MICHAEL C. GERAGHTY
ATTORNEY GENERAL
Z. Kent Sullivan (Alaska Bar No. 0105038)
R. Poke Haffner (Alaska Bar No. 8106025)
Assistant Attorneys General
Department of Law
P.O. Box 110300
Juneau, Alaska 99811-0300
Telephone: (907) 465-3600
Facsimile: (907) 465-2539
Email: kent.sullivan@alaska.gov
poke.haffner@alaska.gov
Attorneys for State of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA DEPARTMENT OF NATURAL REOURCES, *et al.*,	)	
Plaintiffs,	)	
	)	Case No.: 4:13-cv-00008-RRB
v.	)	
UNITED STATES OF AMERICA, *et al.,*	)	THE STATE OF ALASKA'S OPPOSITION TO THE PURDY DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION
Defendants.	)	

The State of Alaska opposes the Purdy Defendants' motion and memorandum in support of dismissal of the State's complaint on the basis of alleged lack of subject matter jurisdiction.[1] In their motion, the Purdys argue that this Court lacks subject matter jurisdiction over the matters set forth in the State's complaint because: 1) this Court lacks authority over the Purdy allotments pursuant to 28 U.S.C. § 2409(a); and 2) this Court

[1] *See generally,* Motion to Dismiss for Lack of Subject Matter Jurisdiction (Dkt. 91)("Purdys' Motion to Dismiss Re. Subject Matter Jursid.").

lacks authority to adjudicate this condemnation action pursuant to 25 U.S.C. § 357.[2] Although the Purdys have already answered the complaint,[3] this motion is their second motion to dismiss since filing that answer.[4] In bringing this motion, the Purdys have failed to cite, and in fact, have completely ignored the legal standard applicable to motions to dismiss based on an alleged lack of subject matter jurisdiction.[5] When this standard is applied to these facts, it quickly becomes apparent that this motion is improper and should be denied.

LEGAL STANDARD

The function of a motion to dismiss is to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support.[6] The complaint should contain sufficient factual allegations "to raise a right to relief above the speculative level."[7] Although completely uncited, the Purdys' motion to dismiss appears to be exclusively based upon Rule 12(b)(1), Fed. R. Civ. P.[8]

A Rule 12(b)(1) jurisdictional attack may be facial or factual.[9] "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction."[10]

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[2] *Id.*
[3] Answer to Complaint (Dkt. 77).
[4] *See also,* Motion to Dismiss Counts II-V of Plaintiffs' Complaint as to Agnes & Anne Purdy for Failure to Exhaust Administrative Remedies (Dkt. 79).
[5] *See generally,* Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91).
[6] *Ryder Energy Distribution v. Merrill Lynch Commodities, Inc.,* 748 F.2d 774, 779 (2d Cir. 1984).
[7] *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556 (2007).
[8] *See generally,* Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91).
[9] *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).
[10] *Id.*

Facial attacks on jurisdiction are analyzed by the court assuming all allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff.[11] In contrast, in analyzing factual attacks on jurisdiction a court may review evidence beyond the complaint itself and need not presume the truthfulness of plaintiff's allegations.[12] A moving party converts a motion to dismiss into a factual motion by presenting affidavits or other evidence outside of the pleadings.[13]

In appropriate circumstances involving factual attacks on jurisdiction, courts may decide genuinely disputed factual issues relating to jurisdiction prior to trial. However, because jurisdictional fact-finding by courts deprives litigants of the protections otherwise afforded by Rule 56, limitations have been imposed on a court's power to do so.[14] "Jurisdictional dismissals in cases premised on federal-question jurisdiction are exceptional . . . "[15] and can only occur "'where the alleged claim under the constitution or federal statutes clearly appears to be *immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous*.'"[16]

> As the Ninth Circuit Court of Appeals has specifically instructed:
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> '[j]urisdictional finding of genuinely disputed facts is inappropriate when 'the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits' of an action.' The question of jurisdiction and the merits of an action are intertwined where 'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief.'[17]

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[11] *Wolfe v. Strankman,* 392 F.3d 358, 362 (9th Cir. 2004).
[12] *Id.*
[13] *Savage v. Gelendale Union High Sch.,* 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).
[14] *Sun Valley Gasoline, Inc. v. Ernst Enters.,* 711 F.2d 138, 140 (9th Cir. 1983).
[15] *Safe Air For Everyone*, 373 F.3d at 1039 (quoting *Sun Valley,* 711 F.2d at 140).
[16] *Id.* (quoting *Bell v. Hood,* 327 U.S. 678, 682-83 (1946))(emphasis added).
[17] *Id.* (quoting *Sun Valley,* 711 F.2d at 139)(emphasis added).

In this instance and due to the Purdys' reliance on affidavits and numerous exhibits outside of the complaint itself, this motion to dismiss is a factual attack on subject matter jurisdiction.[18] Accordingly, and as instructed by the Ninth Circuit Court of Appeals in *Safe Air For Everyone,* jurisdictional dismissal can only occur based on a finding that the federal question counts are either immaterial and made solely for the purpose of obtaining federal jurisdiction, or are wholly insubstantial and frivolous. For the reasons set forth below, in this instance, neither situation exists.

Alternatively, and as occurred in *Safe Air For Everyone,* it is possible for this Court to construe the Purdys' motion to dismiss as a motion for summary judgment.[19] This can occur where resolution of the jurisdictional question raised in Defendants' Rule 12(b)(1) motion to dismiss is intertwined with the merits of the case.[20] However, if this is done, the court "should employ the standard applicable to a motion for summary judgment, as a resolution of the jurisdictional facts is akin to a decision on the merits."[21] Under that standard, "the moving party should prevail *only if the material jurisdictional facts are not in dispute* and the moving party is entitled to prevail as a matter of law. Unless that standard is met, the jurisdictional facts must be determined at trial by the trier of fact."[22] Importantly, a motion for summary judgment must be supported by admissible evidence that shows there is no genuine issue of material fact.[23] Because the Purdys' motion to dismiss is premised almost entirely on genuine issues of material fact, even if

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[18] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91). at Exh.s "A" – "P"; Affidavit of Agnes Purdy (Dkt. 92); Affidavit of Frank Purdy (Dkt. 93).
[19] *Safe Air For Everyone*, 373 F.3d at 1040-1047.
[20] *Id.; See also, Murgia v. Reed,* 338 Fed.Appx. 614, 616 (9th Cir. 2009)("[W]hen a factual jurisdictional issue is intertwined with the merits of an action, a Rule 12(b)(1) motion must be converted into a motion for summary judgment."); *Sun Valley,* 711 F.2d at 139.
[21] *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Elec. Corp.,* 594 F.2d 730, 733–34 (9th Cir. 1979)).
[22] *Id.* (emphasis added)(citing *Thornhill,* 594 F.2d at 733–35).
[23] Fed. R. Civ. P. 56(c).

their motion were alternatively construed as a motion for summary judgment, it should be denied.

ARGUMENT

I. THE STATE'S FEDERAL QUESTION COUNTS ARE NEITHER IMMATERIAL AND MADE SOLELY FOR THE PURPOSE OF OBTAINING FEDERAL JURISDICTION, NOR ARE THEY INSUBSTANTIAL AND FRIVOLOUS.

In this case, the State has alleged a number of different federal question counts against the Purdys.[24] These counts include seeking to quiet title pursuant to R.S. 2477, a/k/a 43 U.S.C. § 932 and 28 U.S.C. § 2409a(a), [25] a declaratory judgment pursuant to 28 U.S.C. § 2201,[26] and to condemn portions of the Purdys' property pursuant to 25 U.S.C. § 357.[27] As will be discussed below, these counts are neither immaterial and made solely for the purpose of obtaining federal court jurisdiction, nor are they insubstantial and frivolous.

A. Count Seeking to Quiet Title Pursuant to R.S. 2477, a/k/a 43 U.S.C. § 932, and 28 U.S.C. § 2409a(a).

The Purdy Defendants argue that this Court lacks jurisdiction over their Native allotments based on the limitations contained in the Federal Quiet Title Act ("QTA") at 28 U.S.C. § 2409a(a).[28] The Purdys correctly note that the QTA specifically excludes its application to "trust or restricted Indian lands."[29] However, as the State alleged in the complaint,[30] the Indian lands exception to the QTA's waiver of sovereign immunity does

[24] *See generally,* Complaint (Dkt. 1).
[25] *Id.* at ¶¶ 314-325.
[26] *Id.* at ¶¶ 340-345.
[27] *Id.* at ¶¶ 346-355.
[28] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 2-7.
[29] *Id.* at 3; *See also,* 28 U.S.C. § 2409a(a).
[30] Complaint (Dkt. 1) at ¶ 11.

not apply in this case based on the holding of *State of Alaska v. Babbitt (Bryant)*.[31] The Purdys argue that the case has no application here because they possess colorable claims to their allotments.[32] The Purdys have misconstrued the holding in *Alaska v. Babbitt (Bryant)*, and have further misconstrued the State's reliance on the case.

The Purdys proclaim that *Alaska v. Babbitt (Bryant)*[33] has no application to this case because the substantive question addressed in *Alaska v. Babbitt (Bryant)* was "***not*** whether Indian lands are subject to the court's jurisdiction under the Quiet Title Act, but rather 'whether Bryant's use and occupancy entitled him to take priority over the state's earlier grant.'"[34] The Purdys wrongly downplay the significance of the *Alaska v. Babbitt (Bryant)* holding to the jurisdictional aspects of this case. As specifically noted by the Ninth Circuit Court of Appeals "[t]he substantive question in this case is whether Bryant's use and occupancy entitled him to take priority over the state's earlier grant. *The main procedural issue is whether the district court had jurisdiction [under the QTA] to decide that substantive question*."[35]

The Purdys also justify their argument that *Alaska v. Babbitt (Bryant)* is inapplicable, by suggesting that they possess "colorable claims to their allotments."[36] However, as *Alaska v. Babbitt (Bryant)* makes clear, the focus is not whether an allotment holder has a colorable claim to the allotment itself. Instead, the issue is whether the allotment holder possesses a colorable claim to the specific portion of the lands in dispute or at issue.[37] If no colorable basis exists as to the lands in dispute, then the Indian

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[31] *State of Alaska v. Babbitt (Bryant),* 182 F.3d 672 (9th Cir. 1999).
[32] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 2-3.
[33] *See generally, Alaska v. Babbitt (Bryant),* 182 F.3d 672 (9th Cir. 1999).
[34] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 4 (emphasis in original).
[35] *Alaska v. Babbitt (Bryant),* 182 F.3d 673 (emphasis added).
[36] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 2.
[37] *See generally, Alaska v. Babbitt (Bryant),* 182 F.3d 672.

lands exception to the United States' waiver of sovereign immunity within the QTA does not apply, and the court possesses jurisdiction under the Act.[38]

At issue in *Alaska v. Babbitt (Bryant)* was the United States' 1961 grant of a 500 acre materials site to the State for use associated with construction of the Parks Highway.[39] Bryant filed an application for a 120 acre Alaska Native allotment, a substantial portion of which was contained within the 500 acre materials site previously conveyed to the State. Bryant claimed to have used the land every year since 1964 for hunting, picking berries, and trapping. In 1969, the United States granted Alaska an amended right-of-way for the land specifically delineating the location of the Parks Highway and also acknowledging relinquishment of an unused portion of the original grant.[40]

In initially approving Bryant's allotment, the Bureau of Land Management ("BLM") declared that to the extent the amended right-of-way conflicted with the allotment, the amended right-of-way was null and void.[41] The State challenged BLM's decision asserting, *inter alia,* that the lands in dispute had been appropriated based on the 1961 grant. Therefore, they were unavailable for allotment purposes beginning in 1961 and during the period that Bryant attempted to establish his use and occupancy. Despite the State's contentions, BLM's decision was subsequently affirmed by the IBLA.[42] The

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[38] *Id.* at 673 (only the portion of the allotment within the State's materials sites and highway rights-of-way was at issue in the case). *See also, Alaska v. Norton,* 168 F.Supp.2d 1102, 1107-1109 (D. Alaska 2001). (Norton is the reported decision on the Bryant remand). In *Alaska v. Norton,* the district court did not invalidate the entirety of the allotment, but instead, only voided it to the extent that the allotment conflicted with the State's material sites and highway rights-of-way. *Id.* As such, the issue in both cases was not whether a colorable basis to the allotment existed, but instead, whether a colorable basis existed as to the lands in dispute.

[39] *Id.* at 673.

[40] *Id.*

[41] *Alaska v. Norton,* 168 F.Supp.2d at 1105.

[42] *Alaska v. Babbitt (Bryant),* 182 F.3d at 673-674.

State then filed an action in the United States district court.[43] The United States argued that the district court lacked jurisdiction under the QTA based on the Indian Lands exception. The district court reluctantly agreed and the issue of jurisdiction was presented to the Ninth Circuit Court of Appeals.[44]

The appeals court held that:

> the Indian lands exception applies only if the lands at issue are Indian lands, or at least colorably so. The Quiet Title Act waives sovereign immunity subject to the exception that it 'does not apply to trust or other restricted Indian lands.' We have repeatedly, in all of our analogous cases speaking to the Indian lands exception, carefully carved out an exception to the exception for cases where the claim of Indian lands is not 'colorable.'[45]

The court next analyzed the relation back doctrine in light of the IBLA's holding in *Goodlataw.*[46] The relation back doctrine provides that the preference right to a Native allotment relates back to the date use and occupancy commenced, even though the application may have been filed much later.[47] As the court noted however, *Goodlataw* confirms that occupancy in the manner performed by Bryant is not "under color of law."[48] This is because allotments are granted subject to existing rights, and a state right-of-way is such a right. Qualifying Native use and occupancy for an allotment under color of law cannot occur when existing rights are already present.[49] Specifically, the appeals court concluded:

> [n]ow that IBLA, in *Goodlataw,* has held expressly that commencement of the use and occupancy period for a Native allotment is without "color of law" if the state already has a right of way at the time, that a materials site

[43] *Id.* at 674.
[44] *Id.*
[45] *Alaska v. Babbitt (Bryant),* 182 F.3d at 675 (citing 28 U.S.C. § 2409a(a)).
[46] *Id.* at 676 (citing *State of Alaska (Goodlataw),* 140 IBLA 205 (1997)).
[47] *Golden Valley Electric Ass'n*,, 98 IBLA 203, 205 (1987).
[48] *Alaska v. Babbitt (Bryant),* 182 F.3d at 675 (citing *Golden Valley Electric Ass'n*,, 98 IBLA at 214)).
[49] *Id.* at 676.

> right of way suffices to bar effective use and occupancy by the would-be allottee, and that subsequent elimination of the right of way does not retroactively give "color of law" to the Native use and occupancy, the claim by the would-be allottee in the case at bar apparently would be treated by IBLA as not made under "color of law." This necessarily means that the claim that the land at issue is Indian land is not "colorable," so the exception to the Indian lands exception demarcated in *Foster, Albert,* and *Wildman* applies, and there is jurisdiction under the Quiet Title Act.[50]

The fate of the Bryant allotment was then placed back before the district court, Judge Holland, on remand.[51] Judge Holland concluded that because Native use and occupancy for allotment purposes must be under color of law and because such use and occupancy under color of law cannot occur where existing rights are already present, Byrant possessed no entitlement to the lands appropriated for the State in 1961.[52] Consequently, Judge Holland concluded that due to the 1961 appropriation, all but eight acres of Bryant's original 120 acre allotment were void.[53]

The present dispute is nearly identical to that which occurred in *Alaska v. Babbitt (Bryant)* and *Alaska v. Norton.* Just as in that case, in this instance, no colorable claim exists that these allotments are not subject to State-owned rights-of-way. As recently explained by the State in its opposition to the Purdys' first motion to dismiss concerning administrative remedies, the Purdys' allotment certificates were expressly made subject to a large portion of the R.S. 2477 rights-of-way now at issue.[54] The facts and evidence

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[50] *Id.*
[51] *Id.* at 677; *See also, Alaska v. Norton,* 168 F.Supp.2d 1102.
[52] *Alaska v. Norton,* 168 F.Supp.2d 1106-1109.
[53] *Id.*
[54] State of Alaska's Opposition to the Purdy Defendants' Motion to Dismiss (Dkt. 89) at 3-5.

concerning the early creation and historical use of these rights-of-way are also overwhelming.[55]

Even Exhibit "K" to the Purdys' own motion to dismiss confirms the existence of these rights-of-way.[56] Exhibit "K" is a decision from the BLM regarding the Agnes Purdy allotment.[57] In it, the BLM indicates that the allotment is being made subject to the Chistochina to Eagle Trail (one of the longer, historic rights-of-way forming the basis for the State's claims in this case)[58] due to the fact that Agnes Purdy's use and occupancy of the allotment did not predate the existence of the trail and was not at the exclusion of others.[59] Specifically, the BLM administrative law judge concluded that:

> public use of the Chistochina-Eagle Trail (part of the old Valdez to Ft. Egbert Trail) began prior to 1921, which is prior to the applicant's claimed use and occupancy. The type of use identified is obtaining access to mining areas. Therefore, the applicant's use of this Chistochina-Eagle Trail was not potentially exclusive of others and the Certificate of Allotment, when issued, will be subject to the Chistochina-Eagle Trail.[60]

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[55] Complaint (Dkt. 1), at ¶¶ 100-231; *See also,* Affidavit of Rockford Beard-Weber in Support of the State's Opposition to the Purdy's Motion to Dismiss ("Affidavit of Rockford Beard-Weber"), attached as Exhibit "1" and Affidavit of Rolfe Buzzell in Support of the State's Opposition to the Purdy's Motion to Dismiss ("Affidavit of Rolfe Buzzell"), attached as Exhibit "2."

[56] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at Exh. "K" (Dkt. 91-11). This document is actually mislabeled on the physical document itself as "Exhibit 2."

[57] *Id.*

[58] State of Alaska's Opposition to the Purdy Defendants' Motion to Dismiss (Dkt. 89) at 4.

[59] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at Exh. "K" (Dkt. 91-11) at 3.

[60] *Id.*

Additionally, attached is a true and correct copy of the BLM decision concerning the Anne Lynn Purdy allotment.[61] As to that allotment, the BLM administrative law judge specifically concluded:

> According to information in the case file, public use of Trail No. 102-167 (Chistochina to Eagle Trail) and Trail No. 102-182 (40 Mile to Lillywig Creek) began in 1921 and 1927, respectively, which predates the applicant's claimed use and occupancy. Public use of the Ketchumstuk to Chicken Trail began in 1905, which also predates the applicant's claimed use and occupancy. Therefore, the applicant's use of the Chistochina to Eagle Trail, the Forty (40) Mile to Lillywig Trail, and the Ketchumstuk to Chicken Trail were not potentially exclusive of others and when the Certificate of Allotment is issued, will be subject to these trails.[62]

These factual findings are largely consistent with the State's allegations contained in the complaint regarding the creation of R.S. 2477 rights-of-way across the allotments.[63]

Defendants Purdy will likely argue that the Agnes Purdy allotment certificate only references being subject to a single R.S. 2477, whereas the State has alleged that as many as four separately named routes cross one Purdy allotment or the other.[64] However, a close examination of both of the Purdy allotment certificates demonstrates that the two certificates are actually subject to a total of four separately named trails.[65] Also, while in some instances the allotment certificates may reference the subject trails by different names than those used in this litigation, a significant portion of the roads and trails at issue in this litigation are also known by these same names or they are smaller sub-

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[61] *See generally,* Decision Regarding Native Allotment Application F-19188, Parcel A, dated August 9, 2012, and attached as Exhibit "3"; *See also,* Exh. "1" (Affidavit of Rockford Beard-Weber) at ¶ 8.
[62] *Id.* at 4.
[63] Complaint (Dkt. 1), at ¶¶ 100-231; Exh. "1" (Affidavit of Rockford Beard-Weber) at ¶ 5; Exh. "2" (Affidavit or Rolfe Buzzell) at ¶ 7.
[64] *Compare* Purdys' Motion to Dismiss (Dkt. 79), Exh. "A" at 2 *with* Complaint (Dkt. 1), at ¶¶ 100-231 and Exh. "1" (litigation map).
[65] Motion to Dismiss Counts II-V of Plaintiff's Complaint as to Agnes and Anne Purdy for Failure to Exhaust Administrative Remedies (Dkt. 79), Exh.s "A" at 2 and "B" at 2.

portions of the much longer trails named in the certificates.[66] The complaint clearly indicates as much.[67]

Another of the rights-of-way named in this case, the Myers Fork Spur Trail, is actually a branch or spur of the other named rights-of-way.[68] It is noteworthy that other federal district courts construing R.S. 2477 rights-of-way recognize the fact that branches and spurs often do not constitute separate roads, but instead, are merely segments of the main road.[69] The same is true in this case as well.

Just as in *Alaska v. Babbitt (Bryant)* and *Alaska v. Norton,* in this case the issue is not whether the entirety of the allotment itself is valid. As expressed in *Norton,* the allotment applicant is entitled to possess the allotment to the extent that it does not conflict with the State's previously created and existing rights.[70] Similarly, here, the State is not seeking to invalidate or nullify either of the Purdy allotments. Instead, the State simply seeks a determination that those allotments are subject to the State's earlier created and existing R.S. 2477 rights-of-way. Exactly as occurred in *Alaska v. Babbitt (Bryant)* and *Alaska v. Norton,* that issue will hinge on whether the Purdys' claimed use

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[66] Complaint (Dkt. 1), at ¶¶ 109, 133, 170 (indicating that the trails referenced in the litigation as the Chicken to Franklin and Chicken Ridge Trails are comprised of portions of the larger trail identified historically as the Chistochina – Eagle and the Valdez to Eagle Trails (largely the same trail); ¶¶ 161, 166, 167 and 170 (indicating that the trail referenced in the litigation as the Chicken Ridge Trail is comprised of a portion of the trail historically referenced as the Ketchumstuk to Chicken Trail).

[67] *Id.*

[68] Complaint (Dkt. 1), at ¶¶ 211-231, Exh. "1" (litigation map).

[69] *Kane County, Utah, v. United States,* No. 2:08-cv-00315, 2013 WL 1180387, at *13 (D. Utah Mar. 20, 2013)("one would not typically say that these branches or spurs constitute separate roads . . . " and "the branches function as part of Mill Creek [Road] rather than as distinct, separate roads."); *Kane County, Utah (1) v. United States,* No. 2:08-cv-00315, 2013 WL 1180764, at *1, fn.1 (D. Utah Mar. 20, 2013)(" Kane County asserts only twelve roads are at issue. Two of the roads have spurs or segments that are named differently from the main road. For ease of reference, the court refers to them as roads, even though the court concludes they are merely a segment of the main road.").

[70] *Alaska v. Norton,* 168 F.Supp.2d at1107-1109

and occupancy occurred under color of law. Just as in that case, here, there is no reasonable basis to suggest that it did.

The fact that these rights-of-way are not Indian lands and that the allotments are clearly subject to them is confirmed by: 1) the conveyance documentation the Purdys received from the United States;[71] 2) BLM's administrative decisions preceding issuance of the allotment certificates;[72] and 3) and the well-pled and verified allegations set forth in the complaint.[73] As this evidence suggests, the State's claims regarding the existence of R.S. 2477 rights-of-way across the allotments are neither immaterial and made solely for the purpose of obtaining federal court jurisdiction, nor insubstantial and frivolous. Finally, to the extent the Purdys deny the facts enumerated above, such a denial creates genuine issues of material fact, thereby further justifying denial of the Purdys' motion.

B. Count Seeking a Declaratory Judgment Pursuant to 28 U.S.C. § 2201.

It is with no small amount of irony that the Purdys bring the present motion challenging this Court's legal ability to hear this case. As this Court is all too familiar, this past December, Defendants Agnes Purdy and Dena' Nena' Henash, a/k/a Tanana Chiefs Conference ("TCC"), filed suit seeking to prevent a local miner and member of the public from using portions of the same State-owned roads and trails at issue here.[74] In other words, evidently this Court possessed the legal ability and authority to hear a dispute involving the use of these same roads and trails when Defendant Agnes Purdy

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[71] Motion to Dismiss Counts II-V of Plaintiff's Complaint as to Agnes and Anne Purdy for Failure to Exhaust Administrative Remedies (Dkt. 79), at Exh.s "A" and "B."
[72] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at Exh. "K"; Exh. "3" (Decision Regarding Native Allotment Application F-19188, Parcel A) at 4; Exh. "1" (Affidavit of Rockford Beard-Weber) at ¶¶ 8, 12.
[73] *See generally,* Complaint (Dkt. 1); Exh. "1" at ¶ 5 (Affidavit of Rockford Beard-Weber); Exh. "2" (Affidavit or Rolfe Buzzell) at ¶ 7.
[74] *See generally, Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Complaint (Dkt.1) and Motion for Preliminary Injunction Against Defendants (Dkt. 24).

was a Plaintiff.[75] Suddenly however, this Court is now alleged to lack jurisdiction and authority to adjudicate a dispute involving use of the same roads and trails when Agnes Purdy is a Defendant in an action brought by the owner of the rights-of-way, the State of Alaska.[76] The reason this now becomes important is with regard to the basis for this Court's jurisdiction over the State's declaratory judgment count pursuant to 28 U.S.C. § 2201.[77]

One of the purposes of the Declaratory Judgment Act, 28 U.S.C. § 2201, is to spare potential defendants from the threat of pending litigation.[78] The Declaratory Judgment Act applies only if federal jurisdiction independently exists.[79] In determining whether a declaratory judgment action presents a federal question, a court may look to a defendant's threatened actions.[80] The Ninth Circuit Court of Appeals has stated:

> The use of the declaratory judgment statute does not confer jurisdiction by itself if jurisdiction would not exist on the face of a well-pleaded complaint brought without the use of 28 U.S.C. § 2201. A declaratory judgment plaintiff may not assert a federal question in his complaint if, but for the declaratory judgment procedure, that question would arise only as a federal defense to a state law claim brought by the declaratory judgment defendant in state court.
>
> If, however, the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights, then we have jurisdiction notwithstanding the declaratory judgment plaintiff's assertion of a federal defense. The coercive action, however, must "arise under" federal law, and not be based merely on diversity of citizenship or another, nonsubstantive jurisdictional statute.[81]

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[75] *Id.*
[76] *See generally,* Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91).
[77] Complaint (Dkt. 1), at ¶¶ 340-345.
[78] *Seattle Audobon Soc. v. Moseley,* 80 F.3d 1401, 1405 (9th Cir. 1996).
[79] *Gritchen v. Collier,* 254 F.3d 807, 811 (9th Cir. 2001).
[80] *Yokeno v. Mafnas,* 973 F.2d 803, 807-808 (9th Cir. 1992).
[81] *Janakes v. United States Postal Service,* 768 F.2d 1091, 1093 (9th Cir. 1985)(citations omitted).

The present case is markedly similar to *Arco Products Co. v. Stewart & Young, Inc.*[82] In that case a franchisee ("Stewart") brought an action pursuant to the Petroleum Marketing Practices Act against a franchisor ("Arco"), which had terminated the parties' franchise agreement. Arco then brought a separate action against Stewart seeking declaratory relief.[83] Following the district court's grant of summary judgment to Arco, Stewart argued on appeal that the district court lacked subject matter jurisdiction over the declaratory relief action. The Ninth Circuit Court of Appeals disagreed. It specifically held that:

> When a declaratory judgment plaintiff "asserts a claim that is in the nature of a defense to a threatened or pending action, the character of the threatened or pending action determines whether federal question jurisdiction exists with regard to the declaratory judgment action." Here, the action initiated by Stewart under the PMPA clearly conferred federal question jurisdiction on the district court. ARCO's claims were in the nature of a defense to a pending action by Stewart. Thus, we hold that the district court had subject matter jurisdiction over ARCO's declaratory relief action.[84]

Here, not only could the Purdys as declaratory judgment Defendants have brought a coercive action in federal court to enforce their rights, in this instance just as in *Arco Products Co.*, Defendants Agnes Purdy and TCC actually did so.[85] In that related case, Agnes Purdy and TCC specifically alleged:

> This Court has jurisdiction in this action pursuant to pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1360(b) (civil jurisdiction in matters to which Indians are parties); 25 U.S.C. § 334 (allotments to Indians not on

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[82] *Arco Products Co. v. Stewart & Young, Inc.,* 50 Fed.Appx. 336, 2002 WL 31001852 (C.A.9 (Cal.)).
[83] *Id.* at 336, 2002 WL 31001852, at *1.
[84] *Id.* at 337, 2002 WL 31001852, at *1 (citations omitted).
[85] *See generally, Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Complaint (Dkt.1) and Motion for Preliminary Injunction Against Defendants (Dkt. 24).

> reservations [sic]; 28 U.S.C. § 1353 (Indian Allotments); 25 U.S.C. § 345 (actions for allotments); and Article III, § II of the U.S. Constitution.[86]

The State, while not technically a party to the *Purdy v. Busby* action, certainly had its interests threatened by that case.[87] This was due to the fact that Agnes Purdy and TCC were attempting to enjoin and prevent travel by members of the public over State-owned rights-of-way.[88]

Therefore, in this instance, federal jurisdiction over the State's declaratory judgment count exists for a variety of reasons. First, and for the reasons set forth elsewhere in this memorandum, federal jurisdiction exists independently pursuant to 43 U.S.C. § 932 (R.S. 2477), 28 U.S.C. § 2409a(a) (QTA),[89] and 25 U.S.C. § 357 (Federal Statute authorizing condemnation of Native allotment lands).[90] Jurisdiction also exists as demonstrated by the actions of Defendants Agnes Purdy and TCC in the *Purdy v. Busby* litigation.[91] As that case makes clear, jurisdiction over the State's declaratory judgment count exists because of Agnes Purdy's and TCC's threatened actions against the State's interests and because the Purdys clearly could have, and at least one of the Purdys did bring coercive action in federal court to enforce alleged rights.[92] Having done so confirms subject matter jurisdiction in this case pursuant to the holdings in *Janakes v. United States Postal Service*[93] and *Arco Products Co. v. Stewart & Young, Inc.*[94]

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[86] *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Complaint (Dkt.1) at ¶ 3
[87] *See generally, id.*
[88] *See generally, Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Complaint (Dkt.1), Motion for Preliminary Injunction Against Defendants (Dkt. 24), Order Granting Motion for Stay at Docket 18 (Dkt. 57).
[89] *Supra* at 5-13.
[90] *Infra* at 17-22.
[91] *See generally, Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Complaint (Dkt.1), Motion for Preliminary Injunction Against Defendants (Dkt. 24), Order Granting Motion for Stay at Docket 18 (Dkt. 57).
[92] *Id.*
[93] *Janakes*, 768 F.2d at 1091.

C. Count Seeking to Condemn Portions of the Purdys' Property Pursuant to 25 U.S.C. § 357.

In the Purdys' motion to dismiss for lack of subject matter jurisdiction, the Purdys erroneously proclaim without citation that "the Allotments are restricted Indian lands that cannot be burdened with easements without approval from the United States government."[95] This statement, however, is fundamentally incorrect. As discussed *supra,*[96] *Alaska v. Babbitt (Bryant)* and *Alaska v. Norton* specifically held that to the extent existing rights were previously created through the allotments in favor of the State, the portions of the allotments traversed by those rights are not Indian lands. Accordingly, this Court may validly exercise jurisdiction over those portions of the allotments pursuant to the QTA.[97] The State also possesses independent authority to confirm the easements at issue based on application of the Declaratory Judgment Act as set forth at 28 U.S.C. § 2201.[98]

Further, as will be set forth below, this Court possesses express authority to exercise jurisdiction over Native allotments pursuant to 25 U.S.C. § 357. The arguments the Purdys have made alleging that the State will not satisfy its burden sufficiently to be awarded condemnation are not jurisdictional.[99] Instead, those issues will be addressed at time of trial. It is clear that 25 U.S.C. § 357 by its express terms confers power and authority on this Court to adjudicate the State's condemnation count. Fortunately, the case of *State v. Harrison,* United States District Court, Case No. A94-464 Civ. (HRH), should remove any questions regarding this Court's jurisdiction arising under 25 U.S.C. § 357 on facts similar to those occurring here.

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[94] *Arco Products Co.,* 50 Fed.Appx. 336, 2002 WL 31001852.
[95] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 6.
[96] *Supra* at 5-13.
[97] *Id.*
[98] *Id.* at 13-17.
[99] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 7-14.

1. *The State has Properly Alleged its Condemnation Count and This Court has Jurisdiction.*

The Purdys ask this Court to dismiss the condemnation count (count VI of the complaint) on the basis of an alleged lack of subject matter jurisdiction.[100] In support of this request, the Purdys argue that the State fails to follow Alaska law in two respects: 1) it has not sufficiently documented consideration of the private injury to the Purdys in condemning the historic trails that cross their allotments; and 2) the Meyers Fork Spur Trail, designated as Route No. 4 on the litigation map,[101] is alleged to be for the benefit of a single individual miner and not for the public. In supporting these arguments, the Purdys suggest that the State has not followed the dictates of AS 09.55.420, .430, .450(a) and .460(b).[102]

Subject matter jurisdiction is conferred on this Court by 25 U.S.C. § 357, which specifically provides: "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee." This statute was held to give subject-matter jurisdiction to the federal court in condemnation cases involving Native allotments in *Yellowfish v. City of Stillwater*.[103] Because 25 U.S.C. § 357 confers subject-matter jurisdiction over this matter to this Court, the Purdys' motion to dismiss for lack of subject-matter jurisdiction must be denied. Without subject-matter jurisdiction, this Court could not address the Purdys' substantive challenges to the sufficiency of the pleadings.

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[100] *See generally,* Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 7-14.
[101] Complaint (Dkt. 1) at Exh. "1" (litigation map).
[102] *See generally,* Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 7-14.
[103] *Yellowfish v. City of Stillwater*, 691 F.2d 926 (10th Cir. 1982), *cert. denied,* 461 U.S. 927 (May 16, 1983); *See also,* 41 Am. Jur. 2d *Indians* §81 (2013).

The Purdys' objection to the complaint is also premature insofar as they dispute the State's allegation that the takings are necessary. Condemnation will only take place, if at all, after this Court has determined what rights-of-way the State already legally possesses via R.S. 2477.[104] If this Court confirms that the State already possesses rights-of-way to the various roads and trails identified in the complaint, and in the manner and scope that the State suggests, there will be no need to condemn any of them. If the Court confirms the State's ownership interest as to some of the rights-of-way, but not as to others, the State will reassess the remaining trails at that time. Until the Court has made such a determination, it is not possible to conduct a detailed analysis of the necessity of any of the routes at issue.

The merits of the Purdys' objections to the condemnation count are also misaddressed. Importantly, the Purdys conflate two different types of condemnation actions and their two different sets of requirements. Further, the Purdys apply the wrong requirements to the type of condemnation at issue here.

In this instance, the Purdys have claimed that the State has failed to comply with AS 09.55.460(b).[105] However, AS 09.55.460(b), regarding the divesting of title from a condemnor and restoring title to its original holder, only applies in a "quick take" case, which this is not.[106]

AS 09.55.420-460 govern a "quick take" condemnation using a declaration of taking.[107] The State has not used a declaration of taking in this case. Rather, this condemnation is what the Alaska Supreme Court has referred to as a "general condemnation." [108] General condemnation was the only option available before Alaska's

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[104] Complaint (Dkt. 1) at ¶¶ 346-355.
[105] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 7-14.
[106] Complaint (Dkt. 1) at ¶¶ 346-355.
[107] *Hillstrand v. City of Homer,* 218 P.3d 685, 690 and n.8 (Alaska 2009).
[108] The differences between a "general" condemnation and a "quick take" condemnation are set out in *ARCO Pipeline Co. v. 3.60 Acres*, 539 P.2d 64 (Alaska 1975). In a "quick

"quick take" statute was adopted in 1953.[109] In *Ship Creek Hydraulic Syndicate v. State*, the Alaska Supreme Court ruled that when the State – or another condemnor - chooses to employ the "quick take" method of condemnation using a declaration of taking, it must include with its declaration of taking a decisional document setting out its reasoning for selecting a particular property for acquisition.[110]

The State has not filed a "quick take" condemnation in this case. Instead, count VI of the complaint states a claim for a general or "slow take" condemnation, in which title remains with the original landowners until the conclusion of the action when the court enters a judgment of condemnation after having determined the amount of just compensation for the taking.[111] A general condemnation is governed by AS 09.55.240 - 410.

> The prerequisites for a general condemnation are set out at AS 09.55.270:
>
> Before property can be taken, it shall appear that:
>
> (1) the use to which it is to be applied is a use authorized by law;
>
> (2) the taking is necessary to the use;
>
> (3) if already appropriated to public use, the public use to which it is to be applied is a more necessary public use.

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take" condemnation, title to the property in question passes defeasibly to the condemnor upon filing of the declaration of taking and deposit of the estimated just compensation, and the question of the amount of compensation is deferred for later proceedings. In a general condemnation, title to the property remains with the previous owner until the conclusion of the action when the amount of compensation has been determined and the court has entered an order and judgment of condemnation. *ARCO* at 70. Thus, the order of consideration is different in a "quick take" than in a general condemnation. In a "quick take" condemnation, the issue of authority and necessity for the taking is bifurcated from the issue of the amount of compensation, and is heard in a separate proceeding prior to the compensation phase. This is not the case in a general condemnation as is at issue here.

[109] *See Ship Creek Hydraulic Syndicate v. State*, 685 P.2d 715, 716 (Alaska 1984).

[110] *Id.* at 718.

[111] Complaint (Dkt. 1) at ¶¶ 346-355.

In *City of Fairbanks v. Metro*, the Alaska Supreme Court held that in a general condemnation case arising under AS 09.55.270(2), the condemnor need show no more than that the taking is "reasonably requisite and proper for the accomplishment of the purpose for which it is sought." [112] Once the condemnor has presented sufficient evidence to support a finding that the taking is "reasonably requisite," particular questions as to the route, location, or amount of property to be taken are to be left to the sound discretion of the condemning authority absent a showing by clear and convincing evidence that such determinations are the product of fraud, caprice, or arbitrariness. [113] These are delineated in the decision as evidentiary questions, and thus are not appropriate to decide on the pleadings alone. [114]

In *Town of Seward v. Margules*, the territorial district court, interpreting a territorial statute that set out the first two elements of AS 09.55.270, held that allegations in an amended complaint that the taking was necessary ("imperatively required") was sufficient to survive a demurrer. [115] So here, in a general condemnation case, the assertion in the complaint that the taking is necessary to serve a legitimate public purpose is sufficient to withstand a motion to dismiss. Evidence will be required to weigh whether the taking is reasonably requisite, and that can only be determined once this Court has ruled on the extent to which the State has already acquired the rights at issue via R.S. 2477.

The Purdys also assert that the condemnation of the Myers Fork Spur trail is for the private benefit of one user and therefore cannot be for a public use as authorized by law. [116] However, as the State specifically addresses *infra*, the Myers Fork Spur Trail is used to access 19 separate mining claims owned by five separate individuals and

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[112] *City of Fairbanks v. Metro Co.*, 540 P 2d 1056, 1058 (Alaska 1975).
[113] *Id.*
[114] *Id.* at 1058-59.
[115] *Town of Seward v. Margules*, 9 Alaska 354, 358 (D Alaska Terr. 1938),
[116] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 10.

entities.[117] It is also routinely used by used by hunters, trappers, and others, including many recreational miners accessing the claims of Michael Busby.[118] Michael Busby has alleged that in 2012 alone, recreational miners accessing his claims via the R.S. 2477 rights-of-way through the Purdy allotments tallied 1,000-1,200 man-days of recreational mining.[119] Consequently, the Purdys' repeated suggestion that the Myers' Fork Spur Trial is only used by a single miner ignores the now verified allegations contained in the complaint as well as numerous previously filed declarations.

Even more problematic for the Purdys is the principle that "[p]ublic use does not require actual use by the public, but rather that the public will receive a benefit or advantage from the taking."[120] "As long as the public has the right of use, whether exercised by one or many members of the public, a 'public advantage' or 'public benefit' accrues sufficient to constitute a public use . . . "[121]

Here, the benefit to the public is of access to resources and opportunities, whether they are recreational, hunting, trapping, exploration, or other types. No individual holds a monopoly on the use of any of the trails identified in the State's complaint. Any of the trails that are condemned in this action will be condemned for the beneficial use of the public, not for any single individual. Based on the foregoing and as expressly set forth in 25 U.S.C. § 357, this Court clearly has subject jurisdiction over the State's condemnation count.

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[117] Complaint at ¶ 227; *Infra* at 35-43.
[118] Complaint at ¶ 229; *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Declaration of Michael Busby in Support of Motion for Stay of Proceeding (Dkt. 19-1) at ¶ 7; *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Declaration of Michael Busby (Dkt. 37) at ¶¶ 48-50.
[119] *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Declaration of Michael Busby (Dkt. 9) at ¶ 6.
[120] 1985 Inf. Op. Atty. Gen. (September 12, File No. 166-186-84) (1985 WL 70222)(Alaska A.G.)(citing *Montana Power Co. v. Bokma*, 457 P.2d 769, 774-75 (Mont. 1969)).
[121] *Id.* (quoted in *Williams v. Hyrum Gibbons & Sons*, 602 P.2d 684, 687 (Utah 1979)).

2. *State v. Harrison, United States District Court, Case No. A94-464 Civ. (HRH); Alaska v. Harrison, 10 Fed.Appx. 527, 2001 WL 569146 (C.A.9 (Alaska)).*

This is not the first instance where Alaska Native allotment owners have attempted to deny the existence of R.S. 2477 rights-of-way across their property. Nor is this the first instance where the State has relied, in similar circumstances, on the subject matter jurisdiction conferred by 25 U.S.C. § 357 to confirm the State's ownership of the right-of-way and the full extent of its breadth and scope. An analogous situation previously arose in *Alaska v. Harrison*.[122]

In *Harrison,* the State of Alaska filed suit against various owners of an Alaska Native allotment, the United States, and the Chickaloon Native Village regarding a right-of-way in the vicinity of Chickaloon, Alaska.[123] The State asserted ownership of the Chickaloon River Road and further contended that Defendants Harrison had repeatedly blocked and obstructed the public's right of access on the road through the allotment.[124]

The State's sole basis for subject matter jurisdiction was 25 U.S.C. § 357.[125] The State's only count against the allotment owners themselves was to seek confirmation that the State already owned and possessed a right-of-way across the allotment and to the extent it did not, seek condemnation of the right-of-way.[126] Specifically, the State alleged that the Native allotment was already subject to the State's valid existing right based on various legal justifications, including R.S. 2477.[127] The State further alleged that given its pre-existing entitlement to the right-of-way, no compensation was owed to the allotment

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[122] *Alaska v. Harrison,* 10 Fed.Appx. 527, 2001 WL 569146 (C.A.9 (Alaska)).
[123] *See generally, State of Alaska v. Harrison, et al.,* Case No. A 94-464 Civ. (HRH), First Amended Complaint. dated June 23, 1995, a true and correct copy of which is attached as Exhibit "4."
[124] *Id.*
[125] *Id.* at ¶ 2.
[126] *Id.* at ¶¶ 33-38.
[127] *Id.* at ¶ 37.

owners.[128] Alternatively, to the extent actual condemnation was necessary, the condemnation sought in *Harrison* was in the form of a slow take or general condemnation as opposed to a quick take condemnation.[129] In *Harrison,* because the State was seeking a slow take condemnation, neither a decisional document nor a declaration of taking were filed with the complaint.[130] Instead, all the complaint alleged was that "the easement is necessary to continue public access for highway purposes along the Chickaloon River Road as part of the State Highway System."[131]

The State ultimately moved for partial summary judgment before the trial court, the Honorable H. Russell Holland presiding. In doing so, the State sought confirmation that it already possessed a valid and legal right across the Harrison allotment. The State's claim of ownership was based on a number of different theories, including but not limited to the Alaska Omnibus Act, Public Land Order 601, and R.S. 2477.[132] The Harrisons disagreed, asserting among other things, that because their allotment certificates were not expressly subject to the State's interest in the roadway, they took their allotment free and clear from any claimed right.[133]

Judge Holland held that the State already possessed a valid existing right through the allotment, that the right-of-way had not been abandoned or extinguished and that the absence of mention of the right-of-way in the allotment certificate did not affect the existence of the right-of-way.[134]

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[128] *Id.* at ¶ 38.
[129] *Id.* at ¶¶ 33-38.
[130] *Id.*
[131] *Id.* at ¶ 37.
[132] *Id.* at ¶ 37.
[133] *State of Alaska v. Harrison, et al.,* Case No. A 94-464 Civ. (HRH), Order (Re. Motion for Partial Summary Judgment)(Dkt. 131), at 9-10, a true and correct copy of which is attached as Exhibit "5."
[134] *See generally, id.*

Following the initial motion for partial summary judgment, the State filed a second motion for summary judgment concerning the issue of valuation.[135] As set forth in that motion, while a previous existing right-of-way had already been confirmed in the State's favor by the court, it was determined that a small portion of the existing road was actually located outside of the bounds of that right-of-way. The total area situated outside of the established road easement was approximately 1.755 acres.[136] As such, the State sought to condemn that portion of the right-of-way and to pay the Harrisons for the additional area required. In doing so, and in order to avoid any valuation issues, the State sought to pay the Harrisons $3,000 which was more than double the area's fair market value.[137] The court agreed and ruled in favor of the State on summary judgment, effectively disposing the case.[138]

The Harrisons appealed Judge Holland's decision to the Ninth Circuit Court of Appeals.[139] The court of appeals specifically noted that the State had originally sought relief per 25 U.S.C. § 357.[140] It upheld the district court's decisions in all respects.[141]

The present dispute is virtually identical to *Alaska v. Harrison.* In this case, just as in *Harrison,* the State asserts that it has a pre-existing entitlement to the rights-of-way across the allotments and that the Purdys took their property subject to these rights-of-

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[135] *See generally, State of Alaska v. Harrison, et al.,* Case No. A 94-464 Civ. (HRH), Order (Re. Motion for Summary Judgment/Valuation)(Dkt. 146), a true and correct copy of which is attached as Exhibit "6."
[136] *Id.* at 1.
[137] *Id.* at 1-2.
[138] *Id.* at 2-4.
[139] *See generally, Alaska v. Harrison,* 10 Fed.Appx. 527, 2001 WL 569146 (C.A.9 (Alaska)). The decision of the Ninth Circuit Court of Appeals in *Alaska v. Harrison* is an unpublished decision. However, because the court of appeal's decision arose from a case filed within the District of Alaska, the State respectfully requests that judicial notice be taken of the decision pursuant to D. Ak. LR 7.1(c)(2)(B)&(C). The decision is also authoritative and citable pursuant to 9th Cir. R. 36-3(c)(ii)(existence of a related case).
[140] *Alaska v. Harrison,* 10 Fed.Appx. at 527, 2001 WL 569146, at *1.
[141] *Id.*

way. Unlike in Harrison, however, in this case, the State is not simply relying upon the subject matter jurisdiction conferred by 25 U.S.C. § 357. In addition to the subject matter jurisdiction clearly and unequivocally conferred by that federal statute, in this instance the State is also further relying on subject matter jurisdiction conferred by 28 U.S.C. § 2201, 43 U.S.C. § 932, 28 U.S.C. § 2409a, and the numerous cases and precedent interpreting those statutes.[142]

Just as in *Harrison,* in this case, the State asserts that this Court has the jurisdiction and authority under 25 U.S.C. § 357 to determine what rights the State already possesses in the rights-of-way at issue. If and only if it appears that the State's entitlement to these rights-of-way is lacking or deficient, will the State be forced to seek condemnation to any portion of the rights-of-way it does not already possess.[143] Also as in *Harrison,* in this case, the method of condemnation being invoked should that become necessary, is in the form of a general as opposed to a quick take condemnation.[144] Under the legal requirements which pertain to general condemnations, just as in *Harrison,* there is no requirement that the State file a decisional document or a declaration of taking at the time the complaint is filed. Instead, the State will only be required to demonstrate the reasonable necessity for this taking, above and beyond the allegations already contained in the complaint, at time of trial.[145] Just as occurred in *Harrison,* there is no reason to believe that the Ninth Circuit Court of Appeals will not uphold the power and authority of this Court to make this determination. This is true even if this court were to

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[142] *See generally, supra.*
[143] Complaint (Dkt. 1) at ¶ 348 ("This count is brought and pled by the State of Alaska, in the alternative, to confirm in the State and/or take a right-of-way for the above-referenced roads and trails where they traverse the Agnes Purdy Native Allotment, No. 50-2008-0437, and the Anne L. Purdy Native Allotment, No. 50-2013-0004.").
[144] *Supra* at 17-22; Complaint (Dkt. 1) at ¶¶ 346-355.
[145] *Supra* at 18-22.

exclusively rely upon the subject matter jurisdiction conferred by 25 U.S.C. § 357 as opposed to the other jurisdictional alternatives the State has provided.

While the State's pre-existing legal entitlement to the right-of-way in *Harrison* may ultimately have been deemed to be based on Public Land Order 601, as opposed to R.S. 2477, this fact is a distinction without a difference. What is important is that in *Harrison,* just as here, the State possessed a valid pre-existing legal entitlement across the allotment. That right-of-way had not been extinguished or abandoned. And, it was inconsequential that the allotment owners' certificate of allotment may not have mentioned the State's entitlement. Finally, and most importantly of all for purposes of this motion, the trial court in *Harrison* was legally empowered to rely on the subject matter jurisdiction conferred by 25 U.S.C. § 357 in making these determinations.

II. DEFENDANTS PURDY HAVE MISCONSTRUED THE RELATION BACK DOCTRINE'S APPLICATION TO THIS CASE.

Defendants Purdy have also attempted to argue that the affidavits Agnes and her son Frank "show that neither [Myers Fork Spur nor the Chicken Creek Alternate] trail existed prior to 1950, after it became Indian land and after the 1931 date of entry."[146] As will be asserted below, the only thing that these affidavits demonstrate is that genuine issues of material fact exist as to a myriad of factual issues in this case.[147] This is because contrary to the Purdys' affidavits, the State has alleged exactly the opposite concerning creation of these two rights-of-way.[148] More importantly, however, Defendants' suggestion that the allotments became Indian land after 1931 manifests a significant misunderstanding regarding the relation back doctrine's application to this case.

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[146] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 9-10.
[147] *Infa.* at 31-39.
[148] Complaint (Dkt. 1) at ¶¶ 196-210, 215-231; *See also,* Exh. "1" at ¶ 5 (Affidavit of Rockford Beard-Weber) and Exh. "2" (Affidavit or Rolfe Buzzell) at ¶ 7.

As noted above, the relation back doctrine provides that the preference right to a Native allotment relates back to the date use and occupancy first commenced, even though the application may have been filed much later.[149] However, a notable exception to the relation back doctrine occurs when the land at issue was mineral in character at the time of such use and occupancy.[150] This is because only "vacant, unappropriated, and unreserved *non-mineral* land" is available for allotment purposes.[151]

In *State of Alaska (Mary Sanford),* the IBLA found the relation back doctrine inapplicable because the applicant had applied for land that was mineral in character and thus statutorily unavailable for allotment at the time she began her use and occupancy. Accordingly, the applicant had no right to the land, irrespective of application of the relation back doctrine. [152] The IBLA once again noted and confirmed this exception in *State of Alaska (Irene Johnson and Jack Craig)*.[153]

Use and occupancy of the Anne Purdy allotment, did not begin in either 1931 or 1947 as the Purdys have alleged.[154] Instead, as the BLM's decision for the allotment specifically provides the earliest Anne Purdy's use and occupancy could legally be deemed to have occurred was 1955:

> Anne Lynn Purdy claimed use of the lands on her Native allotment application when she was born (January 1947). The Interior Board of Land Appeals (IBLA) has ruled as a matter of law that a five year old child or younger, is too young to have exerted independent use and occupancy of the land to the exclusion of others. *Floyd L. Anderson, Sr.*, 41 IBLA 280, 86 LD. 345 (1979). In a later decision, the IBLA ruled that it is possible for

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[149] *Supra* at 8 and n.47 (citing *Golden Valley Electric Ass'n*,, 98 IBLA 203, 205 (1987)).
[150] *State of Alaska (Mary Sanford),* 131 IBLA 121 (1994); *State of Alaska (Irene Johnson and Jack Craig),* 133 IBLA 281 (1995).
[151] 43 U.S.C. § 270-1 (1970)(repealed by the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628 (1976), subject to applications pending on December 18, 1971).
[152] *State of Alaska (Mary Sandford),* at 127-128.
[153] *State of Alaska (Irene Johnson and Jack Craig),* 133 IBLA 289-290 (1995).
[154] *See* Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 9-10, 12.

> minor children eight years old or older to assert independent use and occupancy. *William Bouwens, et al.*, 46 IBLA 366. The land within Ms. Purdy's application remained open to the initiation of a Native allotment claim from the year of her birth, until December 18, 1971, when the Native Allotment Act of March 17, 1906 was repealed. *Therefore, the BLM must consider January 1955 as the earliest date of the commencement of independent use and occupancy by the applicant and will proceed to adjudicate accordingly*.[155]

As to the allotment now owned by Defendant Agnes Purdy, and contrary to what the Purdy Defendants have alleged,[156] the BLM previously determined that the allotment was mineral in character and unavailable for use and occupancy up and through a large portion of the 1960s.[157] The referenced BLM decision is based on a challenge by the United States to Arthur Purdy's Native allotment application[158] originally filed in 1971. Following the application, in 1979 the BLM conducted a mineral examination of the property and approved a mineral report in 1989. The mineral report determined that the land was valuable for minerals. Therefore, the allotment application was ultimately rejected and Arthur Purdy's heir, Agnes Purdy, appealed the rejection. A week-long evidentiary hearing took place in Tok, Alaska in 2006, before administrative law judge, Robert G. Holt.[159]

As Judge Holt noted, the parties do not dispute that gold is located on the land, but simply dispute its quality and cost of mining it. "The land is in what was once a very

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[155] Exh. "3" (Decision Regarding Native Allotment Application F-19188, Parcel A) at 3 (emphasis added).
[156] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 10.
[157] *See generally, United States of America v. Heir of Arthur Purdy, Sr.,* BLM Administrative Decision, dated September 7, 2006, a true and correct copy of which is attached as Exhibit "7."
[158] Arthur Purdy, Sr. is the deceased husband of Agnes Purdy, a Defendant in this case. *See* Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91), Exh. "I" (Dkt. 91-9) at ¶ 8.
[159] Exh. "7" (*United States of America v. Heir of Arthur Purdy, Sr.,* BLM Administrative Decision) at 2.

productive and well known placer gold mining area of Alaska. Despite its location, no one was successfully mining it, or interested in mining it, *at the time Purdy filed his application*."[160] While Judge Holt ultimately granted the Arthur Purdy application because of this conclusion, importantly for this analysis are the other findings and conclusions made by Judge Holt with regard to Arthur Purdy's use and occupancy. [161]

Based on the evidence presented at the five-day hearing, among other things, Judge Holt concluded that:

> [t]he area has been actively mined for gold since the 1880s.[162]
>
> . . . gold was discovered along Chicken Creek in 1896 and it was reported in 1935 that this creek and its tributaries, including Myers Fork (which runs northwest to southeast through Purdy's allotment) had 'produced a lot of gold.'[163]
>
> Purdy's father, Frank, began mining for gold on Myers Fork in the early 1900s. In 1936, the U. S. Geological Survey reported that both sides of Myers Fork had been extensively mined from the mouth upstream for over 1,000 feet and throughout the northeast side of the creek. This area corresponds to an area of past mining on Purdy's allotment.
>
> Purdy and his brother, Fred, carried on the mining in Myers Fork from the 1930s until the early 1960s. Government reports show that Purdy and Fred had two mining operations in Myers Creek in 1939. One used a bulldozer and employed three men and the second employed two men. By 1950 the reports showed that Purdy and Fred had mined out their creek claims and had moved up to a bench of Meyers Fork. "They were not finding much pay and were quite discouraged." By 1951 Alaska's Department of Mines reported a general decline in gold mining with further decreases expected. The reports showed the brothers continued to mine in the Meyers Fork area through the remaining 1950's, with the last reported activity in 1964. The

[160] *Id.* at 1 (emphasis added).
[161] *Id.* at 13.
[162] *Id.* at 5.
[163] *Id.* at 10.

> evidence does not describe further mining by Purdy in Meyers Fork after this time or after he filed his allotment application in 1971.[164]
>
> . . .
>
> This record demonstrates that the area of Chicken Creek adjacent to Purdy's allotment was well known since the late 1880's to have gold mining potential. Further, the land in Meyers Fork, including in and around Purdy's allotment, had been mined in years past but was in decline by the late 1960s. By the time Purdy applied for his Native allotment in 1971, no one showed an interest in continued mining.[165]
>
> . . .
>
> To summarize, gold mining in Chicken was generally in decline when Purdy filed for his Native allotment. A major mining company, the FE Company, had left the Chicken Creek area in 1967 because it could not make money. Except for Eich, no one had mined within the allotment since 1964. Eich had tried to mine shortly after 1971, but his experience demonstrated that mining could not be done profitably. Given the area's reputation for placer gold deposits, the conclusion must be drawn that no miner believed a profit could be made on Purdy's allotment during this time. The lack of mining in such a well known area provides strong evidence that the allotment failed the prudent man test.[166]

Ultimately, Judge Holt concluded that, *as of the date of the Arthur Purdy allotment application in 1971*, the land was nonmineral in character.[167] It was this conclusion which was ultimately responsible for the subsequent BLM decision granting the allotment to the heirs of Arthur Purdy.[168]

However, for purposes of this motion, what is more important are the factual findings by Judge Holt demonstrating that the allotment was actively mined and was

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[164] *Id.* at 10-11.
[165] *Id.* at 12.
[166] *Id.*
[167] *Id.* at 12 ("By the time Purdy applied for his Native allotment in 1971, no one showed an interest in continued mining."); *See also, id.* at 13.
[168] *See generally,* Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at Exh. "K."

clearly mineral in character until some point in the 1960s.[169] Here, just as in *State of Alaska (Mary Sanford),* the allotment was unavailable for use and occupancy until it was mined out sometime in the 1960s. This is because prior to that time, the land was not "vacant, unappropriated, and unreserved *non-mineral* land".[170] In other words, it was statutorily ineligible for use and occupancy until it lost its mineral characterization sometime during the 1960s. At any point up until that time, R.S. 2477 rights could have accrued.

Therefore, for purposes of these two allotments, all the State is required to demonstrate is that the R.S. 2477 rights-of-way on the Agnes Purdy allotment arose before the 1960s and that the rights-of-way on the Anne Purdy allotment arose before January 1955. Any suggestion to the contrary fails to accurately apply the relation back doctrine to this case and ignores the evidence concerning use and occupancy of these two allotments.

III. THE PURDYS VOLUMINOUS FACTUAL ARGUMENTS ARE VERY MUCH DISPUTED AND LEGALLY UNAVAILING.

Defendants Purdy have asserted an exhaustive array of factual allegations.[171] As will be set forth below, the Purdys' factual claims are highly disputed. Further, irrespective of whether this motion is construed as a factual attack on subject matter jurisdiction, or alternatively as a motion for summary judgment, Defendants' factual assertions are legally unavailing.

With regard to a motion to dismiss characterized as a factual attack on jurisdiction, the judicial determination of genuinely disputed facts is inappropriate when the jurisdictional issues and substantive issues are so intertwined that the question of

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[169] *See generally, United States of America v. Heir of Arthur Purdy, Sr.,* BLM Administrative Decision.
[170] 43 U.S.C. § 270-1 (1970)(repealed by the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628 (1976), subject to applications pending on December 18, 1971).
[171] *See generally,* Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91).

jurisdiction is dependent on resolution of factual issues going to the merits.[172] "The question of jurisdiction and the merits of an action are intertwined where 'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief.'"[173] As is clear from even a brief analysis of the facts raised by the Purdys, the jurisdictional and substantive issues are in fact substantially intertwined in this case.

Also, even if this motion were converted to a motion for summary judgment, the factual issues raised by the Purdys are equally unavailing. This is because these factual allegations undeniably create genuine issues of material fact, justifying denial.[174] In a motion for summary judgment, the moving party has the burden of demonstrating an absence of genuine issues of material fact.[175] In construing motions for summary judgment, all inferences are drawn in favor of the non-moving party and reasonable doubts as to the existence of material fact issues are resolved against the moving parties.[176] As the below analysis demonstrates, the Purdys' motion is replete with genuine issues of material fact.

This analysis is not an attempt to refute all of the factual discrepancies set forth in the Purdys' motion to dismiss. Simply stated the factual inaccuracies contained in the Purdys' filing are too numerous and too far off the mark to accurately respond to in the limited space allowed here. This is particularly true given the importance of the legal issues which also need to be addressed. Further, many of the factual claims made by the Purdys are immaterial to the legal issues applicable to this motion. Facts which are immaterial are presently irrelevant for purposes of this analysis and as such, many of the

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[172] *Safe Air For Everyone*, 373 F.3d at 1039.
[173] *Id.* (quoting *Sun Valley,* 711 F.2d at 139).
[174] Fed. R. Civ. P. 56(a); *See also, Leisek v. Brightwood,* 278 F.3d 895, 898 (9th Cir. 2002).
[175] *Leisek v. Brightwood,* 278 F.3d at 898.
[176] *Addisu v. Fred Meyer,* 198 F.3d 1130, 1134 (9th Cir. 2000).

Purdys' factual misstatements have been ignored. The State wishes to make clear, however, that simply because it may have elected to not address some of the many factual inaccuracies raised should not in any way be construed as an admission or acknowledgement of the accuracy of those statements.

Following is an overview of many of the genuine issues of material fact set forth in the Purdys' motion to dismiss:

Genuine Issues of Material Fact Alleged By the Purdys	**The State's Response**
". . . it is virtually impossible for the State to demonstrate that condemning several dead-end or duplicative trails maximizes the public good or minimizes injury to the Purdys."[177]	It is unclear what the Purdys may be referencing with regard to alleged dead-end trails. All of the roads and trails through the Purdy allotments are continuous roads and trails which intersect other trails.[178] While it is acknowledged that the western portion of the Chicken Ridge Alternate Trail (Route 3 on Exh. "1" of the complaint) and the Myers Fork Spur Trail (Route 4 on Exh. "1" of the complaint) are roughly parallel, they are nearly a quarter mile apart. One is located in the creek bottom and accesses numerous mining claims within the creek bottom, while the other is located on much higher ground outside of the creek bottom and away from claims. Further, as the complaint indicates, the State is only seeking condemnation to the extent R.S. 2477 rights-of-way may not be confirmed by the Court.[179] Which rights-of-way the State ultimately may seek via condemnation will likely be significantly influenced by what rights-of-way the Court confirms in favor of the State via R.S. 2477. As such, it is factually improper to suggest that the State will ultimately seek condemnation of all trails set forth in Exhibit "1."
"Although the State presents an exhaustive history of the Fortymile Country from the 1890s to the 1950s in its Complaint,	This statement is both factually and legally inaccurate. It is legally inaccurate to the extent that it implies that the State must prove use of R.S. 2477 rights-of-way after the mid-1950s. That is not the case. For condemnation, while present or future need may be required, historic use is largely irrelevant.[181] For an R.S. 2477

[177] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 8.
[178] Complaint at Exh. "1" (litigation map).
[179] *Id.* at ¶¶ 346-355.
[181] AS 09.55.240 - 410.

the fact of the matter remains that nowhere in the Complaint does the State mention any use of any of the purported R.S. 2477 trails allegedly crossing the Purdy Allotments after the mid-1950s. The State merely notes "the right-of-way confirmation and/or acquisition is necessary to continue public access for highway purposes along the rights-of-way at issue."[180]	to be created, all that must be shown is that prior to any federal reservation or withdrawal: 1) there was some positive act on the part of the appropriate public authorities manifesting an intent to accept the R.S. 2477 grant, or 2) there must be a sufficient degree of public use as to demonstrate that the grant had been accepted.[182] Nothing with regard to R.S. 2477 requires that the State allege use of the roads and trails across the allotments after 1950 as the Purdys suggest. The statement is also factually inaccurate in that the State has clearly alleged in the verified factual allegations contained in the complaint[183] that use of the routes at issue have continued up through to the present day.[184]
". . . the State arbitrarily claims in its Complaint that it is entitled to these and several more rights-of-way that are one-hundred (100) feet in width pursuant to AS 19.10.015 without explaining why this additional 75 feet of access rights to barely-used-if-not-entirely-abandoned trails in Bush Alaska."[185]	The complaint clearly articulates the legal basis for the State's entitlement to rights-of-way 100' in width per AS 19.10.015 and Department of Interior Order 2665.[186] The complaint, its numerous allegations, photos, and exhibits also clearly demonstrate that the roads and trails at issue in this case are far from barely used and entirely abandoned.[187] While it is certainly true that these rights-of-way encompass a broad variation in present day use and travel, a substantial portion of the roads and trails at issue across the Purdy allotments receive significant use.[188]
"Only one miner, Michael Busby, uses the Myers Fork Spur Road, and it is	As the verified allegations contained in the complaint clearly indicate, 19 separate State mining claims are located along and accessed via the Myers Fork Spur Trail.[190] These 19 claims are

[180] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 8.
[182] *Hammerly v. Denton,* 359 P.2d 121, 123 (Alaska 1961).
[183] Exh. "1" (Affidavit of Rockford Beard-Weber) at ¶ 5; Exh. "2" (Affidavit or Rolfe Buzzell) at ¶ 7.
[184] Complaint (Dkt. 1) at ¶¶ 155, 187, 208, 229, 257, 274.
[185] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 8-9.
[186] Complaint at ¶¶ 95-96.
[187] *Id.* at ¶¶ 120-275, 302-355; Exh. "1" (Affidavit of Rockford Beard-Weber) at ¶ 5; Exh. "2" (Affidavit or Rolfe Buzzell) at ¶ 7.
[188] Complaint (Dkt. 1) at Exh.s "28," "32."

undisputed that Busby is the person who built the road as it appears today."[189]	owned by no less than five separate individuals and entities, including Michael Busby.[191] Under State law, all of these individuals and entities are required to perform annual labor on their claims.[192] The trail is further used by hunters, trappers, and others, including many recreational miners accessing the claims of Michael Busby.[193] Michael Busby has alleged that in 2012 alone, recreational miners accessing his claims via the R.S. 2477 rights-of-way through the Purdy allotments tallied 1,000-1,200 man-days of recreational mining.[194] Finally, as the complaint clearly indicates, the Myers Fork Spur Trail was initially constructed in approximately 1890.[195] As is common with many R.S. 2477 rights-of-way, they are often shifted and modified due to weather, erosion and necessity, including mining. This has occurred with the Myers Fork Spur Trail as well.[196] As a result, Michael Busby has confirmed that he has performed recent maintenance and repair work on the Myers Fork Spur Trail, but he has unequivocally denied having been responsible for its construction.[197]
"[Michael Busby] has prevented others from using the trail by posting guards and "No Trespassing" signs on Agnes' property and he admits the trail dead ends in	The only "No Trespassing" signs placed on the Agnes Purdy property were the ones erected by TCC.[199] Michael Busby acknowledges having installed one sign[200] at the beginning of the worst section of trail leaving the Agnes Purdy allotment.[201] The sign was intended to direct Michael Busby's clients to his mining claims and deter 'passenger car' use of the trail beyond the

[190] Complaint (Dkt. 1) at ¶ 227; Exh. "1" (Affidavit of Rockford Beard-Weber) at ¶ 5.
[189] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 10.
[191] *Id.*
[192] AS 38.05.210.
[193] Complaint at ¶ 229; *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Declaration of Michael Busby in Support of Motion for Stay of Proceeding (Dkt. 19-1), at ¶ 7; *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Declaration of Michael Busby (Dkt. 37) at ¶¶ 48-50.
[194] *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Declaration of Michael Busby (Dkt. 9) at ¶ 6.
[195] Complaint at ¶¶ 215, 306.
[196] *Id.* at ¶ 220; *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Declaration of Michael Busby in Support of Opposition to Motion for Preliminary Injunction (Dkt. 37), at ¶¶ 11-16.
[197] *Id.*

the Myers Creek valley with no reasonable access to Chicken Ridge on any of the three "spurs" depicted on the State's litigation map. Busby admits that none of these trails are usable, and Agnes and Frank Purdy swear these trails never existed."[198]	allotment (over the muddy section).[202] At no point has Michael Busby ever alleged that the Myers Fork Spur Trail or any trails across the allotments are "dead ends" as the Purdys suggest. None of the citations provided by the Purdys remotely support this.[203] While it is accurate that Michael Busby has previously alleged that he cannot presently access his claims without passing through the Agnes Purdy allotment,[204] that is far different than suggesting that Michael Busby has admitted that Myers Fork trail "dead ends" in the Myers Creek valley or is unusable. Finally, while Agnes and Frank Purdy may have provided sworn affidavits claiming that certain portions of the Myers Fork Spur Trail never existed, such statements are belied by the aerial photography attached to the complaint.[205]
". . . the State's litigation map admits that the State is not litigating RST 1832, Chicken-Fish-McKinley Creeks Trail (RST 421), Ketchumstuck Chicken Trail, or RST 1642 (Fortymile to Lillywig Trail)."[206]	The State's litigation map "admits" no such thing. As the State has previously made clear, many of rights-of-way at issue in this litigation have gone by a number or historic names and route designations.[207] Simply because the State identified a route by a certain label for purposes of this litigation does not mean that the same route may not have been known by a different name historically or that the State may not have called it something different in the past. Adding to this confusion is the fact that many of the State's identified R.S. 2477 routes overlap. For

[199] The State of Alaska's Opposition to Defendant TCC's Motion to Dismiss Without Prejudice (Dkt. 81) at 9.
[200] *See* Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at Exh. "A"; *See also, Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Joint Reply to Court's Order to Show Cause and Opposition to Defendants' Motion for Stay (Dkt. 20), Exh. "1" at 2.
[201] *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Supplemental Declaration of Michael Busby (Dkt. 31-1) at ¶¶ 13A & B.
[198] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 10.
[202] *Id.*
[203] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 10.
[204] *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Declaration of Michael Busby in Support of Opposition to Motion for Preliminary Injunction (Dkt. 37), at ¶¶ 26-41.
[205] Complaint (Dkt. 1) at Exh. "30."
[206] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 10.

	instance, RST 10 (Chicken - Franklin), RST 421 (Ketchumstuck-Chicken) and RST 1832 (Chicken-Fish McKinley Creeks) all originate in the same location in Chicken and are all initially the same road. It is only miles outside of Chicken that the routes begin to diverge and proceed to the different locations for which they are named.[208] As much as possible, the complaint has sought to clarify the different names the various routes at issue in this case have been known by.[209] Contrary to what the Purdys have suggested, the verified allegations in the complaint confirm that the routes at issue in this litigation referenced in the litigation map do include portions of RST 421 (Ketchumstuck-Chicken) and RST 1832 (Chicken-Fish McKinley Creeks).[210]
"The Myers Fork Spur Road is a road to nowhere, built and used by one mining operation."[211]	As specifically referenced in and supported by the documentation set forth in the complaint, the Myers Fork Spur Trail provides access to 19 separate mining claims within the Myers Fork drainage.[212] The trail is further used by hunters, trappers, and others, including many recreational miners accessing the claims of Michael Busby.[213] Finally, as alleged and set forth in Exhibit "1" to the State's complaint, the trail is not a trail to nowhere nor does it dead-end, but in fact reconnects to the Chicken Ridge Trail.[214]
"The road building performed by Busby destroyed the creek bed, muddied the water, and has significantly damaged the	This allegation has been exhaustively disputed by Michael Busby.[216]

[207] The State of Alaska's Opposition to the Purdy Defendants' Motion to Dismiss (Dkt. 89) at 4.
[208] Complaint at ¶¶ 109, 120, 161, 166, 167, 170, 232, 237, 238.
[209] *Id.*
[210] *Id.* at 161, 166, 167, 170, 232, 238; Exh. "1" (Affidavit of Rockford Beard-Weber) at ¶ 5.
[211] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 10.
[212] Complaint at ¶ 227.
[213] Complaint at ¶ 229; *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Declaration of Michael Busby in Support of Motion for Stay of Proceeding (Dkt. 19.1) at ¶ 7; *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Declaration of Michael Busby (Dkt. 37) at ¶¶ 48-50.
[214] Complaint (Dkt. 1) at ¶ 213; *Id.* at Exh. "1" (litigation map).

economic and aesthetic value of Agnes [sic] property."[215]	
"The Chicken Creek Alternate Road is comprised of two sections, one that travels to Agnes' house and intersects the Chicken Ridge Trail, and one that dead ends at a clearing once used as a materials site for the Taylor Highway."[217]	The verified allegations and exhibits contained in the complaint clearly refute this statement. Both sections of the Chicken Ridge Alternate Trail link to and connect with the Chicken Ridge Trail.[218]
"Even if the State can meet its threshold burden of establishing that the Chicken Ridge Trail (as it passes through Anne's **but** not Agnes' allotment) should be recognized as a 100-foot-wide highway for a "purpose compatible with the greatest public good and the least private injury,"33 such a finding cannot legitimately be made with respect to an alternate access road built by the FE Company in 1950 to replace	The State denies that the Chicken Ridge Alternate Trail was originally constructed by the F.E. Company in 1950. As specifically alleged by the State in the verified allegations contained in the complaint, the Chicken Ridge Alternate Trail was simply improved in the 1950s. It existed long before that time.[220]

[216] *See generally, Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Declaration of Michael Busby (Dkt. 9); *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Declaration of Michael Busby in Support of Motion for Stay of Proceeding (Dkt. 19.1); *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Supplemental Declaration of Michael Busby (Dkt. 31.1); *Purdy, et al. v. Busby, et al.,* Case No. 4:12-cv-00031-RRB, Declaration of Michael Busby (Dkt. 37).
[215] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 10.
[217] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 10.
[218] Complaint (Dkt. 1) at ¶¶ 191-210; Exh. "1" (Affidavit of Rockford Beard-Weber) at ¶ 5.

Agnes' original access from Chicken Creek."[219]	
"Public access on Chicken Ridge (by whatever name eventually sticks) may be declared compatible with the greatest good, but when existing access from Chicken Creek to the top of Chicken Ridge is suitable, no secondary and superfluous access routes to Chicken Ridge, via either spur of the Chicken Ridge Alternate Road, can be asserted to foster the greater public good because of the considerable injury these alternate trails place on Agnes' peaceful enjoyment of her allotment."[221]	As the exhibits to the complaint reflect, the Chicken Ridge Alternate Trail is a well-established road capable of being driven by highway vehicles.[222] Due to its size, location and condition, should condemnation be required, the Chicken Ridge Alternate Trail will likely be shown to be the preferred alternative from the standpoint of public good and necessity.
"The road to the material site was built by DOT in approximately 1950 after Agnes' allotment became Indian land in 1931, and Anne's became Indian land in 1947."[223]	The State denies that the Chicken Ridge Alternate Trail to the materials site was originally constructed by DOT. As specifically alleged by the State in the verified allegations contained in the complaint, the Chicken Ridge Alternate Trail was simply improved in the 1950s. It existed long before that time.[224] Also, as the State has asserted *supra,* [225] the Agnes Purdy allotment did not become Indian land until the 1960s.[226] The Anne Purdy allotment did not become Indian land until January 1955.[227]

[220] *Id.* at ¶¶ 196-199; Exh. "2" (Affidavit of Rolfe Buzzell) at ¶ 7.
[219] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 11.
[221] *Id.*
[222] Complaint (Dkt. 1) at Exh.s "26" - "28," "30."
[223] Purdys' Motion to Dismiss Re. Subject Matter Jursid. (Dkt. 91) at 12.
[224] *Id.* at ¶¶ 196-199; Exh. "2" (Affidavit or Rolfe Buzzell) at ¶ 7.
[225] *Supra* at 27-32.
[226] *Id.* at 29-32.
[227] *Id.* at 28-29.

As this overview demonstrates, the jurisdictional and substantive issues are substantially intertwined in this case. Further, the issues of fact set forth above are both material and very much contested. Therefore, irrespective of whether the Purdys' motion is construed as a factual attack on subject matter jurisdiction or as a motion for summary judgment, the result is the same. The Purdys' motion must be denied.

CONCLUSION

There exist at least three separate justifications for this Court's subject matter jurisdiction in this case. First, this Court has jurisdiction under the QTA pursuant to 28 U.S.C. § 2409a(a). This is because the exception to the Indian lands exception in the QTA applies and as articulated by the Ninth Circuit Court of Appeals in *State of Alaska v. Babbitt (Bryant)*.

Second, this Court also has jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. This is because Agnes Purdy and TCC brought a coercive action in federal court seeking to prevent the public's use of the same State-owned rights-of-way at issue here. Doing so confers jurisdiction upon this Court as set forth in *Janakes v. United States Postal Service* and *Arco Products Co. v. Stewart & Young, Inc.*

Third, this Court has express jurisdiction over this case pursuant to 25 U.S.C. § 357. While the Purdys may disagree regarding whether the State can ultimately meet its burden for justifying condemnation, that issue must await trial. The Purdys simply cannot deny that 25 U.S.C. confers jurisdiction on this Court just as occurred in *State v. Harrison*.

Finally, while the Purdys have peppered their motion to dismiss with a seemingly unlimited supply of genuine issues of material fact, those facts fail to support their motion. Instead, those facts demonstrate that the substantive and jurisdictional issues in this case are substantially intertwined. This justifies denial of this motion if it is construed as a factual attack on subject matter jurisdiction. To the extent this motion is construed as

a motion for summary judgment, the arguments made by the Purdys undeniably create genuine issues of material fact further justifying denial of this motion.

For these reasons, the State respectfully requests that the Purdys' motion to dismiss be denied.

DATED this _____ day of September, 2013.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:/s/Z. Kent Sullivan
Z. Kent Sullivan (AK Bar No. 0105038)
Assistant Attorney General
Department of Law
P.O. Box 110300
Juneau, Alaska 99811-0300
Telephone: (907) 465-3600
Facsimile: (907) 465-2539
Email: kent.sullivan@alaska.gov
Attorney for State of Alaska

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:/s/R. Poke Haffner
R. Poke Haffner (AK Bar No. 8106025)
Assistant Attorney General
Department of Law
100 Cushman Street, Suite 400
Fairbanks, Alaska 99701
Telephone: (907) 451-2813
Facsimile: (907) 451-2846
Email: poke.haffner@alaska.gov
Attorney for State of Alaska

Certificate of Service

I hereby certify that on this ____ day of September, 2013, a true and correct copy of the foregoing was electronically delivered to the parties indicated below via the Court's Case Management/Electronic Case Files system:

Joseph Thomas Mathews, Esq.
United States Department of Justice
Natural Resources Division
601 D Street Northwest, Room 3036
Washington, D.C. 20004
Ph: (202) 305-0432
Fax: (202) 305-0506
Email: joseph.mathews@usdoj.gov
Attorneys for Defendant United States

Dean Dunsmore, Esq.
United States Department of Justice
Environmental &Natural Resources Div.
801 B Street Northwest, Suite 504
Anchorage, Alaska 99501-1657
Ph: (907) 271-5452
Fax: (907) 271-5827
Email: dean.dunsmore@usdoj.gov
Attorneys for Defendant United States

Michael C. Kramer, Esq.
Kramer and Associates
542 4th Avenue, Suite 207
Fairbanks, Alaska 99701
Ph: (907) 888-4098
Fax: (907) 374-3829
Email: mike@mikekramerlaw.com
Attorneys for Defendants Agnes M. Purdy and Barbara A. Redmon, on behalf of Anne L. Purdy

Richard D. Monkman, Esq.
Joan M. Wilson, Esq.
Sonosky, Chambers, Sachse, Miller & Munson, LLP (Anchorage)
900 West 5th Avenue, Suite 700
Anchorage, Alaska 99501
Ph: (907) 586-5880
Fax: (907) 586-5883
dick@sonoskyjuneau.com
joan@sonosky.net
Attorneys for Defendant Dena' Nena' Henash (a/k/a Tanana Chiefs Conference)

/s/ Z. Kent Sullivan