IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES and DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, Plaintiffs, vs. UNITED STATES OF AMERICA, *et al.*, Defendants.	Case No. 4:13-cv-00008-RRB **ORDER REGARDING MOTIONS AT DOCKETS 91, 99, 117, and 122**

I. PENDING MOTIONS

At **Docket 91** Defendants Agnes Purdy and Anne L. Purdy (hereinafter collectively the "Purdys") have moved to dismiss this action for lack of subject matter jurisdiction.[1] At Docket 102 Plaintiff State of Alaska, through its agencies Department of Natural Resources and Department of Transportation and Public Facilities (hereinafter "State"), has opposed the motion, and at Docket 115 the Purdys have replied. At the request of the Court, at Dockets 119 and 123, respectively, the Tanana Chief's Conference ("TCC") and the United States Bureau of Indian Affairs ("BIA"), acting in their capacity as *parens patriae*, have filed briefs in support of the Purdys' motion.

[1] Fed. R. Civ. P. 12(b)(1).

At **Docket 99** the United States has moved to dismiss the cross-claims of the Purdy Defendants. At Docket 114 the Purdys have opposed the motion, and at Docket 118 the United States has replied.

At **Docket 122** the Purdys have moved to dismiss Counts II, IV, and V of the Complaint. The time to oppose those motions has not yet lapsed.

At **Docket 117** the Purdys have requested oral argument on the Motion at Docket 91. The Court, having determined that oral argument would not materially assist in the resolution of the issues presented in the pending motion, hereby **DENIES** the motion[2] and the matter is submitted for decision on the moving and opposing papers.[3]

II. NATURE OF ACTION/BACKGROUND

The State has alleged six counts affecting the status various trails under the Act of July 26, 1866, ch. 262, §8, 14 Stat. 251, 253, which was later codified as Revised Statute 2477, subsequently recodified as 43 U.S.C. § 932 (repealed October 21, 1976, with a savings provision recognizing the validity of rights-of-way already established), commonly referred to as "R.S. 2477."[4] The State asserts ownership of these rights-of-way. As relevant to the pending motion, included in that action is the existence of rights-of-way over that

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[2] D.Ak. LR 7.2(a)(3).

[3] D.Ak. LR 7.1(j)(3)

[4] The Court notes with displeasure that each Count of the Complaint, although captioned ostensibly to limit its scope, incorporates all the preceding paragraphs. Because it makes it difficult for both the Court and the several defendants to determine which cause of action is directed against which defendant(s), such "daisy-chain" pleading is looked upon with disfavor.

portion of Native Allotment 50-2008-0437 held by Defendant Agnes Purdy and Native Allotment 50-2013-0004 held by Defendant Anne L. Purdy to the extent that they are crossed by the Chicken Ridge Alternate, Myers Fork Spur, Chicken to Franklin, and Chicken Ridge Trails.[5]

Count I, brought under the federal Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, appears to be directed at the United States alone.

Count II, a quiet title action under Alaska law (A.S. § 09.45.010), appears to be brought against all Defendants except the United States.

Count III, a quiet title action under Alaska law (A.S. § 09.45.010), appears to be brought against all Defendants except the Purdys and the United States.

Count IV, which seeks recovery of possession of the rights-of-way under Alaska law (A.S. 09.45.630), appears to be brought against all Defendants except the United States.

Count V, which seeks declaratory relief under the Declaratory Judgment Act (28 U.S.C. § 2201) concerning the existence and scope of the R.S. 2477 rights-of-way, appears to be brought against all Defendants.

Count VI, which seeks to condemn the rights-of-way in the Native Allotments under 25 U.S.C. § 357 and applicable Alaska statutes, appears to be directed against the Purdys alone.

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[5] These allotments were granted under the Native Allotment Act of May 17, 1906, 34 Stat. 197, as amended Aug. 2, 1956, 70 Stat. 954, 43 U.S.C. §§ 270-1 through 270-3 (1970). The 1906 Allotment Act was repealed by § 18(a) of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1617(a), which included a savings provision for allotment applications pending on December 18, 1971.

III. BASIS FOR MOTION/ISSUES PRESENTED

The Purdys contend that, because the United States has not waived its sovereign immunity, neither the QTA nor 25 U.S.C. § 357 confer subject-matter jurisdiction in federal courts over Alaska Native allotments.

For a court to exercise jurisdiction under the QTA, "(1) the United States must claim an interest in the property at issue, and (2) there must be a disputed title to real property."[6] "[The Ninth Circuit] has repeatedly held that both disputes over the right to an easement and suits seeking a declaration as to the scope of an easement fall within the purview of the QTA."[7] At the heart of the pending motion is the provision of the QTA that provides: "This section does not apply to trust or restricted Indian lands . . . ."[8] Here, the State unquestionably claims an adverse interest in the property, bringing the action arguably within the scope of § 2409a.[9] Contrary to the argument of the State, § 2409a is the exclusive remedy available for determining the existence of a right of way;[10] thus, the Declaratory Judgment Act, 28 U.S.C. § 2201 does not confer jurisdiction over this action.

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[6] *Lesnoi, Inc. v. United States*, 170 F.3d 1188, 1191 (9th Cir. 1999); *see Alaska v. Babbitt* (*Albert*), 38 F.3d 1068, 1073 (9th Cir. 1994).

[7] *Robinson v. United States*, 586 F.3d 683, 686 (2009) (citations omitted).

[8] 28 U.S.C. § 2409a(a).

[9] *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2206–09 (2012) (discussing the scope of a QTA action); *Albert*, 38 F.3d at 1073 ("The Supreme Court has noted that 'when the United States claims an interest in real property based upon that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the government's immunity.'" (quoting *United States v. Mottaz*, 476 U.S. 834, 843 (1986))).

[10] *Block v. North Dakota ex rel. Bd. of University and School Lands*, 461 U.S. 273, 284–85 (1983);

In resolving the pending motion, the Court must first determine whether an Alaska Native allotment falls with the scope of "restricted Indian lands" as used in § 2409a. Should the Court answer that question in the affirmative, it must then determine whether the case may proceed against the allotment holders in the absence of the United States. If the Court determines it may not proceed, the entire matter must be dismissed as against the Purdys.

IV. DISCUSSION

The State contends that no colorable basis for the application of the Indian lands exception to the QTA's waiver of immunity exists. This Court agrees that, under extant controlling authority, *Bryant*,[11] *if* there is no colorable basis for applying the Indian lands exception to the QTA's waiver of sovereign immunity, this Court has subject-matter jurisdiction over the case. For the following reasons this Court agrees with the Purdys and *amici* that *Bryant* is neither applicable nor controlling in this case; therefore reliance on it is misplaced.

Bryant, as well as two predecessors,[12] involved an *express* grant of a right-of-way to the State under 23 U.S.C. § 317 (appropriation of federal lands for highway purposes), not a R.S. 2477 right-of-way. In *Bryant*, the Ninth Circuit found that, because of a change in the agency's interpretation of the law, unlike *Foster* and *Albert*, Bryant no longer had a colorable claim to an allotment. Conversely, in this case the Purdys clearly have more than

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[11] *Alaska v. Babbitt* (*Bryant*), 182 F.3d 672, 675–76 (9th Cir. 1999), on remand *sub nom, Alaska v. Norton* (*Bryant II*), 168 F. Supp.2d 1102 (D. Alaska 2001).

[12] *Alaska v. Babbitt* (*Foster*), 67 F.3d 864, *as amended*, 75 F.3d 449 (9th Cir. 1995) (noting that Indian land exception applies whether the federal government is right or wrong, as long as the government has a colorable claim, i.e., the determination has some rationale and is not taken in an arbitrary or frivolous manner); *Albert, supra*, (same).

a "colorable" claim to their allotments, in fact they have been issued allotments. As noted on remand in *Bryant II*, the result in that case flowed from the fact that under 43 U.S.C. § 270-1 (repealed) Native allotments are limited to "vacant, unappropriated and unreserved nonmineral land in Alaska," and lands subject to the grant of a right-of-way under 23 U.S.C. § 317 *prior* to the commencement of the claimant's use/occupancy are no longer "unappropriated."[13] Unlike § 317, no authority has been cited that a R.S. 2477 right-of-way renders the land it encompasses as occupied, appropriated, or reserved, thereby removing it from the protected status as Indian lands. Nor has independent research revealed the existence of any such authority. In the absence of clear authority to do so, this Court is disinclined to abrogate the sovereign authority of the United States. Thus, based upon extant authority, this Court finds that the United States has not waived it sovereign immunity to suits involving Indian lands and this court lacks jurisdiction over the United States to that extent.[14]

The Court must now determine what impact its lack of jurisdiction over the United States has on the State's action against the Purdys. This issue turns on "whether, inequity or good conscience, the action should proceed among the existing parties or should be dismissed."[15] This Court finds that to the extent the State's claim involves rights in Native

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[13] *Bryant II*, 168 F. Supp.2d at 1106 (citing 32 U.S.C. § 317(b) and *Southern Idaho Conf. v. United States*, 418 F.2d 4111, 414–15 (9th Cir. 1969).

[14] The Court hastens to add that this determination is not intended to, and does not reach, the issue of the sovereign immunity of the United States as to any other claims that are not before it.

[15] Fed. R. Civ. P. 19(b).

allotments, the United States is an indispensable party under *Minnesota v. United States*.[16] There, the State of Minnesota sought to take by condemnation a right-of-way for a highway over parcels of land that were part of a reservation and allotted to individual members of an Indian tribe.[17] The state named the United States, as holder of the fee in trust, as a defendant along with the individual allottees.[18] The United States moved to dismiss on the ground that, although it was a necessary party without which the case could not proceed, it could not be sued due to sovereign immunity.[19] The Court, agreeing, held:

> The United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against the United States. It is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees. As the United States owns the fee of these parcels, the right of way cannot be condemned without making it a party . . . . The fee of the United States is not a dry legal title divorced from substantial powers and responsibilities with relation to the land . . . . In the stronger case of a trust allotment, it would seem clear that no effective relief can be given in a proceeding to which the United States is not a party and that the United States is therefore an indispensable party to any suit to establish or acquire an interest in the lands.[20]

As the Ninth Circuit noted, "*Minnesota* did not distinguish between attempts to create new interests in land and attempts to have pre-existing interests recognized."[21] Thus,

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[16] 305 U.S. 382 (1939).

[17] *Id.* at 383–84.

[18] *Id.* at 384.

[19] *Id.*

[20] *Id.* at 386–87 & n. 1 (internal citations omitted).

[21] *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1069–70 (9th Cir. 2010). This Court notes that this action was brought by the State not the allotment holders, thus the exception for actions brought by the allotment holders applied by the Ninth Circuit in *Lyon* is inapplicable. *See Paiute-Shoshone Indians of Bishop Cmty of the Bishop Colony, California v. City of Los Angeles*, 637 F.3d 993, 1002 (9th Cir. 2011) (explaining the

irrespective of whether the State seeks to establish a right-of-way under R.S. 2477 or to condemn under § 357, the failure of the United States to have waived its sovereign immunity bars this action as against the Purdy Native allotments.

V. CONCLUSION/ORDER

(1) Alaska Native allotments are "trust or restricted Indian lands"; (2) The United States is an indispensable party to the State's claims against the Alaska Native allotments held by Agnes and Anne Purdy; (3) The United States has not waived it sovereign immunity; (4) This Court lacks subject matter jurisdiction over the claims of the State of Alaska to the extent they seek to establish an interest in the Alaska Native allotments; and (5) The claims of the State as against Agnes and Anne Purdy having been dismissed, the Purdys' cross-claim against the United States is rendered moot.

Accordingly, the Court hereby **ORDERS** as follows:

1. The Motion to Dismiss for Lack of Subject Matter Jurisdiction at **Docket 91** is **GRANTED**.

2. The Motion to Dismiss the Cross-Claims of the Purdy Defendants at **Docket 99** is **GRANTED**.

3. The Motion to Dismiss Counts II, IV, and V of Plaintiffs' Complaint as to Agnes and Anne Purdy at **Docket 122** is **DENIED** as moot.

4. The Complaint as against Defendants Agnes Purdy and Anne Purdy is **DISMISSED** in its entirety for failure to state a cause of action and judgment is to be entered thereon in favor of the Purdys against Plaintiff State of Alaska.

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limitations on the *Lyon* exception).

5. The Cross-Claim of the Purdy Defendants as against the United States is **DISMISSED** and judgment is to be entered thereon in favor of the United States against the Purdys.

6. The action having been terminated in its entirety as to Defendants Agnes and Anne Purdy and it being in the interests of the parties in bringing to this matter to a final conclusion as expeditiously as possible, there is no just reason for delay.[22] An immediate appeal would hopefully serve to resolve this issue once and for all. Therefore, the Clerk of the Court is directed to enter final judgment accordingly.

IT IS SO ORDERED this 23rd day of December, 2013.

S/ RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

[22] Fed. R. Civ. P. 54(b).