SB

93

Gore

Amendment ___

Insert at p. 2 line 25.

"Nothing in this section shall be deemed to limit the ~~State's~~ ~~its~~ rights of a state or political subdivision ~~its~~ under the existing law of adverse possession."

TO: Chair, Representative Lesil McGuire
Members of the House Judiciary Committee

Re: SB93(JUD)am Adverse Possession

From: Jim Colver Matanuska-Susitna Borough Assemblymember,
Professional Land Surveyor
(907) 746-5300 surveyor@pobox.alaska.net

Date: May 16, 2003

I understand that there is concern by Native Corporations about the ability to protect their land from adverse possession claims. The Alaska Native Claims Settlement Act already gives that protection.

Pursuant to 43 U.S.C.A 636(d) (1), attached, land conveyed by the federal government pursuant to the Alaska Native Claims Settlement Act, or to an individual Native or a Native Corporation is exempted from adverse possession claims. If this is a concern, then this bill is unnecessary.

The Borough is concerned that prescriptive rights that may have accrued after 10 years for the physical presence of a utility are being converted to a grant of an easement in this bill. This is unnecessary, under current law utilities already have prescriptive rights.

The major problem with this bill as it applies to the doctrine of adverse possession is that under the bill **private roads and trails with prescriptive rights**, that is 10 years of open and notorious use or more **will be extinguished**. Many private **landowners will loose their right of access** to their cabins and homes. The bill only allows a government to claim adverse possession for roads and trails.

Additionally, as there have been cases where adverse possession claims by legitimate title holders have been necessary due to lost deeds or destroyed records as happened when the Chitina Courthouse burnt down and the records were lost.

RE: SB 93 (JUD)am

TO: State House Juciary Chair. Representative Lesil McGuire
Members of the House Judiciary Committee

Re: **SB93 Adverse Possession**
Amendments

From: Jim Colver Matanuska-Susitna Borough Assemblymember
Professional Land Surveyor
(907) 746-5300 surveyor@pobox.alaska.net

To limit the effect of the amendment of 9.10.030 to native corporation land, you simply need to add that language of limitation to the proposed section (b) of 9.10.030, as follows:

*** Section 2**

(b) an action may be brought at any time by a person or a corporation organized under 43 U.S.C. _____ as amended (Alaska Native Claims Settlement Act) whose ownership interest in 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.

Also, to give private parties the right to establish prescriptive easements for access to adjacent land, you need to add a new section (e) to 9.45.052, as follows:

***Section 4** add:

(e) Notwithstanding AS 09.10.030, the uninterrupted adverse notorious use of private land, including the construction, management, operation, and maintenance of roads and trails, for the purpose of gaining access to adjacent real property owned by the adverse claimant for a period of 10 years or more, vests in the adverse claimant an easement in the private land for that purpose.

ALASKA STATE LEGISLATURE

SENATOR THOMAS H. WAGONER
CHAIR, SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE
VICE-CHAIR, SENATE RESOURCES COMMITTEE

May 14, 2003

Tom Irwin, Commissioner
Department of Natural Resources
400 Willoughby Ave 5th Floor
Juneau, Alaska 99801

Dear Commissioner:

It has been brought to my attention that there is some concern that the wording in Section 4 subsection (c) of Senate Bill 93 would give public utilities the ability to gain interest in easements on state land.

This issue, and similar issues have been discussed many times with our legal department. I have been told from the Legislative Legal department that public utilities would not have any more rights than they currently have, and currently they cannot take state or federal lands through adverse possession.

It is not my intent, or the intent of the Legislature to give public utilities the ability to gain an easement on state or federal land for utility purposes.

Regards,

Tom

Thomas Wagoner, Senator

State Capitol, Room 427, Juneau, AK 99801 Telephone 907/465-2828 Fax 907/465-4779
SERVING THE KENAI PENINSULA

THE
FOLLOWING
DOCUMENT(S)
ARE
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My name is Teresa Williams, and I'm the Borough Attorney for the Matanuska-Susitna Borough.

I have a question regarding Section 3 of the amended SB 93. In Paragraph (c) of that section, the language appears create an exception to the general language of Section 29.71.010 of the Alaska Statutes, that is, that a municipality may not be divested of title to real property by adverse possession.

While this language preserves title to, say, for example, borough property, the new Paragraph (c) of Senate Bill 93, as written, is vulnerable to the interpretation that, while it doesn't divest the borough of title, it DOES arguably act to divest the borough of one of the bundle of rights of title, that is, an easement for the public utility. Is this the intended result of the new provision?

If divestiture of the easement right was intended, the borough, among other municipalities, would surely object to the addition of Paragraph (c) of Section 3 of the amended bill. If such was NOT the intent of the drafter, I recommend that qualifying language be added to Paragraph (c), such as, for example, "except as against any municipality, the state or the United States". This language would preserve ALL rights of title of municipalities as against adverse possession.

Thank you for the opportunity to testify before you today.

my suggested amendment

Henry Kroll
PO Box 526
Kasilof, Alaska 99610

5/13/03

To all Alaska Senators: and Representatives

Dear Senators:

Senate bill 93 is an infringement upon basic human rights and is indirect conflict with rights held by citizens in other states.

Article IV Sections 2. U.S. Constitution: The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

In other words, abolishing and or restricting the rights of citizens in Alaska when they can enjoy those same rights in other states makes this legislation unconstitutional. **The problem is this Senate caved in to the big the corporations who own large tracts of land with natural gas potential in South Western Alaska! You guys are supposed to be working for the citizens not corporations!**

Amendment XIV Section 1 U.S. Constitution: "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment IV Constitution of the United States: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 16 Constitution of the State of Alaska: PROTECTION OF RIGHTS. "No person shall be involuntarily divested of his right to the user of waters, his interests in lands, or improvements affecting either purpose, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law."

You are sworn by the following oath:

Article: XII General Provisions The constitution of the State of Alaska: Section 5, OATH OF OFFICE: All public officers, before entering upon the duties of their offices, shall take and subscribe to the following oath or affirmation: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Alaska , and that I will faithfully discharge my duties as.....to the best of my ability."

Having a shelter or some kind of roof over your head is a basic human right. Abolishing Adverse Possession laws in the State of Alaska and destroying all refuge shelters is not right. Destroying the personal effects and life works of trappers, hunters, and fishermen who built the refuge shelters is a crime perpetuated by this Senate.

Wilderness refuge shelters could save your life.

Wilderness refuge shelters can save your life and are needed for safety purposes. Many people have encountered adverse weather conditions in remote bush Alaska and have had to find shelter. A sudden storm or cold snap in the interior can be life threatening. Many Alaskans have stumbled across a refuge shelter stocked with food and firewood in the nick of time and it saved their lives. Some of them are grateful enough to cleaned up their mess and even cut more firewood before they left. I am sure there are people out there who are thanking their lucky stars today for the emergency shelter that saved their lives. If you enact Senate Bill 93 to destroy wilderness shelters people will die.

I can understand the California environmentalist mindset of "See remote land, lock it up," but Alaska is not California. There is plenty of land in Alaska for everybody to enjoy and Alaska's relatively small population can enjoy it without causing harm.

There is a lot of hypocrisy in being an environmentalist. If you do not go out and enjoy the wilderness why lock it up so that others cannot use it? "I got mine so screw everybody else" seems to be the real environmentalist agenda. They live in a house built of wood but they want to stop logging. They wear gold and diamond jewelry but they want to stop mining. They wear synthetic clothing and swing golf clubs made of epoxy, and drive a gas-eating sports car but they want to stop all oil drilling in America.

Environmentalists profess to do the humanitarian thing for the benefit of future generations but their real agenda is to lock up the land forever, allowing access only to a select few of their environmentalist friends.

Environmentalists claim to be kind and caring for all living things but they would proudly burn down a shelter that could possibly save their own life and the lives of others and do it without regard for the incredible labor it took to build that shelter. They don't seem to have a clue as to how the building materials got to the site in the first place. They would never consider carrying lumber on their backs ten or twenty miles to build a refuge. Doing such a thing in their mind is beneath them. They much prefer other people to do the work for them.

Environmentalists for the most part have never had to go out and earn the original dollar. All wealth comes from the earth. There is no other source. Environmentalists prefer to live off the people who go out and earn the original dollar by trapping, mining, and fishing yet at the same time they want to stop all these activities. If they had to endure the hardship of making their way in the wilderness they would have more respect for such activities and maybe they would have more respect for the people who built the shelters and made the sacrifices so that they could have a better life.

Senate Bill 93 violates the rights of the people and endangers human life.

Sincerely,

Henry Kroll

ALASKA STATE LEGISLATURE

SENATOR THOMAS H. WAGONER
CHAIR, SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE
VICE-CHAIR, SENATE RESOURCES COMMITTEE

May 12, 2003

MEMORANDUM

To: Representative Lesil McGuire, Chair
House Judiciary Committee

From: Senator Thomas Wagoner

Subject: CSSB 93(JUD)am - Committee Hearing

I would appreciate your hearing CS for Senate Bill 93 in the House Judiciary Committee at your earliest convenience.

I have attached a sponsor statement, and other information pertaining to this bill.

If you have any questions or would like additional information please contact my staff, Amy Seitz at 465-3421. Thank you for your time and consideration.

State Capitol, Room 427, Juneau, AK 99801 Telephone 907/465-2828 Fax 907/465-4779
SERVING THE KENAI PENINSULA

TO: Chair, Representative Lesil McGuire
Members of the House Judiciary Committee

Re: SB93(JUD)am Adverse Possession

From: Jim Colver Matanuska-Susitna Borough Assemblymember,
Professional Land Surveyor
(907) 746-5300 surveyor@pobox.alaska.net

Date: May 16, 2003

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The Borough is concerned that prescriptive rights that may have accrued after 10 years for the physical presence of a utility are being converted to a grant of an easement in this bill. This is unnecessary, under current law utilities already have prescriptive rights.

The major problem with this bill as it applies to the doctrine of adverse possession is that under the bill **private roads and trails with prescriptive rights**, that is 10 years of open and notorious use or more **will be extinguished**. Many private **landowners will loose their right of access** to their cabins and homes. The bill only allows a government to claim adverse possession for roads and trails.

Additionally, as there have been cases where adverse possession claims by legitimate title holders have been necessary due to lost deeds or destroyed records as happened when the Chitina Courthouse burnt down and the records were lost.

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together with interest on such taxes and assessments in an amount to be determined at the highest rate of interest charged with respect to delinquent property taxes by the Federal, State or local taxing authority, if any.

(8) The agreement may contain such additional terms, which are consistent with the provisions of this section, as seem desirable to the parties entering into the agreement: *Provided*, That the refusal of the landowner to agree to any additional terms shall not be grounds for the refusal of the Secretary or the State to enter into an agreement with the landowner under this section.

(c) BENEFITS TO PRIVATE LANDOWNERS. — (1) In addition to any requirement of applicable law, the appropriate Secretary is authorized to provide technical and other assistance with respect to fire control, trespass control, resource and land use planning, and the protection, maintenance, and enhancement of any special values of the land subject to the agreement, all with or without reimbursement as agreed upon by the parties, so long as the landowner is in compliance with the agreement.

(2) The provision of section 21(e) of the Alaska Native Claims Settlement Act shall apply to all lands which are subject to an agreement made pursuant to this section so long as the parties to the agreement are in compliance therewith.

(d) AUTOMATIC PROTECTIONS FOR LANDS CONVEYED PURSUANT TO THE ALASKA NATIVE CLAIMS SETTLEMENT ACT. — (1)(A) Notwithstanding any other provision of law or doctrine of equity, all land and interests in land in Alaska conveyed by the Federal Government pursuant to the Alaska Native Claims Settlement Act to a Native individual or Native Corporation or subsequently reconveyed by a Native Corporation pursuant to section 39 of that Act to a Settlement Trust shall be exempt, so long as such land and interests are not developed or leased or sold to third parties from —

(i) adverse possession and similar claims based upon estoppel;

(ii) real property taxes by any governmental entity;

(iii) judgments resulting from a claim based upon or arising under —

(I) title 11 of the United States Code or any successor statute,

(II) other insolvency or moratorium laws, or

(III) other laws generally affecting creditors' rights;

(iv) judgments in any action at law or in equity to recover sums owed or penalties incurred by a Native Corporation or Settlement Trust or any employee, officer, director, or shareholder of such corporation or trust, unless this exemption is contractually waived prior to the commencement of such action; and

(v) involuntary distributions or conveyances related to the involuntary dissolution of a Native Corporation or Settlement Trust.

(B) Except as otherwise provided specifically provided, the exemptions described in subparagraph (A) shall apply to any claim or judgment existing on or arising after the date of the enactment of the Alaska Native Claims Settlement Act Amendments of 1987.

(2) DEFINITIONS. — (A) For purposes of this subsection, the term —

(i) "Developed" means a purposeful modification of land, or an interest in land, from its original state that effectuates a condition of gainful and productive present use without further substantial modification. Surveying, construction of roads, providing utilities, or other similar actions, which are normally considered to be component parts of the development process but do not create the condition described in the preceding sentence, shall not constitute a developed state within the meaning of this clause. In order to terminate the exemptions listed in paragraph (1), land, or an interest in land, must be developed for purposes other than exploration, and the exemptions will be terminated only with respect to the smallest practicable tract actually used in the developed state;

(ii) "Exploration" means the examination and investigation of undeveloped land to determine the existence of subsurface nonrenewable resources; and

(iii) "Leased" means subjected to a grant of primary possession entered into for a gainful purpose with a determinable fee remaining in the hands of the grantor. With

RE: SB 93 (JUD)am

TO: State House Juciary Chair. Representative Lesil McGuire
Members of the House Judiciary Committee

Re: **SB93 Adverse Possession**
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My name is Teresa Williams, and I'm the Borough Attorney for the Matanuska-Susitna Borough.

I have a question regarding Section 3 of the amended SB 93. In Paragraph (c) of that section, the language appears create an exception to the general language of Section 29.71.010 of the Alaska Statutes, that is, that a municipality may not be divested of title to real property by adverse possession.

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Thank you for the opportunity to testify before you today.

my suggested Amendment

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM May 17, 2003

SUBJECT: Does CSSB 93 (Judiciary) am, the Senate-passed version of SB 93, expand the authority of public utilities to obtain title to or easements over municipal land? (Work Order No. 23-LS0518\B.a)

TO: Senator Tom Wagoner

FROM: Jack Chenoweth
Assistant Revisor of Statutes

You relate that you've been contacted by officials of public utilities who have asked whether CSSB 93 (Judiciary) am, the Senate-passed version of SB 93, expands their authority to obtain title to or easements over municipal land?

The answer to that question depends on several factors, including, notably, the status of current law and the interplay between proposed AS 09.45.052(c), added by bill sec. 4, and existing AS 29.71.010.

*

At common law, a utility may acquire an easement by prescription, functionally, though not legally, the equivalent of adverse possession.[1] *Pacific Gas and Electric Company v. Crockett Land and Cattle Co.*, 233 P. 360 (Cal. App. 1924) (upholding judgment in favor of a public utility in an action to quiet title to an alleged easement consisting of a certain right of way to install and maintain phone pole lines, and to restrain defendant landowners from interfering with use). As with claims based on adverse possession, in order to establish a prescriptive claim, the claimant must demonstrate every element that warranted the claimant's obtaining title. The claimant should be prepared to show that the possession was actual, open, and notorious, that it continued for at least the duration required, that it was exclusive, hostile, and under a claim of right:

> The elements of a prescriptive easement are essentially the same as the elements of adverse possession, except that adverse possession focuses on possession rather than use. To be entitled to a prescriptive easement, a

---

[1] An easement is not "*title* to real property." Although it constitutes an interest in the land of another under which the holder of the easement obtains a right to use the property of another for a specified purpose, an easement does not give title to land or confer any title in the land itself. 25 Am. Jur. 2d Easements and License § 2 (1966).

> party must prove (1) continuity -- that the use of the easement was continuous and uninterrupted; (2) hostility -- that the user acted as the owner and not merely one with the permission of the owner; and (3) notoriety -- that the use was reasonably visible to the record owner. A claimant must prove each element by clear and convincing evidence. Finally, a claimant must have engaged in the adverse use for at least ten years.

McDonald v. Harris, 971 P.2d 81 (Alaska 1999), at 83 (notes omitted).

In the bill, proposed AS 09.45.052(c) confirms by codified law that a public utility may obtain an easement over real property through "uninterrupted adverse notorious use" of the property used for a period of not less than ten years. Unlike the next following subsection in the bill section, subsection (c) is not further limited by the words "private land," but extends to all "real property."

*

Whether or not the codification materially changes the relationship between a public utility and its use or possession of municipal land depends on another statute, AS 29.71.010. CSSB 93 (Judiciary) am does not directly amend AS 29.71.010. That section states unequivocally that

> **No adverse possession.** A municipality may not be divested of title to real property by adverse possession.

By comparison, a similar but more expansive statute, AS 38.95.010, explicitly precludes adverse possession claims against state land:[2]

> **State's interest may not be obtained by adverse possession or prescription.** No prescription or statute of limitations runs against the title or interest of the state to land under the jurisdiction of the state. No title or interest to land under the jurisdiction of the state may be acquired

---

[2] AS 09.45.052(a), amended by bill section 3, also precludes a claim of adverse possession against state land. Before amendment, subsection (a) reads:

> (a) The uninterrupted adverse notorious possession of real property under color 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 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.

The amendment of AS 09.45.052(a) by CSSB 93 (Judiciary) am retains the protection.

> by adverse possession or prescription, or in any other manner except by conveyance from the state.

Principles of statutory construction come into play.

Under one relevant theory of statutory construction, the enactment of AS 09.45.052(c) might be held to repeal any protections provided by AS 29.71.010 to municipal interests in land apart from protections as to land title. The theory, repeals by implication, provides:

> We shall look to the purpose indicated by the legislature in passage of an act in our effort to determine whether the new enactment is intended to repeal a prior one. If enforcement of the prior statute is in irreconcilable conflict with such purpose, it will be held to have been impliedly repealed.

Peter v. State, 531 P.2d 1263, 1268 (Alaska 1975), quoted in *Hafling v. Inlandboatmen's Union*, 585 P.2d 870 (Alaska 1978) note 20. Further, in *Peter*, the court also explained that

> "if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act." *Id.* at 1267, quoting *Posadas v. National City Bank*, 296 U.S. 497, 503, 80 L. Ed. 351, 355, 56 S. Ct. 349 (1936). See also *People v. Gould*, 345 Ill. 288, 178 N.E. 133, 144 (Ill. 1931). Legislative intent is the key and if the inconsistency between the two enactments is not fatal to the operation of either, the two may stand together and there will be no implied repeal. *Peter v. State*, supra; *Lilly v. Gladden*, 220 Ore. 84, 348 P.2d 1 (Or. 1959); 1A J. Sutherland, Statutes and Statutory Construction §§ 23.09, 23.10, at 223-32 (4th ed. Sands 1973).

Id. The record of this Act to date does not, to my mind, provide evidence that it "is clearly intended as a substitute" so that the court will necessarily imply repeal of any of the protections provided by AS 29.71.010. Of course, the court may see a difference and conclude otherwise. At this time, we simply can't know the outcome.

Alternatively, the court would have an obligation to try to harmonize the language added by the amendment of AS 09.45.052 with the limitation already imposed by AS 29.71.010. The principle of statutory construction applicable here is that "all sections of an act are to be construed together so that all have meaning and no section conflicts with another." *In re Hutchinson*, 577 P.2d 1074, 1075 (Alaska 1978), quoted in *Braham v. Beirne*, 675 P.2d 1297, 1300, n. 5 (Alaska App. 1984). To follow the reasoning that the appellate court used in *Braham v. Beirne*, under the principle the court should attempt to reconcile the two statutes in order to give effect to both. It would have to consider whether AS 29.71.010 operates only to protect just a municipality's title in land (allowing AS 09.45.052(c) to operate so that a public utility may obtain easements in the

landholdings of a municipality) or whether it must read that statute more expansively, as also protecting the broader subordinate interests that involve occupancy or use of land without fee title -- including protection of the municipality's landholdings against the utility's claim of an easement.

JBC:med
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OFFICE OF
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ATTORNEY AT LAW

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ANCHORAGE, ALASKA 99510-0440

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3000 A STREET, SUITE 408
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PHONE NO.: 907 565-8818
FAX NO.: 907 565-8819

May 10, 2003
Via Facsimile to 907-465-6592

Honorable Lesil L. McGuire
House of Representatives
State of Alaska

Subject: CSSB 93 and the Law of Adverse Possession

Dear Representative McGuire:

I write concerning the above-referenced bill and the law of adverse possession which the bill would repeal. The views stated herein are solely my own and do not represent the position of any client concerning this legislation. I reside in House District 28.

I have been licensed as an attorney in Alaska for 25 years and am currently in private practice in Anchorage where my practice emphasizes real estate matters. I have been involved in litigation involving adverse possession claims and represented one of the parties, both at trial and on appeal, in *Tenala, Ltd. v. Fowler*[1], a recent Alaska Supreme Court case which addressed many of the main principles of that law.

The law of adverse possession is a complex doctrine of case and statutory law which is utilized by the courts to address a wide range of disputes over title to real estate. Under this law, the party in such disputes who has continuously used land in a manner clearly visible to the other party for a period of many years is favored over the party who does nothing and delays for the same period to bring that party's claim to court. The doctrine is followed in all fifty states[2] and has existed in American and English property law for hundreds of years. Despite its ancient origin, however, none of the thousands of courts and judges who have been called upon to apply and develop this law has ever called for its repeal as being outdated. Legal scholars concur. The legal judgment is summed up by the authors, three law professors, of a leading treatise on real property law as follows:

> Title by possession, along with prescription, is an old subject in English law; it had its counterparts in Roman law. If we had no doctrine of adverse possession, we should have to invent something very like it.[3]

Indeed, only one legal scholar has suggested that the doctrine should even be limited.[4]

In opposition to this unanimous judicial and scholarly support for the continued usefulness of the law adverse possession, one lawyer, Jonathan Tillinghast of Juneau, has opined to the Senate Judiciary Committee on behalf of a single client with large land holdings, Sealaska Corporation, that the law should be repealed because it is burdensome to such large landowners. In an effort to win support for the legislation, proponents have attempted to portray the doctrine as merely law that protects "squatters" who in turn are characterized as unsavory persons out to "steal" land from the "rightful" property owner. Citing justifications for the doctrine from decisions in prior centuries, proponents of the legislation have attempted to brand the doctrine as outdated.

An examination of the reported cases of the Alaska Supreme Court which have actually applied adverse possession law, however, reveals no instances where a party remotely similar to the evil "squatter" has been able to obtain title. Rather, the cases, which are numerous, reveal complex facts where the fair and just outcome is never as clear as the proponents of this legislation suggest. Indeed, no written or oral testimony on the Senate side even attempted to compare how these cases would turn out if the proposed legislation had then been in effect.

The complexity of this area of law is revealed by the development of this legislation in the Senate. Initially the bill simply repealed AS 09.10.030 as a statute of limitations on any claim which was based on a recorded interest in property. When legal counsel for the State advised the committee what the effect of such a repeal would have on the State's transportation interests under the related doctrine of prescription, an exception to the proposed statute was added. When utilities advised concerning the effect of the statute on the provision of utility service, the exception was broadened to include utility prescriptive rights. When the proponents were advised that their assertions about how the bill would affect boundary disputes[5] were inaccurate, an exception was drafted overnight to attempt to preserve the law in the area. There remain still other areas which the proponents of this legislation have failed to address.[6]

What this evolution of the bill reveals to the fair-minded is at a minimum that the law of adverse possession serves many useful purposes. Rather than repealing wholesale a body of law followed in every state, a more cautious approach would have been to leave AS 09.10.030 untouched and attempt to create an exception to the doctrine to deal with the "squatter" problem, defined in some way. This would provide the least disturbance to existing law and provide a bill whose effect could be reasonably predicted.

But even this effort is questionable without a demonstration that "squatters" are common and that the existing law does not adequately deal with them. Existing law, for example, requires the adverse possessor to prove all elements of the claim by clear and convincing evidence[7], a burden only slightly easier than the beyond a reasonable doubt standard for a criminal prosecution. And Alaska native corporations already have federal statutory exemption from the doctrine with respect to ANCSA lands which have not been developed.[8] Apparently, Sealaska has had to defend only one such claim and did so successfully under existing law. This is not a launching ramp for the radical revision of established law which SB 93 represents.

At a personal financial level, this bill will be a great boon to my law practice. Clients with cases that would have been clear under existing law will now be in doubt thereby creating a new incentive for expensive litigation. All of the nuances of the law of adverse possession settled by hundreds of years of cases will have to addressed entirely anew with results which no lawyer can predict.

I respectfully urge you to reject this radical legislation. At a very minimum, I hope that as chair of the House Judiciary Committee, you will hold hearings at which this legislation can be more carefully scrutinized than it has been to date. I would like to testify when and if the bill reaches your committee.

Sincerely,

Ronald L. Baird

---

[1] 921 P.2d 1114 (Alaska 1996)

[2] R. Powell and M. Wolf, Powell on Real Property, vol. 16, sec. 91.04[1] (2000); D. Thomas, Thompson on Real Property, v 10, sec 87.01 (2d ed 1998)

[3] R.Cunningham, W. Stoebuck, and D. Whitman, The Law of Property, 815 (2d ed. 1993).

[4] One law professor has suggested that the law should be narrowed for environmental reasons to preserve land in its "wild" state. J. Sprankling, *An Environmental Critique of Adverse Possession*, 70 Cornell L. Rev. 816, 864 (1994). He has not been joined by anyone else.

[5] Six of the nine cases where the Alaska Supreme Court has approved a claim of adverse possession have been in the context of a boundary dispute. *Tenala Ltd. v. Fowler*, 921 P.2d 1114 (Alaska 1996)(incomplete deeds); *Nome 2000 v. Fagerstrom*, 799 P.2d 304 (Alaska 1990)(native allotment claimant versus mining claimant); *Smith v. Krebs*, 768 P.2d 124 (Alaska 1989)(two valid deeds to overlapping parcels); *Bentley Family Trust, Bank of California v. Lynx Enterprises, Inc.* 658 P.2d 761 (Alaska 1983)(slough which had been partially filled); *Roberts v. Brooks*, 649 P.2d 710 (Alaska 1982)(house built across boundary when two lots owned by one owner who later conveyed lots to separate parties); *Nelson v. Green Construction Company*, 515 P.2d 1225, 1226 (Alaska 1973)(patents to overlapping homesteads).

[6] The proponents have not addressed entry on land pursuant to an oral gift (*see, Vezey v. Green*, 35 P.3d 14 (Alaska 2001)(grandparents gift to granddaughter)) and some types of reasonable mistake (*see, Hubbard v. Curtiss*, 684 P2d 842 (Alaska 1984)). Also not addressed are the numerous cases resolving disputes over driveways and other access between private property owners. *See, e.g., Penn v. Ivey*, 615. P.2d 1, 2 (Alaska 1980).

[7] *Curran v. Mount*, 657 P.2d 389, 391 (Alaska 1982).

[8] 43 U.S.C. sec. 1636(d)(1)(A).

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 93
(S) Publish Date: 4/2/03

Revision Date/Time (Note if correction):
Dept. Affected: DCED

Title: Adverse Possession
BRU: Community Assist. & Econ. Dev. (405)
Component: Community & Business Development

Sponsor: Senator Wagoner
Requester: Senate Labor & Commerce
Component No.: 2486

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type–Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation would change current adverse possession law so that title holders of real property under AS 40.17 would no longer be required to initiate eviction processes within a ten-year limit to preclude adverse possession. A property owner could initiate an eviction process at any time. This legislation has no fiscal impact on this division.

Prepared by: Gene Kane, Acting Director — Phone 907-269-4578
Division: Community & Business Development — Date/Time 3/11/03 9:17 AM
Approved by: Edgar Blatchford, Commissioner — Date 3/11/2003
Agency: Department of Community & Economic Development

(4) "public utility" or "utility" includes every corporation whether public, cooperative, or otherwise, company, individual, or association of individuals, their lessees, trustees, or receivers appointed by a court, that owns, operates, manages, or controls any plant, pipeline, or system for

(A) furnishing, by generation, transmission, or distribution, electrical service to the public for compensation;

(B) furnishing telecommunications service to the public for compensation;

(C) furnishing water, steam, or sewer service to the public for compensation;

(D) furnishing by transmission or distribution of natural or manufactured gas to the public for compensation;

(E) furnishing for distribution or by distribution petroleum or petroleum products to the public for compensation when the consumer has no alternative in the choice of supplier of a comparable product and service at an equal or lesser price;

(F) furnishing collection and disposal service of garbage, refuse, trash, or other waste material to the public for compensation;

Chapter 40.17. RECORDING OF DOCUMENTS

Sec. 29.71.010. No adverse possession.

A municipality may not be divested of title to real property by adverse possession.

Sec. 38.95.010. State's interest may not be obtained by adverse possession or prescription.

No prescription or statute of limitations runs against the title or interest of the state to land under the jurisdiction of the state. No title or interest to land under the jurisdiction of the state may be acquired by adverse possession or prescription, or in any other manner except by conveyance from the state.

Subject: SB 93
Date: Sun, 18 May 2003 09:17:20 -0800
From: Colver Surveying <surveyor@pobox.alaska.net>
To: vanessa_tondini@legis.state.ak.us

Good Morning Vanessa-

How are you holding out? Real tired I bet. I see that SB93 is scheduled in Judiciary this morning.

I would like to encourage Rep. McGuire to hang on to the bill to work on it over the interim. More time and public input is needed to assess the impacts of messing with an 800 year legal doctrine, and try to find a way to address the concerns of Seaalaska without depriving Alaskans of access to their homes and cabins.

Thank You,

Jim Colver

746-5300
232-6953 cell

STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES
OFFICE OF THE COMMISSIONER

3132 CHANNEL DRIVE
JUNEAU, ALASKA 99801-7898

TEXT: (907) 465-3652
FAX: (907) 586-8365
PHONE: (907) 465-3900

April 10, 2003

The Honorable Thomas Wagoner
Alaska State Legislature
State Capitol, Room 427
Juneau, AK 99801-1182

Dear Senator Wagoner:

Thank you for taking the time to meet with Deputy Commissioner John MacKinnon and I last week regarding Senate Bill 93. I appreciate you hearing our concerns and accommodating language changes to the bill to address them. With the addition of the language protecting the state's interest, the department no longer has any objection with the passage of the bill.

Thank you again for working with us. I look forward to working with you again.

Sincerely,

Mike Barton

Mike Barton
Commissioner

25A-T31LH

Subject: **SB 93**
Date: Fri, 25 Apr 2003 14:17:53 -0800
From: "Rick Kauzlarich" <rick_kauzlarich@dot.state.ak.us>
To: "Amy Seitz" <Amy_Seitz@Legis.state.ak.us>
CC: "Michael L Downing" <mike_downing@dot.state.ak.us>,
"Dennis Poshard" <dennis_poshard@dot.state.ak.us>,
"John S. MacKinnon" <john_mackinnon@dot.state.ak.us>

Hello Amy,

Regarding SB 93 and the language from the working draft of Section 2:

"... land necessary for the construction, management, operation, or maintenance of a public transportation or public access right of way ... "

The phrase "construction, management, operation, or maintenance" is understood by us to describe the typical use by DOT of the state's rights of way – the words are inclusive. Also, I checked with our Regional Right of Way Chiefs and they do not see gravel pits or camps being effected one way or the other by SB 93. Usually the state is granted the use of a gravel pit, etc., through some other type of legal instrument other than "adverse possession."

Best regards,

Rick

~~~~~~

G. E. Rick Kauzlarich, State Right of Way Chief

State of Alaska DOT & PF

3132 Channel Drive Juneau AK 99801-7898

office: 907-465-6962 / toll free: 800-467-6955

fax: 907-465-5240 / text: 907-465-3652

~~~~~~

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM May 8, 2003

SUBJECT: Questions/responses concerning specific provisions contained in CSSB 93 (Judiciary) (Work Order No. 23-LS0518\B)

TO: Senator Tom Wagoner

FROM: Jack Chenoweth
Assistant Revisor of Statutes

Ongoing responsibility for further work on this measure has now been transferred to me. Accordingly, the three May 7 questions and responses prepared by Jon Tillinghast have been assigned to me for response. I did not hear the Senate's deliberations on the measure, so, for purposes of this document, I assume that the statements set out accurately reflect the content of the debate.

Section 3 does not give [the Department of Transportation and Public Facilities], or any other government entity or utility, any right to take private property without compensation that they do not already have. . . . .

Jon Tillinghast's response rebuts the argument by pointing out that (1) the government may take land without payment of compensation through adverse possession, and (2) whether the taking without payment of compensation is unconstitutional, as a violation of the Fifth Amendment [or, he might have added, art. I, sec. 18 of the Alaska Constitution], has not been litigated in the long history of the nation.

Fundamentally, I have to agree with the concluding observation that the measure under consideration does not provide "government [a] right to take property without compensation . . . that it doesn't have today."

[C]oncern was expressed that the phrase "at some time" on p. 2, lines 2 - 3, might mean that somebody could surface who claims that an ancestor possessed the land "at some time" in the very distant past, and demand to reclaim it. . . . .

and

The words "at some time" on p. 2 are technical conforming changes to existing law. . . . .

The caution that the provisions need to be read in context and the characterization that "at some time" is no more than a conforming change necessitated by the addition, in subsection (b), of a

different -- an open-ended -- period for commencing an action when the ownership interest is based on holding a recorded title are, in my judgment, accurate.

As the current law (AS 09.10.030 as it reads today) applies, there is a ten-year time requirement that cuts off a claim of adverse possession and that must be met as a part of the basis of a claim for recovery. That time requirement may include time during which "an ancestor" of the plaintiff held the title -- in other words, that "ancestor's" holding may be counted toward meeting the ten-year period. The amendments made in the measure's page 1, line 14 and page 2, lines 1 - 3 (subsection (c)) don't change that.

With the proposed expansion of the section by the inclusion of the new language of subsection (b), an action to quiet title or to compel ejectment is not necessarily limited by the ten-year period--it may be brought outside that ten-year limitation in (a)--but it does require that the plaintiff hold recorded title. Unless the plaintiff shows record title, he or she may not maintain an action under (b). If the plaintiff holds record title, then I don't see that reference to "an ancestor, a predecessor, or the grantor of the plaintiff" has relevance to whether or not the plaintiff may bring a quiet title or ejectment action under subsection (b).

*

Would it be clearer if subsections (a) and (b) were revised to say:

> * **Section 1.** AS 09.10.030 is amended to read:
>
> **Sec. 09.10.030. Actions to recover real property [IN 10 YEARS].** **Except as provided in (b) of this section, a** [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.
>
> * **Sec. 2.** AS 09.10.030 is amended by adding a new subsection to read:
>
> (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 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.

or something substantially similar, together with an appropriate conforming amendment to bill section 4?

JBC:mdr
03-108.mdr

Subject: SB93
Date: Mon, 3 Mar 2003 08:16:55 -0900
From: "Williams, Dave" <Dave_Williams@health.state.ak.us>
To: "'mary_jackson@legis.state.ak.us'" <mary_jackson@legis.state.ak.us>
CC: "'linda_sylvester@legis.state.ak.us'" <linda_sylvester@legis.state.ak.us>

I generally agree with the principle of SB93. Thanks to Senator Wagoner for introducing the bill.

Dave W. Williams
Manager, State Program Financing
Division of Medical Assistance
Department of Health and Social Services
P.O. Box 110660
Juneau AK 99811-0660

Phone: (907) 465-5826
Fax: (907) 465-2204

Subject: Senate Bill 93
Date: Sat, 01 Mar 2003 08:34:28 -0900
From: axtell <chihuahua@gci.net>
To: mary_jackson@legis.state.ak.us

Dear Senator Wagoner:

Thank you for bringing this bill to the Legislature.
Important to delete/dismiss archaic bills that could bring hardship to all Alaskans.
Hopefully you can present a bill to the legislature deleting intrusive trails or roads imposed on private property.

Thank you,

Bruce Ohmer and Sandra Jane Axtell
Palmer Alaska

SB 93: Legislation to Limit the Circumstances Under Which A Person May Divest a Landowner of Title to Its Land Under the Doctrine of Adverse Possession

A. Overview of the Legislation

"Adverse possession" is the doctrine under which a person--even a squatter acting in bad faith--can take another person's property without compensation by simply possessing it, in an open and hostile way, for a certain period of years. It is a doctrine born in the Middle Ages under circumstances that have little applicability to 21st Century Alaska, and it offends Alaska's abiding respect for private property ownership.

SB 93 would limit the availability of this doctrine to circumstances in which a person has, in good faith, occupied property under color of title for seven years. Beyond that situation, "adverse possession" is a doctrine inimical to the concept of private property ownership. And it imposes a particularly harsh burden on private landowners in Alaska who, because of the doctrine, are often charged with the impossible task of policing large remote landholdings to assure themselves that no squatter has taken residence. That burden is an economic waste, and serves no valid public policy.

B. The Origins and Purpose of the "Adverse Possession" Doctrine

1. The Doctrine's Original Rationale--Possession was Equated with Ownership

"Adverse possession" is a doctrine that rewards possession of land at the expense of the landowner. The doctrine has its roots in the feudal concept of "seizin." In the early Middle Ages, "ownership" of land was proven not by title or deed, but rather by actual possession. If a person was forcefully expelled from his property, the trespasser became

the land's new "owner," and the dispossessed person could regain "ownership" only by himself resorting to force. [1]/

Gradually, the dispossessed "owner" was given a legal remedy to regain possession--a remedy which, by virtue of a statute issued under Henry VIII, must be exercised within 60 years of dispossession. Thus was borne the thought that a person could recover his land from an "adverse possessor," but only if he acted within a specific period of time. [2]/

Remember, though, that in those days possession--or "seizin"--*was* title. Therefore, by giving the "adverse possessor"--or "disseizor"--the opportunity to bar the person he dispossessed from reclaiming his property after 60 years, feudal courts were, in their minds, doing no injustice to the prior occupant, since that occupant had lost the basis for his claim of "ownership" when he was forceably dispossessed.

2. A New Rationale--Possession was the Best Proof of Ownership

Gradually, English common law came to recognize the concept of conveying and holding land by deed. "Title" became something different from, and superior to, mere "possession." And so the doctrine of "adverse possession" needed a new rationale.

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[1] / 5 George W. Thompson, *Commentaries on the Modern Law of Real Property* (1979) ("*Commentaries*") at 573-76.

[2] / *Commentaries, supra* at 574-76. Actually, "adverse possession" rules can be traced further back, to the Code of Hammurabi, which provided, in part, that:

> *If a captain or a soldier has neglected his field, his garden and his house, instead of working them; and another takes his field, his garden and his house, and works them for three years; if he returns and desires to till his field, his garden, and his house, they shall not be given to him. He that has taken and worked them shall continue to use them.*

The Hammurabi Code and the Sinaitic Legislation at 32-33 (Chilperic Edwards ed., 1904).

The virtue of "seizin," of course, was that it was obvious who is "seized" of a particular piece of property--the person living on it. "Title," conversely, was the source of considerable dispute, since there then existed no reliable, centralized recording system to resolve conflicting claims of "title." As a result:

> *In an era of comparatively scarce land, decentralized records and crude surveying techniques, lengthy possession may have been the best possible proof of ownership.*

[3]/ Thus, while possession no longer equated with ownership, possession remained the best evidence of "title," and so the doctrine of adverse possession continued to serve some worthwhile purpose. "Ultimately, the 1623 Statute of Limitations required that suits to recover possession of land be brought within twenty years. The Statute recited that this limit was necessary for 'quieting men's estates, and avoiding of suits...'" [4]/

3. The New American Purpose--Social Engineering

In James I's England, if a person owned land, he probably lived on it. [5]/ Even by the 16th century, there was precious little wild land in England that a person might own, but not make productive use of. [6]/

This was not true in North America, where vast tracts of wilderness might lie in private ownership. Here, the assumption that ownership was reliably proven by physical possession did not hold true:

> *Transplanted to the abundant, sparsely populated wild lands of North America, however, the assumptions of the [doctrine of adverse possession] ...failed. The terrain was too hostile, the*

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[3] / Sprankling, *An Environmental Critique of Adverse Possession,* 79 Cornell Law Rev. 816, 822 ("*Critique*") (1994).
[4] / *Critique, supra* at 823.
[5] / James I promulgated the 1623 statute just quoted.
[6] / By 1696, only 16% of England's land were uncultivated forest lands. *Critique, supra* at 822, n. 25.

> *forests too impenetrable and the distances too vast for most owners to reside upon or even to inspect their properties regularly. More importantly, possession of land in the English sense, characterized by residence, cultivation or improvement, was often impractical. The minor acts, greatly separated in time, that characterized land use in wilderness areas were unlikely to afford constructive notice to the owner who did inspect occasionally.*

Critique, supra at 823. "Adverse possession," then, needed a new purpose, and found one in our 19th century urge to settle the West. The modern doctrine " was developed when much of the continental United States was unsurveyed wilderness," and our courts and legislatures resultantly "adopted a public policy that as much land should be put to use as possible." [7] Under the new theory of adverse possession, the squatter was to be rewarded for making use of wild land, even at the expense of the person who owned it:

> *Beginning in the nineteenth century, American courts serving the ideology of economic expansion reformulated adverse possession in the pursuit of national productivity. These courts transformed the doctrine from a mechanism designed to protect the title of the true owner against false claims into a tool designed to transfer title to wild lands from the idle true owner to the industrious adverse posessor.*

Critique, supra at 821 (emphasis original).

The American justification for the doctrine also took on something of a Marxist flavor. Vast expanses of public lands were conveyed to large, absentee landlords--principally, the railroads. As pioneers struck west and inadvertently (or otherwise) homesteaded then-or-future railroad land, Western state legislators, and courts, concluded that disputed land should belong to the worker rather than the absentee capitalist. *Critique, supra* at 843. For this reason, the periods necessary to establish title by "adverse possession" tend to shrink as one proceeds westward--from the old 20-year

English rule still prevalent in the original colonies, to as little as five years in many western states.

C. Adverse Possession in 20th Century Alaska--A Doctrine Without a Reason

To this day, some courts, including the Alaska Supreme Court, maintain that the doctrine of adverse possession serves a useful public purpose because "society will benefit from someone's making use of land the owner leaves idle." [8]/

One might argue that there is considerable "idle" land in Alaska's ***public*** domain. However, in Alaska as elsewhere, neither the state nor federal government can be divested of title through adverse possession. AS 09.45.052(a). And Alaska has precious little "idle" private land.

The largest private landowners in Alaska are the Native corporations established under the Alaska Native Claims Settlement Act. Those lands were conveyed both in settlement of Alaska Natives' aboriginal claims, and to meet the "real economic and social needs of Natives." ANCSA, §1. ANCSA lands, then, and every acre of them, serve an important legal, social and economic purpose. They are not, any of them, "idle" in that sense.

Congress, in fact, has recognized that fact, and has accordingly extended ANCSA lands some protection from adverse possession claims as long as they remain undeveloped. 43 U.S.C. §1636(d). But ANCSA corporations often acquire other remote lands for future resource development purposes, as will other private landowners as time goes by. To the extent that these lands are not developed, it is because development now

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[7] / *Seddon v. Harpster*, 403 So. 2nd 409, 413 (Florida 1981).
[8] / *Tenala, Ltd. v. Fowler*, 921 P.2nd 1114 (Alaska 1996).

would be an economic waste, and there is no sound public policy that should prevent a private landowner from investing those lands for future generations.

The last remaining modern justification for adverse possession is that it "keep[s] stale causes out of court." *Tenala, Ltd. v. Fowler, supra.* But, in fact, it does just the opposite. Adverse possession cases involve untrustworthy testimony about who-possessed-what 10 or 20 years ago; conversely, and "considering current methods of record storage on microfiche, computer disks and data tapes," claims based on record ownership will never grow stale. [9]/

Similarly, allowing adverse possession claims promote litigation, while limiting them discourages it. This because:

> *[b]right line standards generally deter litigation...The record title standard draws an exceedingly bright line: the holder of record title always prevails. In contrast, adverse possession as applied to wild lands is an indeterminate, murky standard under which results can rarely be predicted with certainty.*

Critique, supra at 878. The fact of the matter, as Florida's Supreme Court observed, is that "[w]ith modern technology and computerized transactions our society is now more capable of accurately establishing legal interest to property through paper title than through possession." *Seddon v. Harpster,* 493 So.2nd at 414.

Continued recognition of "squatters' rights" serves no useful public purpose in Alaska today, and it disserves others. Apart from its impact on private property ownership generally, and implementation of ANCSA in particular, "[a]dverse

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[9] / *"Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession,"* 31 Land and Water Law Review 79, 104 (1996) (*"Outlaws"*).

possession...erode[s] the effectiveness and utility of both recording and marketable title statutes by creating uncertainty." *Outlaws, supra* at 97.

The doctrine ought to be limited to those few situations where some equity might lie in the adverse possessor's favor, and SB 93 attempts to do just that by amending only AS 09.10.030, which currently allows land to be taken by bad faith trespassers, while leaving untouched AS 09.45.052, which allows adverse possession claims by persons with a good faith claim to the property based on color of title.

AS 09.10.030 is the squatters' statute. The adverse possessor need not occupy the property under "color of title"--that is, a deed or other conveyance. And the squatter need not even occupy the property in good faith. [10]/ As one commentator puts it, this statute "gives title not only to one who because of good faith error occupies the land of another but also to a person who knowingly sought to appropriate another's land." [11]/

Under this statute, the squatter must adversely possess the property for 10 years. After that, the statute, which is framed as a statute of limitations, bars the property's owner from bringing any action against the squatter to recover his property.

Section 1 of SB 93 would amend this statute to provide that the owner of record could recover his or her land--by a quiet title or ejectment action--at any time. [12]/ Because of computerized land records, the record owner's claim will never, as a practical matter, grow stale.

AS 09.45.052 is Alaska's second adverse possession statute, and it deals with adverse possession that is based on "color of title." In other words, the adverse

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[10] / *Hubbard v. Curtiss*, 684 P.2nd 842, 848 (Alaska 1984).
[11] / 7 Richard R. Powell, *Powell on Real Property*, ¶1012(3) (1993).

possessor has some deed or other document purporting (but for some reason failing) to convey title to the property being possessed. Unlike the statute amended by Section 1, this statute requires good faith on the part of the possessor--in other words, an honest and reasonable belief that the possessor really owns the land. *Ault v. State*, 688 P.2nd 951, 956 (Alaska 1984). The legislation leaves this section untouched.

Finally, Section 2 of the legislation would make the new legislation applicable to any adverse possession claim that has not "vested" by the effective date of the legislation. Adverse possession claims "vest" when the adverse possessor has met the statutory requirements for the requisite number of years--under current Alaska law, 10 years (or seven years for claims under color of title). [13]/ Serious constitutional questions would arise if the legislation purported to extinguish already-vested adverse possession claims; conversely, there would appear to be no constitutional difficulty in affecting unvested claims, since an adverse possessor has no protected right in the mere expectation that, eventually, he or she may possess the land for a sufficient period of time. [14]/

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[12] / To the extent that this statute governs other types of real property claims, the 10-year statute of limitations would be retained.

[13] / *Markovich v. Chambers*, 857 P.2nd 906, 908 (Or. App. 1993).

[14] / *See Lovell v. Magnet Cove School District No. 8*, 782 S.W.2nd 41, 42 (Ark. 1990) (change in Arkansas adverse possession statutes applicable to unvested adverse possession claims).

ALASKA STATE LEGISLATURE

SENATOR THOMAS H. WAGONER
CHAIR, SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE
VICE-CHAIR, SENATE RESOURCES COMMITTEE

May 14, 2003

Tom Irwin, Commissioner
Department of Natural Resources
400 Willoughby Ave 5th Floor
Juneau, Alaska 99801

Dear Commissioner:

It has been brought to my attention that there is some concern that the wording in Section 4 subsection (c) of Senate Bill 93 would give public utilities the ability to gain interest in easements on state land.

This issue, and similar issues have been discussed many times with our legal department. I have been told from the Legislative Legal department that public utilities would not have any more rights than they currently have, and currently they cannot take state or federal lands through adverse possession.

It is not my intent, or the intent of the Legislature to give public utilities the ability to gain an easement on state or federal land for utility purposes.

Regards,

Tom

Thomas Wagoner, Senator

State Capitol, Room 427, Juneau, AK 99801 Telephone 907/465-2828 Fax 907/465-4779
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1130 WEST SIXTH AVENUE, SUITE 100
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May 14, 2003

FACSIMILE NO.: (907) 465-6592

Honorable Lesil L. McGuire
House of Representatives
State of Alaska

RE: CSSB 93

Dear Representative McGuire:

I have been in government and private practice in the state of Alaska for 23 years.

My practice emphasizes real estate and over my career I have handled approximately a dozen matters involving adverse possession. I respectfully suggest that CSSB 93 inadvertently changes one of the few areas where well-defined statutory provisions and common law currently provide clear legal guidance to adjudicate the rights of those whose actual use of land is in conflict with record title. Further, the utility of the doctrine survives intact. In all of the matters I have addressed, only one matter required judicial intervention once the facts were established.

Adverse possession rarely rises in the context of "squatters." The experience of some countries where squatters over a period of months or a few years have taken control of real estate is not the experience under American law. Without color of title, adverse possession requires 10-years of uninterrupted hostile, open and notorious use, without permission. The use must be established by clear and convincing evidence, an extremely high standard in civil cases. Even large landowners should be familiar enough with their holdings to eject someone who moves a cabin or other permanent use on their property, especially over 10 years.

An example recently brought to my attention concerns a wall which was placed several inches over a neighbor's property line 20-years ago. Relocation of the wall would cost in excess of $200,000.

During that period of time the owners of the adjacent properties changed several times. The doctrine of adverse possession provides a socially effective way of establishing a new property line in this instance. The wall has been clearly visible to the world and there never was any question as to whether an encroachment existed until 20-years later. Under existing law the neighbors simply have to establish that the wall was in place for the 10 requisite years; and that it was in fact not there with permission. Aerial photography, building permits, as-builts and testimony of the neighbors as to when the wall was built were sufficient to establish these facts.

By contrast, since § 3 of SSB 93 includes a good faith but mistaken belief requirement in boundary disputes, in this case the parties would have to go back and find the parties who actually placed the wall in the first instance. Those people are no longer in Alaska and would be very difficult to contact. The question of whether the original intent was in bad faith, but subsequent purchasers continued the use in good faith is obviously the first question that members of my profession will litigate to resolve this problem. In those circumstances, when would the time start running -- when the subsequent good faith buyer bought the property? The above example is but one example of the mischief that will occur when one drafts special interest litigation and then tries to carve out exceptions to ameliorate its inequities.

Exemptions have been made for the state and for utilities to adversely possess property without even a requirement of good faith. Under Alaska law, adverse possession by the state is an act of eminent domain which requires just compensation until the statute of limitations passes. Presumably, the same might apply to utilities. CSSB 93's new language in § 4 may simply be a restatement of current law, or it may be argued that it intends to allow the state to intentionally and in bad faith acquire private property without paying just compensation. Clearly, that is another area that would be subject to future judicial interpretation. This is unfortunate as the law is well settled now and is appropriately protective of private rights. Finally, one could cynically observe that the state and private utilities are allowed an opportunity to exercise bad faith actions or intentional actions not afforded to the private citizens of the state. Whether that is based upon a belief that institutions will rarely act in bad faith or to accommodate simple political expediency remains to be decided. However, as public policy, I seem to see little justification for a distinction between the doctrine that applies equally to the state, utilities, and citizens.

I should note that this bill has had relatively little exposure to the Alaska Bar. I have only recently heard of the bill despite my extensive practice in this area. I suggest at a minimum that the matter be tabled until the next session so that proper input from the Alaska Bar can be sought and the implications of the bill properly debated.

If I may be of any further assistance, please do not hesitate to call.

Very truly yours,

ASHBURN & MASON, P.C.

Donald W. McClintock

cc: Representative Les Gara
Representative Max Gruenberg

State Of Alaska
Legislative Affairs Agency
Kenai LIO
145 Main St Lp,Ste 217
Kenai, AK 99611
907-283-2030

Date:_____05-14-03_____

Please accept the enclosed original(s) of written testimony for the __House Judiciary Committee_____ teleconference hearing that was scheduled on __05-14-03_____.

A copy of this testimony was transmitted to your committee via fax on _____05-14-03_____.

Thank You,

_____Kenai LIO_____

Henry Kroll
PO Box 526
Kasilof, Alaska 99610

5/13/03

To all Alaska Senators: and Representatives

Dear Senators:

Senate bill 93 is an infringement upon basic human rights and is indirect conflict with rights held by citizens in other states.

Article IV Sections 2. U.S. Constitution: The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

In other words, abolishing and or restricting the rights of citizens in Alaska when they can enjoy those same rights in other states makes this legislation unconstitutional. **The problem is this Senate caved in to the big the corporations who own large tracts of land with natural gas potential in South Western Alaska! You guys are supposed to be working for the citizens not corporations!**

Amendment XIV Section 1 U.S. Constitution: "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment IV Constitution of the United States: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 16 Constitution of the State of Alaska: PROTECTION OF RIGHTS. "No person shall be involuntarily divested of his right to the user of waters, his interests in lands, or improvements affecting either purpose, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law."

You are sworn by the following oath:

Article: XII General Provisions The constitution of the State of Alaska: Section 5, OATH OF OFFICE: All public officers, before entering upon the duties of their offices, shall take and subscribe to the following oath or affirmation: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Alaska , and that I will faithfully discharge my duties as.....to the best of my ability."

Having a shelter or some kind of roof over your head is a basic human right. Abolishing Adverse Possession laws in the State of Alaska and destroying all refuge shelters is not right. Destroying the personal effects and life works of trappers, hunters, and fishermen who built the refuge shelters is a crime perpetuated by this Senate.

Wilderness refuge shelters could save your life.

Wilderness refuge shelters can save your life and are needed for safety purposes. Many people have encountered adverse weather conditions in remote bush Alaska and have had to find shelter. A sudden storm or cold snap in the interior can be life threatening. Many Alaskans have stumbled across a refuge shelter stocked with food and firewood in the nick of time and it saved their lives. Some of them are grateful enough to cleaned up their mess and even cut more firewood before they left. I am sure there are people out there who are thanking their lucky stars today for the emergency shelter that saved their lives. If you enact Senate Bill 93 to destroy wilderness shelters people will die.

I can understand the California environmentalist mindset of "See remote land, lock it up," but Alaska is not California. There is plenty of land in Alaska for everybody to enjoy and Alaska's relatively small population can enjoy it without causing harm.

There is a lot of hypocrisy in being an environmentalist. If you do not go out and enjoy the wilderness why lock it up so that others cannot use it? "I got mine so screw everybody else" seems to be the real environmentalist agenda. They live in a house built of wood but they want to stop logging. They wear gold and diamond jewelry but they want to stop mining. They wear synthetic clothing and swing golf clubs made of epoxy, and drive a gas-eating sports car but they want to stop all oil drilling in America.

Environmentalists profess to do the humanitarian thing for the benefit of future generations but their real agenda is to lock up the land forever, allowing access only to a select few of their environmentalist friends.

Environmentalists claim to be kind and caring for all living things but they would proudly burn down a shelter that could possibly save their own life and the lives of others and do it without regard for the incredible labor it took to build that shelter. They don't seem to have a clue as to how the building materials got to the site in the first place. They would never consider carrying lumber on their backs ten or twenty miles to build a refuge. Doing such a thing in their mind is beneath them. They much prefer other people to do the work for them.

Environmentalists for the most part have never had to go out and earn the original dollar. All wealth comes from the earth. There is no other source. Environmentalists prefer to live off the people who go out and earn the original dollar by trapping, mining, and fishing yet at the same time they want to stop all these activities. If they had to endure the hardship of making their way in the wilderness they would have more respect for such activities and maybe they would have more respect for the people who built the shelters and made the sacrifices so that they could have a better life.

Senate Bill 93 violates the rights of the people and endangers human life.

Sincerely,

Henry Kroll

ALASKA STATE LEGISLATURE

SENATOR THOMAS H. WAGONER
CHAIR, SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE
VICE-CHAIR, SENATE RESOURCES COMMITTEE

CS for SB 93(JUD)

Sponsor Statement

"An Act relating to limitations on actions to quiet to, eject a person from, or recover real property or the possession of it; relating to adverse possession; and providing for an effective date."

Adverse possession, or "squatters rights", is the doctrine in which a person may receive the title to property simply by possessing it. The Doctrine of Adverse Possession was born some 800 years ago during the Middle Ages, but incredibly still applies in the State of Alaska.

The current doctrine places undue hardships on Alaska's private landowners by charging them with the impossible task of policing their large or remote property. SB 93 would repeal the Doctrine of Adverse Possession in the case of "bad faith" trespassers, giving private property owner's security in knowing their property cannot be taken by squatters. This bill does not affect any existing rights that one may have already acquired through adverse possession, and provisions have been made to protect the means to settle boundary disputes.

Senate Bill 93 gives the state, or political subdivisions, the right to claim land through adverse possession for highways, streets, roads, and trails. This will enable the Department of Transportation to continue providing maintenance and upgrades on roads with minimal complications. It also makes an exception for public utilities gaining rights to easements for utility purposes.

Under existing law, a person is prohibited from taking government property by adverse possession. SB 93 simply accords some equal dignity and protection to private land ownership rights.

State Capitol, Room 427, Juneau, AK 99801 Telephone 907/465-2828 Fax 907/465-4779
SERVING THE KENAI PENINSULA

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: May 12, 2003 **FURTHER REFERRALS:**

Date of Committee Action: May 18, 2003

The JUDICIARY Committee considered: **CSSB 93(JUD) am**

CS FOR SENATE BILL NO. 93(JUD) am **ADVERSE POSSESSION**

"An Act relating to limitations on actions to quiet title to, eject a person from, or recover real property or the possession of it; relating to adverse possession; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero
CED	1			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Ogg		✓		
	Guggenberger		✓		
	HANSEN	X			
	SAMUELS			✓	
	Gara			✓	
	Holm			✓	
Chair:	McGuire			✓	
Chair:					

ALASKA STATE LEGISLATURE

SENATOR THOMAS H. WAGONER
CHAIR, SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE
VICE-CHAIR, SENATE RESOURCES COMMITTEE

May 12, 2003

MEMORANDUM

To: Representative Lesil McGuire, Chair
House Judiciary Committee

From: Senator Thomas Wagoner

Subject: CSSB 93(JUD)am - Committee Hearing

I would appreciate your hearing CS for Senate Bill 93 in the House Judiciary Committee at your earliest convenience.

I have attached a sponsor statement, and other information pertaining to this bill.

If you have any questions or would like additional information please contact my staff, Amy Seitz at 465-3421. Thank you for your time and consideration.

State Capitol, Room 427, Juneau, AK 99801 Telephone 907/465-2828 Fax 907/465-4779
SERVING THE KENAI PENINSULA

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 93
(S) Publish Date: 4/2/03

Revision Date/Time (Note if correction):
Dept. Affected: DCED
Title: Adverse Possession
BRU: Community Assist. & Econ. Dev. (405)
Component: Community & Business Development
Sponsor: Senator Wagoner
Requester: Senate Labor & Commerce
Component No.: 2486

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation would change current adverse possession law so that title holders of real property under AS 40.17 would no longer be required to initiate eviction processes within a ten-year limit to preclude adverse possession. A property owner could initiate an eviction process at any time. This legislation has no fiscal impact on this division.

Prepared by: Gene Kane, Acting Director
Phone 907-269-4578
Division: Community & Business Development
Date/Time 3/11/03 9:17 AM
Approved by: Edgar Blatchford, Commissioner
Date 3/11/2003
Agency: Department of Community & Economic Development

(Revised 9/2002 OMB)

ALASKA STATE LEGISLATURE

SENATOR THOMAS H. WAGONER
CHAIR, SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE
VICE-CHAIR, SENATE RESOURCES COMMITTEE

CS for SB 93(JUD)

Sponsor Statement

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SERVING THE KENAI PENINSULA

(4) "public utility" or "utility" includes every corporation whether public, cooperative, or otherwise, company, individual, or association of individuals, their lessees, trustees, or receivers appointed by a court, that owns, operates, manages, or controls any plant, pipeline, or system for

(A) furnishing, by generation, transmission, or distribution, electrical service to the public for compensation;

(B) furnishing telecommunications service to the public for compensation;

(C) furnishing water, steam, or sewer service to the public for compensation;

(D) furnishing by transmission or distribution of natural or manufactured gas to the public for compensation;

(E) furnishing for distribution or by distribution petroleum or petroleum products to the public for compensation when the consumer has no alternative in the choice of supplier of a comparable product and service at an equal or lesser price;

(F) furnishing collection and disposal service of garbage, refuse, trash, or other waste material to the public for compensation;

Sec. 29.71.010. No adverse possession.

A municipality may not be divested of title to real property by adverse possession.

Sec. 38.95.010. State's interest may not be obtained by adverse possession or prescription.

No prescription or statute of limitations runs against the title or interest of the state to land under the jurisdiction of the state. No title or interest to land under the jurisdiction of the state may be acquired by adverse possession or prescription, or in any other manner except by conveyance from the state.

Chapter 40.17. RECORDING OF DOCUMENTS

STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES
OFFICE OF THE COMMISSIONER

3132 CHANNEL DRIVE
JUNEAU, ALASKA 99801-7898

TEXT: (907) 465-3652
FAX: (907) 586-8365
PHONE: (907) 465-3900

April 10, 2003

The Honorable Thomas Wagoner
Alaska State Legislature
State Capitol, Room 427
Juneau, AK 99801-1182

Dear Senator Wagoner:

Thank you for taking the time to meet with Deputy Commissioner John MacKinnon and I last week regarding Senate Bill 93. I appreciate you hearing our concerns and accommodating language changes to the bill to address them. With the addition of the language protecting the state's interest, the department no longer has any objection with the passage of the bill.

Thank you again for working with us. I look forward to working with you again.

Sincerely,

Mike Barton

Mike Barton
Commissioner

25A-T04LM

Subject: **SB 93**
Date: Fri, 25 Apr 2003 14:17:53 -0800
From: "Rick Kauzlarich" <rick_kauzlarich@dot.state.ak.us>
To: "Amy Seitz" <Amy_Seitz@Legis.state.ak.us>
CC: "Michael L Downing" <mike_downing@dot.state.ak.us>,
"Dennis Poshard" <dennis_poshard@dot.state.ak.us>,
"John S. MacKinnon" <john_mackinnon@dot.state.ak.us>

Hello Amy,

Regarding SB 93 and the language from the working draft of Section 2:

"... land necessary for the construction, management, operation, or maintenance of a public transportation or public access right of way ... "

The phrase "construction, management, operation, or maintenance" is understood by us to describe the typical use by DOT of the state's rights of way -- the words are inclusive. Also, I checked with our Regional Right of Way Chiefs and they do not see gravel pits or camps being effected one way or the other by SB 93. Usually the state is granted the use of a gravel pit, etc., through some other type of legal instrument other than "adverse possession."

Best regards,

Rick

~~~~~~

G. E. Rick Kauzlarich, State Right of Way Chief

State of Alaska DOT & PF

3132 Channel Drive Juneau AK 99801-7898

office: 907-465-6962 / toll free: 800-467-6955

fax: 907-465-5240 / text: 907-465-3652

~~~~~~

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM May 8, 2003

SUBJECT: Questions/responses concerning specific provisions contained in CSSB 93 (Judiciary) (Work Order No. 23-LS0518\B)

TO: Senator Tom Wagoner

FROM: Jack Chenoweth
Assistant Revisor of Statutes

Ongoing responsibility for further work on this measure has now been transferred to me. Accordingly, the three May 7 questions and responses prepared by Jon Tillinghast have been assigned to me for response. I did not hear the Senate's deliberations on the measure, so, for purposes of this document, I assume that the statements set out accurately reflect the content of the debate.

Section 3 does not give [the Department of Transportation and Public Facilities], or any other government entity or utility, any right to take private property without compensation that they do not already have. . . . .

Jon Tillinghast's response rebuts the argument by pointing out that (1) the government may take land without payment of compensation through adverse possession, and (2) whether the taking without payment of compensation is unconstitutional, as a violation of the Fifth Amendment [or, he might have added, art. I, sec. 18 of the Alaska Constitution], has not been litigated in the long history of the nation.

Fundamentally, I have to agree with the concluding observation that the measure under consideration does not provide "government [a] right to take property without compensation . . . that it doesn't have today."

[C]oncern was expressed that the phrase "at some time" on p. 2, lines 2 - 3, might mean that somebody could surface who claims that an ancestor possessed the land "at some time" in the very distant past, and demand to reclaim it. . . . .

and

The words "at some time" on p. 2 are technical conforming changes to existing law. . . . .

The caution that the provisions need to be read in context and the characterization that "at some time" is no more than a conforming change necessitated by the addition, in subsection (b), of a

different -- an open-ended -- period for commencing an action when the ownership interest is based on holding a recorded title are, in my judgment, accurate.

As the current law (AS 09.10.030 as it reads today) applies, there is a ten-year time requirement that cuts off a claim of adverse possession and that must be met as a part of the basis of a claim for recovery. That time requirement may include time during which "an ancestor" of the plaintiff held the title -- in other words, that "ancestor's" holding may be counted toward meeting the ten-year period. The amendments made in the measure's page 1, line 14 and page 2, lines 1 - 3 (subsection (c)) don't change that.

With the proposed expansion of the section by the inclusion of the new language of subsection (b), an action to quiet title or to compel ejectment is not necessarily limited by the ten-year period--it may be brought outside that ten-year limitation in (a)--but it does require that the plaintiff hold recorded title. Unless the plaintiff shows record title, he or she may not maintain an action under (b). If the plaintiff holds record title, then I don't see that reference to "an ancestor, a predecessor, or the grantor of the plaintiff" has relevance to whether or not the plaintiff may bring a quiet title or ejectment action under subsection (b).

*

Would it be clearer if subsections (a) and (b) were revised to say:

> * **Section 1.** AS 09.10.030 is amended to read:
>
> **Sec. 09.10.030. Actions to recover real property [IN 10 YEARS].** **Except as provided in (b) of this section, a** [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.
>
> * **Sec. 2.** AS 09.10.030 is amended by adding a new subsection to read:
>
> (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 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.

or something substantially similar, together with an appropriate conforming amendment to bill section 4?

JBC:mdr
03-108.mdr

Subject: SB93
Date: Mon, 3 Mar 2003 08:16:55 -0900
From: "Williams, Dave" <Dave_Williams@health.state.ak.us>
To: "'mary_jackson@legis.state.ak.us'" <mary_jackson@legis.state.ak.us>
CC: "'linda_sylvester@legis.state.ak.us'" <linda_sylvester@legis.state.ak.us>

I generally agree with the principle of SB93. Thanks to Senator Wagoner for introducing the bill.

Dave W. Williams
Manager, State Program Financing
Division of Medical Assistance
Department of Health and Social Services
P.O. Box 110660
Juneau AK 99811-0660

Phone: (907) 465-5826
Fax: (907) 465-2204

Subject: Senate Bill 93
Date: Sat, 01 Mar 2003 08:34:28 -0900
From: axtell <chihuahua@gci.net>
To: mary_jackson@legis.state.ak.us

Dear Senator Wagoner:

Thank you for bringing this bill to the Legislature.
Important to delete/dismiss archaic bills that could bring hardship to all Alaskans.
Hopefully you can present a bill to the legislature deleting intrusive trails or roads imposed on private property.

Thank you,

Bruce Ohmer and Sandra Jane Axtell
Palmer Alaska

SB 93: Legislation to Limit the Circumstances Under Which A Person May Divest a Landowner of Title to Its Land Under the Doctrine of Adverse Possession

A. Overview of the Legislation

"Adverse possession" is the doctrine under which a person--even a squatter acting in bad faith--can take another person's property without compensation by simply possessing it, in an open and hostile way, for a certain period of years. It is a doctrine born in the Middle Ages under circumstances that have little applicability to 21st Century Alaska, and it offends Alaska's abiding respect for private property ownership.

SB 93 would limit the availability of this doctrine to circumstances in which a person has, in good faith, occupied property under color of title for seven years. Beyond that situation, "adverse possession" is a doctrine inimical to the concept of private property ownership. And it imposes a particularly harsh burden on private landowners in Alaska who, because of the doctrine, are often charged with the impossible task of policing large remote landholdings to assure themselves that no squatter has taken residence. That burden is an economic waste, and serves no valid public policy.

B. The Origins and Purpose of the "Adverse Possession" Doctrine

1. The Doctrine's Original Rationale--Possession was Equated with Ownership

"Adverse possession" is a doctrine that rewards possession of land at the expense of the landowner. The doctrine has its roots in the feudal concept of "seizin." In the early Middle Ages, "ownership" of land was proven not by title or deed, but rather by actual possession. If a person was forcefully expelled from his property, the trespasser became

the land's new "owner," and the dispossessed person could regain "ownership" only by himself resorting to force. [1]/

Gradually, the dispossessed "owner" was given a legal remedy to regain possession--a remedy which, by virtue of a statute issued under Henry VIII, must be exercised within 60 years of dispossession. Thus was borne the thought that a person could recover his land from an "adverse possessor," but only if he acted within a specific period of time. [2]/

Remember, though, that in those days possession--or "seizin"--*was* title. Therefore, by giving the "adverse possessor"--or "disseizor"--the opportunity to bar the person he dispossessed from reclaiming his property after 60 years, feudal courts were, in their minds, doing no injustice to the prior occupant, since that occupant had lost the basis for his claim of "ownership" when he was forceably dispossessed.

2. A New Rationale--Possession was the Best Proof of Ownership

Gradually, English common law came to recognize the concept of conveying and holding land by deed. "Title" became something different from, and superior to, mere "possession." And so the doctrine of "adverse possession" needed a new rationale.

---

[1] / 5 George W. Thompson, *Commentaries on the Modern Law of Real Property* (1979) ("*Commentaries*") at 573-76.

[2] / *Commentaries, supra* at 574-76. Actually, "adverse possession" rules can be traced further back, to the Code of Hammurabi, which provided, in part, that:

> *If a captain or a soldier has neglected his field, his garden and his house, instead of working them; and another takes his field, his garden and his house, and works them for three years; if he returns and desires to till his field, his garden, and his house, they shall not be given to him. He that has taken and worked them shall continue to use them.*

The Hammurabi Code and the Sinaitic Legislation at 32-33 (Chilperic Edwards ed., 1904).

The virtue of "seizin," of course, was that it was obvious who is "seized" of a particular piece of property--the person living on it. "Title," conversely, was the source of considerable dispute, since there then existed no reliable, centralized recording system to resolve conflicting claims of "title." As a result:

> *In an era of comparatively scarce land, decentralized records and crude surveying techniques, lengthy possession may have been the best possible proof of ownership.*

[3]/ Thus, while possession no longer equated with ownership, possession remained the best evidence of "title," and so the doctrine of adverse possession continued to serve some worthwhile purpose. "Ultimately, the 1623 Statute of Limitations required that suits to recover possession of land be brought within twenty years. The Statute recited that this limit was necessary for 'quieting men's estates, and avoiding of suits...'" [4]/

3. The New American Purpose--Social Engineering

In James I's England, if a person owned land, he probably lived on it. [5]/ Even by the 16th century, there was precious little wild land in England that a person might own, but not make productive use of. [6]/

This was not true in North America, where vast tracts of wilderness might lie in private ownership. Here, the assumption that ownership was reliably proven by physical possession did not hold true:

> *Transplanted to the abundant, sparsely populated wild lands of North America, however, the assumptions of the [doctrine of adverse possession] ...failed. The terrain was too hostile, the*

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[3] / Sprankling, *An Environmental Critique of Adverse Possession*, 79 Cornell Law Rev. 816, 822 ("*Critique*") (1994).
[4] / *Critique, supra* at 823.
[5] / James I promulgated the 1623 statute just quoted.
[6] / By 1696, only 16% of England's land were uncultivated forest lands. *Critique, supra* at 822, n. 25.

> *forests too impenetrable and the distances too vast for most owners to reside upon or even to inspect their properties regularly. More importantly, possession of land in the English sense, characterized by residence, cultivation or improvement, was often impractical. The minor acts, greatly separated in time, that characterized land use in wilderness areas were unlikely to afford constructive notice to the owner who did inspect occasionally.*

Critique, supra at 823. "Adverse possession," then, needed a new purpose, and found one in our 19th century urge to settle the West. The modern doctrine " was developed when much of the continental United States was unsurveyed wilderness," and our courts and legislatures resultantly "adopted a public policy that as much land should be put to use as possible." [7] Under the new theory of adverse possession, the squatter was to be rewarded for making use of wild land, even at the expense of the person who owned it:

> *Beginning in the nineteenth century, American courts serving the ideology of economic expansion reformulated adverse possession in the pursuit of national productivity. These courts transformed the doctrine from a mechanism designed to protect the title of the true owner against false claims into a tool designed to transfer title to wild lands from the idle true owner to the industrious adverse posessor.*

Critique, supra at 821 (emphasis original).

The American justification for the doctrine also took on something of a Marxist flavor. Vast expanses of public lands were conveyed to large, absentee landlords--principally, the railroads. As pioneers struck west and inadvertently (or otherwise) homesteaded then-or-future railroad land, Western state legislators, and courts, concluded that disputed land should belong to the worker rather than the absentee capitalist. *Critique, supra* at 843. For this reason, the periods necessary to establish title by "adverse possession" tend to shrink as one proceeds westward--from the old 20-year

English rule still prevalent in the original colonies, to as little as five years in many western states.

C. Adverse Possession in 20th Century Alaska--A Doctrine Without a Reason

To this day, some courts, including the Alaska Supreme Court, maintain that the doctrine of adverse possession serves a useful public purpose because "society will benefit from someone's making use of land the owner leaves idle." [8]/

One might argue that there is considerable "idle" land in Alaska's ***public*** domain. However, in Alaska as elsewhere, neither the state nor federal government can be divested of title through adverse possession. AS 09.45.052(a). And Alaska has precious little "idle" private land.

The largest private landowners in Alaska are the Native corporations established under the Alaska Native Claims Settlement Act. Those lands were conveyed both in settlement of Alaska Natives' aboriginal claims, and to meet the "real economic and social needs of Natives." ANCSA, §1. ANCSA lands, then, and every acre of them, serve an important legal, social and economic purpose. They are not, any of them, "idle" in that sense.

Congress, in fact, has recognized that fact, and has accordingly extended ANCSA lands some protection from adverse possession claims as long as they remain undeveloped. 43 U.S.C. §1636(d). But ANCSA corporations often acquire other remote lands for future resource development purposes, as will other private landowners as time goes by. To the extent that these lands are not developed, it is because development now

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[7] / *Seddon v. Harpster*, 403 So. 2nd 409, 413 (Florida 1981).
[8] / *Tenala, Ltd. v. Fowler*, 921 P.2nd 1114 (Alaska 1996).

would be an economic waste, and there is no sound public policy that should prevent a private landowner from investing those lands for future generations.

The last remaining modern justification for adverse possession is that it "keep[s] stale causes out of court." *Tenala, Ltd. v. Fowler, supra.* But, in fact, it does just the opposite. Adverse possession cases involve untrustworthy testimony about who-possessed-what 10 or 20 years ago; conversely, and "considering current methods of record storage on microfiche, computer disks and data tapes," claims based on record ownership will never grow stale. [9]/

Similarly, allowing adverse possession claims promote litigation, while limiting them discourages it. This because:

> *[b]right line standards generally deter litigation...The record title standard draws an exceedingly bright line: the holder of record title always prevails. In contrast, adverse possession as applied to wild lands is an indeterminate, murky standard under which results can rarely be predicted with certainty.*

Critique, supra at 878. The fact of the matter, as Florida's Supreme Court observed, is that "[w]ith modern technology and computerized transactions our society is now more capable of accurately establishing legal interest to property through paper title than through possession." *Seddon v. Harpster,* 493 So.2nd at 414.

Continued recognition of "squatters' rights" serves no useful public purpose in Alaska today, and it disserves others. Apart from its impact on private property ownership generally, and implementation of ANCSA in particular, "[a]dverse

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[9] / *"Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession,"* 31 Land and Water Law Review 79, 104 (1996) (*"Outlaws"*).

possession...erode[s] the effectiveness and utility of both recording and marketable title statutes by creating uncertainty." *Outlaws, supra* at 97.

The doctrine ought to be limited to those few situations where some equity might lie in the adverse possessor's favor, and SB 93 attempts to do just that by amending only AS 09.10.030, which currently allows land to be taken by bad faith trespassers, while leaving untouched AS 09.45.052, which allows adverse possession claims by persons with a good faith claim to the property based on color of title.

AS 09.10.030 is the squatters' statute. The adverse possessor need not occupy the property under "color of title"--that is, a deed or other conveyance. And the squatter need not even occupy the property in good faith. [10]/ As one commentator puts it, this statute "gives title not only to one who because of good faith error occupies the land of another but also to a person who knowingly sought to appropriate another's land." [11]/

Under this statute, the squatter must adversely possess the property for 10 years. After that, the statute, which is framed as a statute of limitations, bars the property's owner from bringing any action against the squatter to recover his property.

Section 1 of SB 93 would amend this statute to provide that the owner of record could recover his or her land--by a quiet title or ejectment action--at any time. [12]/ Because of computerized land records, the record owner's claim will never, as a practical matter, grow stale.

AS 09.45.052 is Alaska's second adverse possession statute, and it deals with adverse possession that is based on "color of title." In other words, the adverse

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[10] / *Hubbard v. Curtiss*, 684 P.2nd 842, 848 (Alaska 1984).
[11] / 7 Richard R. Powell, *Powell on Real Property*, ¶1012(3) (1993).

possessor has some deed or other document purporting (but for some reason failing) to convey title to the property being possessed. Unlike the statute amended by Section 1, this statute requires good faith on the part of the possessor--in other words, an honest and reasonable belief that the possessor really owns the land. *Ault v. State,* 688 P.2nd 951, 956 (Alaska 1984). The legislation leaves this section untouched.

Finally, Section 2 of the legislation would make the new legislation applicable to any adverse possession claim that has not "vested" by the effective date of the legislation. Adverse possession claims "vest" when the adverse possessor has met the statutory requirements for the requisite number of years--under current Alaska law, 10 years (or seven years for claims under color of title). [13]/ Serious constitutional questions would arise if the legislation purported to extinguish already-vested adverse possession claims; conversely, there would appear to be no constitutional difficulty in affecting unvested claims, since an adverse possessor has no protected right in the mere expectation that, eventually, he or she may possess the land for a sufficient period of time. [14]/

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[12] / To the extent that this statute governs other types of real property claims, the 10-year statute of limitations would be retained.

[13] / *Markovich v. Chambers,* 857 P.2nd 906, 908 (Or. App. 1993).

[14] / *See Lovell v. Magnet Cove School District No. 8,* 782 S.W.2nd 41, 42 (Ark. 1990) (change in Arkansas adverse possession statutes applicable to unvested adverse possession claims).