreation. It went on to cite examples from other cases where pasturing of sheep in grazing areas for only three weeks a year and six annual visits to a hunting cabin and timber cutting were sufficient notoriety. "Where physical visibility is established, community repute is also relevant evidence that the true owner was put on notice." [Citations omitted].

### **Are Public Prescriptive Rights Across Private Lands Applicable in Alaska?**

Traditionally the common law and many states did not recognize the right of the public to establish public rights against private property through adverse use. In those jurisdictions, generally an inverse condemnation, ejectment or injunctive relief to eliminate the use were the remedies available to the private owners. Today however, the majority rule in the United States

is to recognize the establishment of public rights through adverse use. Alaska follows the majority rule. Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 416 (1985). As with any rule of law there are exceptions. Later in the program you will hear about the exceptions relating to lands granted under the Alaska Native Claims Settlement Act. In those instances where the public use does not meet the adverse use requirements or the statute of limitations, the traditional remedies may still be available.

The question of public highway, road or alley easements are the most settled of the types of uses the public may acquire by adverse use. The case of Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410 (1985), illustrates that issue. The City of Dillingham and a private owner litigated the City's claims relating to a public roadway created by RS 2477 and public alleys created by more than 40 years of public use. The roadway issue was resolved in favor of the City. Whether the public's use of the alleys created a prescriptive easement in the City was not decided. The Court ruled that the City's use did not interrupt the continuous use and possession of the private owner and was therefore not adverse possession, but it did find as a matter of law that "the right of the public to use land as a public highway may be acquired through public use." Id., at 412. On remand the lower court was instructed to determine if the public's use was adverse thereby creating a public easement, or a permissive use meaning the owner's title was not subject to an easement.

While the case hasn't returned to the Supreme Court, it clearly establishes that Alaska follows the majority view that a public easement may be acquired by prescription. Id., at 416. This was reaffirmed in a later case, Swift v. Kniffen, 706 P.2d 296 (1985), which involves a subdivision road issue.

An earlier case, Ault v. State, 688 P.2d 951, 956, (1984), does note that the right of the State to acquire property by adverse possession should be narrowly construed in light of the provisions of Article 1, Section 18 of the Alaska Constitution which provides: "Private property shall not be taken or damaged without just compensation." Prior to statehood, the District Court of Alaska in Clark v. Taylor, 9 Ak 298, 314 (1938), found that the Alaska Road Commission could obtain a prescriptive easement across an unpatented mining claim. The width of the easement was limited to the width actually used.

### **What Public Prescriptive Uses Can Be Established?**

With the exception of the highway/roadway cases, the only other Alaska Supreme Court case involving public prescriptive rights is City of Anchorage v. Nesbett, 530 P.2d 1324 (1975). An electrical easement was at issue in that case. The decision turned on the issue of permissive use as a result of the City's initial right to be on the property by virtue of a permit. Since the Supreme Court found the use was permissive the City's claim of a prescriptive right failed. The City was required to pay just compensation under the eminent domain laws.

## **Are Public Prescriptive Rights Available Across Public Lands?**

The short answer is no. AS 09.25.050 excludes both the State and the United States, while AS 38.95.010 excludes the State from prescriptive rights. Additionally case law reaches the same result. See, Classen v. State, Department of Highways, 621 P.2d 15, 17 (1980), for state lands, Noble v. Melchior, 5 Ak 729, 733 (1917).

While the general rule is adverse possession (or prescriptive rights) do not apply to sovereign lands, it appears there is an exception that prescriptive rights may attach against an entry on such lands, provided the entry is alienable (can be sold or encumbered). That adverse right does stand against the sovereign, and will fail if the entry is abandoned or fails. Should the entry such as a mining claim or other entry remain the adverse or prescriptive right may be valid against the entryman's claim. Clark v. Taylor, 9 Ak 298, 314 (1938).

## **How Do You Prevent the Establishment of Prescriptive Rights?**

The most effective way to prevent the establishment of public (or private) prescriptive rights is to initiate an action for ejectment prior to the expiration of the statute of limitations set forth in AS 09.10.030 or AS 09.25.050. Alternatively, as the owner you must assure that at least one of the elements necessary for an adverse user to prove a claim does not take place. This may range from making the use permissive through a lease, license or permit or breaking the continuity of use by the adverse user.

What is required to break continuity? At a minimum the acts to break continuity would have to meet the same standards of notoriety that an adverse user must meet. The nature and character of the land would be a consideration and the owner would have to establish such visible evidence of his own dominion and control. Knowledge by the community of those acts of dominion and control would add to owner's defense. Nome 2000 v. Fagerstrom, 799 P.2d 304, 309 (1990). See also Talbot's Inc. v. Cessnun Enterprises, Inc., 566 P.2d 1320, 1322 (1977).

## **Final Remarks.**

From the above information provided, you are now dangerous. This presentation only presents an overview of one person's opinion of the law. Obviously from the number of attorneys and lawsuits interpretations of the law vary widely. There are many other cases regarding adverse possession and large gaps in Alaska law involving prescriptive easement issues. Every set of facts have a different twist and minor variations in the application of the law to those facts can result in different outcomes. In short, consult with your attorney about the facts of your particular case when you are faced with prescription and adverse possession issues.