

LEGAL SERVICES

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
State Capitol
Juneau, Alaska 99801-1182
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MEMORANDUM

March 11, 2003

SUBJECT: CSSB 93(), RS-2477 Rights-of-Way, and Prescriptive Easements
(Work Order No. 23-LS0518\H)

TO: Senator Thomas Wagoner
Attn: Amy

FROM: Gerald P. Luckhaupt 
Legislative Counsel

You have asked how the above-referenced bill draft relates to RS-2477 rights-of-way and prescriptive easements. Due to Kathryn Kurtz' workload, I am addressing your questions.

RS-2477 Rights-of-Way. An RS-2477 right-of way refers to a right-of-way established under former 43 U.S.C. 932. That act granted a right-of-way for the construction of public highways over unreserved federal lands. Acceptance of this general right-of-way grant could be accomplished in either of two ways, by legislation or by public use of the right-of-way. In either case control and ownership of the right-of-way inured in the state. An RS-2477 right-of-way exists as of the date of its acceptance or its use by public. I do not know how this CS() could affect the existence of the right-of-way.

Prescriptive Easements. An easement by prescription is in essence an easement acquired by adverse possession. An easement across the land of another can be acquired if the use for which the easement is sought is adverse, open and notorious, exclusive, and continuous and uninterrupted for the full prescriptive period. It seems to me that a prescriptive easement is never, or at least would rarely ever be, under color of title. As such it appears to me that this CS() would essentially eliminate prescriptive easements.¹

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¹ It also appears that it might eliminate easements by necessity. A prescriptive easement is somewhat different from an easement by necessity. An easement by necessity arises in the context of a transfer of land by a sale or other transaction. In the absence of an expressed agreement to allow access across a piece of land, an easement by necessity is implied when the owner of land sells a piece of land over which the owner must cross to access land that the owner retained or when the owner sells a piece of land that is accessible only by crossing land retained by the seller. In the first instance, it is inferred that the owner reserved the right to cross the land that he sold in order to access the land that he retained. In the second instance, it is inferred that the owner granted to the purchaser of the land the right to cross the land retained by the owner. The essential element of an easement by necessity is that the easement is necessary for access to the land.