

March 12, 2015

R&M No. 2246.01

Peter Brautigam
Manley & Brautigam, PC
845 K Street
Anchorage, AK 99501

RE: [REDACTED] Access

Dear Mr. Brautigam:

On February 25, 2015 you provided R&M Consultants, Inc. with a notice to proceed on behalf of your clients, [REDACTED]. The purpose of our services was to investigate legal access into the [REDACTED]'s mining claims along the Cripple River and Arctic Creek located on the west side of the Nome – Teller highway and approximately 11 to 15 miles west of Nome. The [REDACTED]'s property, by casual observation, does not appear to be served by public road access. The mining claims are also encompassed by lands patented to Sitnasuak Native Corporation, who currently require an access permit to reach the [REDACTED] parcels.

The issue of access had previously been reviewed by Dave Manzer of Alaska Land Status, Inc. In a phone conversation with Dave I understood that he had considered access options by ANCSA 17(b) easement, RS-2477 trail easement, Section Line easement and easements by prescription and was unable to conclude that any access rights by these means existed. R&M was contracted to reconsider these access options and to pursue any other opportunities that might exist to provide legal access across Sitnasuak lands.

The short answer is that we believe that at least one viable option for legal access exists across the Sitnasuak lands to the [REDACTED] properties. While we believe that legal access exists, our experience suggests that it will not be accepted by Sitnasuak without challenge. Also, the usability of each access option would be a question for the [REDACTED]s to resolve.

The bulk of this report discusses each of the potential access options and our conclusions as to why most of them are legally or practically unavailable. On page 11 of this report, we discuss the ANCSA 17(b)(2) "Valid existing right" option and why we believe it is legally and practically supportable and should meet the [REDACTED]'s access needs.

Background

Location: The [REDACTED] mining claims are located within Townships 9-11 South, Range 35-36 West, Kateel River Meridian. These lands are within the USGS Nome C-2 quadrangle map.

ANCSA¹ Lands: The [REDACTED] mining claims are entirely surrounded by lands patented to Sitnasuak and Bering Straits Native Corporations with the exception of their property within Sections 1, 2, 11 & 12 of T11S, R36W, KRM (M.S. 1102) that is bounded on the west by two native allotments, Lots 1 & 4 of U.S. Survey No. 8723.

The ANCSA lands are referred to as "split estate" lands where the surface estate is owned by a village corporation and the subsurface is owned by a regional corporation. In this case, the surface estate is owned by Sitnasuak Native Corporation and the subsurface estate is owned by Bering Straits Native Corporation. For a high value improvement such as a public highway or airport, the Department of Transportation will seek to obtain a right-of-way from the owner of the surface estate as well as a sub-surface easement or non-development covenant from the owner of the subsurface estate to ensure that public funds are not placed at risk. In

¹ ANCSA - P.L. 92-203 (85 Stat. 688), 12/18/71, 43 U.S.C. 1601. - Regulations 43 CFR 2650.4-7.



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this case, if an easement or permit is to be acquired for access to the mining claims, it would only be necessary to deal with the owner of the surface estate or Sitnasuak.

The Sitnasuak lands surrounding the [REDACTED] claims were transferred from the federal government under two patents. Patent 50-82-0148 dated 9/3/82 and patent 50-2008-0494 dated 9/24/08. Both patents were based on applications filed on 10/11/74.

Subject Property: The [REDACTED] property includes six patented mineral surveys claims identified in the following table:

M. S. No.	Location Date	Plat Approval	Patent Date	QCD Parcel ²
1102	7/15/13	1/12/14	11/24/16	III
1134	6/12/14	8/19/14	8/9/20	IV
1162	6/30/15	9/25/15	9/27/17	V
1260	8/30/19	9/15/20	3/23/23	VI
1332	8/17/22	5/28/23	4/8/25	VII
1331	8/17/22	5/29/23	11/25/25	VII

Access Review: On March 4, 2015 we received the hardcopy documents collected and reviewed by Dave Manzer. The files included documents and maps primarily available from the Bureau of Land Management and the State of Alaska, Department of Natural Resources. We supplemented the materials with historical U.S. Geological Survey maps, Alaska Road Commission reports, mineral survey field notes, Interior Board of Land Appeals decisions (IBLA), recorder's office documents and other records from the R&M right-of-way archives.

Included in the Manzer file was a map that indicated the primary existing access is from approximate milepost 17 on the Nome – Teller road southwest along Arctic creek to its intersection with a road running northwest and southeast along the Cripple River. These roads are fairly well defined in Google Earth aerial photography.

Access Options (Manzer)

1. *Easement by Prescription:* "Prescriptive easement" is the term associated with an easement interest that accrues to an individual under Alaska's adverse possession statutes³ when the use meets the "prescribed" period of time along with other conditions. A successful adverse claim for an access road or utility would result in a judgment granting an easement interest, where a claim resulting from an encroaching structure would likely result in a judgment granting a fee interest. Generally, the elements of adverse possession are that:
 - a. the possession must have been continuous and uninterrupted;

² Parcel references according to Quitclaim Deed between Gold Prospectors Association of America, LLC and The Gold Business, LLC recorded as document no. 2014-000425-0 on 4/28/14, Cape Nome Recording District.

³ A.S. 9.45.052. Paragraph (a) of the statute states that "...The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more, or the uninterrupted adverse notorious possession of real property for 10 years or more because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant, is conclusively presumed to give title to the property except as against the state or the United States."

- b. the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and
- c. the possession must have been reasonably visible to the record owner.

Due to the long history of the ██████ claims and the necessity to service the claims by road, there should be little difficulty in providing evidence that the roads existed for many decades longer than the 10 years required under A.S. 9.10.030. There are many cases discussing adverse possession and prescription between private parties in Alaska law. And while ANCSA Corporations are considered to be private parties in many contexts, ANCSA lands have been afforded special protection from alienation by adverse possession in federal law. A 1988 amendment to ANCSA⁴ effectively limits the ability of an adverse user to claim an easement by prescription across ANCSA corporation lands including those of Sitnasuak. The amendment included a “developed” lands exception that would not appear to be applicable to Sitnasuak lands surrounding the ██████ properties.

Another issue that would make assertion of an easement by prescription difficult is the agreements or permits that we understand have been issued by Sitnasuak and accepted by the ██████’s in the past. We presume that any such agreements are a result of the ambiguity of their existing access rights. These agreements represent permissive use of Sitnasuak lands and would serve to defeat a claim by adverse possession.

- 2. *Section Line Easement*: Section line easements (SLE) should be considered in situations where topography permits and where there exist no roads or trail rights-of-way by other authorities. A section line easement is an easement for highway purposes that generally runs along a surveyed section line established as a part of the rectangular survey system. The SLE may be based on a federal grant or state statute which results in varying rules for establishment and varying widths. As no state lands or lands conveyed out of state ownership must be crossed to access the ██████ properties, they will not be discussed.

The alternative is a federal SLE based on an offer of an RS-2477⁵ grant across unreserved public land. The federal SLE is like an easement dedication on a plat. It is a two-part contract that requires both an “offer” of a grant as well as an “acceptance” on behalf of the public. In 1923, the Alaska Territorial Legislature accepted the RS-2477 grant completing the dedication.⁶

There are two problems in considering SLEs as a reasonable access option to the ██████ claims. SLEs follow the rectangular system and can result in unacceptable alignments and high construction costs due to excessive grades, poor soils and other engineering obstacles. Without suitable conditions, construction over an SLE should be considered a last resort.

⁴ Section 11 of Public Law 100-241, 101 Stat. 1807, Feb. 3, 1988, (ANCSA Amendment) “amends section 907 of ANILCA (43 USCS 1636) to provide automatic protection for ANCSA lands. So long as ANCSA lands are not “developed, leased or sold to third parties, they are exempt from: (a) adverse possession or similar claims based on estoppel;” (Quoted from Alaska Native Lands: Aboriginal Title, to ANCSA and Beyond, David S. Case, 1.23.90) – This provision has been tested in the Alaska Supreme Court cases Kenai Peninsula Borough v. Cook Inlet Region, Inc., 807 P.2d 487 (1991) and Snook v. Bowers, 12 P.3d 771 (2000). The term “developed” can be difficult to interpret. Under the Kenai case the court ruled that “In the context of raw land, the common meaning of ‘developed’ includes subdivided property which is ready for sale.” And “...to be within this definition of ‘developed’ the land must be practically and legally suitable for sale to the ultimate user.”

⁵ July 26, 1866 - The 1866 Mining Law granted the “right-of-way for construction of highways over unreserved public lands.”

⁶ The 4-rod (66 foot) wide federal section line easement is based upon the offer of the RS-2477 grant and the initial acceptance of that grant on April 6, 1923 by the Territorial legislature (Ch 19 SLA 1923) for highway purposes.

The second issue comes from the analysis required to determine whether an SLE exists. According to an Attorney General's Opinion⁷, for an SLE to be considered valid it must meet certain tests. First, the SLE must cross unreserved public lands between the periods of offer and acceptance. Second, the lands must have been surveyed. The offer of the RS-2477 grant ended in 1976 with the passage of FLPMA⁸. Effectively, all lands in Alaska were reserved by Public Land Order No. 4582 in anticipation of the Alaska Native Claims Settlement Act. The order withdrew all unreserved public lands in Alaska from all forms of appropriation and disposition under the public land laws. The township survey plats for T. 9-11 S., R. 36 W., K.R.M. prepared by the Bureau of Land Management were not approved until February 18, 1981. Furthermore, the surveys only monumented partial township boundaries which is common for large scale ANCSA and State selections as opposed to all section lines in a more traditional township survey. This combination of events would make it appear impossible to assert a federal SLE using the common analysis. There is a less conventional assertion that could be made based on the effective date of publication in the Federal Register of the "protracted" section lines or their theoretical positions that is discussed in the Attorney General's opinion. However, as it is an unconventional approach and access by SLE already appears to be an unreasonable option due to topography and cost, it will not be further discussed.

3. *ANCSA 17(b) Easement*⁹: 17(b) easements were reserved for public access across lands conveyed to Native corporations pursuant to Section 17(b) of the Alaska Native Claims Settlement Act. The easement reservations are cited in the Interim Conveyances and Patents to ANCSA Corporations and graphically depicted on BLM 17(b) maps. The intent was to provide linear easements for access across ANCSA lands to other public lands and site easements for changes in transportation mode such as 1 acre site easements at bodies of water and near air strips.

The only specifically defined ANCSA 17(b) easement that would serve the [REDACTED] property is EIN 72, D1, D9, L. It is defined as "An easement for an existing access trail twenty-five (25) feet in width from Nome in Sec. 27, T. 11 S., R. 34 W., Kateel River Meridian, westerly to Teller." This is essentially the coastal trail that runs along the beach of Norton Sound.

In order to avoid the controversy of acknowledging RS-2477 rights, BLM will generally superimpose an ANCSA 17(b) easement over what the State asserts as a valid RS-2477 right-of-way. This has occasionally led to conflict where the State and the public assert a greater width and scope of use than is provided by the relatively limited 17(b). This results in a layering of easements based on differing authorities over the same trail. A 17(b) easement is generally considered less desirable as they are classified by varying widths and allowable uses. In addition, the manager of a 17(b) easement is generally considered to be the Bureau of Land Management unless a transfer of administration has been executed placing the management of the easement in another federal agency or the State of Alaska. Sitnasuak patent No. 50-2008-0494 identifies the Nome to Teller 17(b) easement as a "25 Foot Trail" and limits allowable uses to "travel by foot, dogsleds, animals, snowmobiles, two and three-wheeled vehicles, and small all-terrain vehicles." In addition, "The season of use will be limited to winter."

⁷ 1969 Opinions of the Attorney General No. 7 dated December 18, 1969 entitled Section Line Dedications for Construction of Highways

⁸ Federal Land Policy and Management Act of 1976 (FLPMA) § 315 (P.L. 94-579) & 43 CFR § 1864; October 21, 1976 - The offer of the RS-2477 grant was repealed in Title VII § 706(a); RS-2477 Repealed

⁹ See section 17(b) of the Alaska Native Claims Settlement Act. Easements referenced in ANCSA patents are referenced by an Easement Identification Number (EIN) and graphically represented on associated USGS Quadrangle maps.

Given the limitations of this 17(b) easement and the fact that it runs along the beach, it would appear to be unsuitable for the ██████'s purposes.

4. *RS-2477 Trail Easement:* Revised Statute 2477 provided a federal offer for road easements over public lands. The intent of the grant was to protect the access rights of miners in the early 1800's where there was a virtually complete absence of a federal presence on the public domain lands. The State of Alaska has been a strong advocate for the assertion of access rights using the RS-2477 authority. In 1992 the Department of Natural Resources created regulations to nominate, identify and certify RS-2477 trail rights-of-way. In 1998, the state legislature added Article 5. Rights of way Acquired under former 43 U.S.C. 932 to A. S. 19.30. This statute identifies RS-2477 rights-of-way accepted by public user.

Alaska takes a fairly liberal view towards the scope and width of a highway easement under RS-2477. State courts have held that an RS-2477 may be used for "any purpose consistent with public travel" and that "Alaska views the scope of an R.S. 2477 generously".¹⁰ Incidental uses such as a power line or communications line are also allowed under State law.¹¹ The width of an RS-2477 easement may vary; however, as ANCSA lands did not come into being until 1971, they are generally subject to a 100-foot width, 50-feet on each side of the trail centerline as a result of 1963 state legislation.¹²

Dave Manzer communicated with the DNR Public Access and Assertion Defense Unit (PAAD) with regard to the identification of RS-2477 trails in the vicinity of the ██████ claims. Only two were identified: RST 170, the Penny River Trail that in part appears to coincide with the Nome – Teller highway, and RS 158, the Nome to Teller Coastal Trail. The coastal trail (RST 158) is the same trail previously noted as 17(b) easement EIN 72, D1, D9, L. Under A.S. 19.30.400 Identification and acceptance of rights-of-way (a), "The state claims, occupies, and possesses each right-of-way granted under former 43 U.S.C. 932 that was accepted either by the state or the territory of Alaska or by public users. A right-of-way acquired under former 43 U.S.C. 932 is available for use by the public..." An overlapping RS-2477 right-of-way is impressed on the land by operation of law and is enforceable even if it is of greater scope than the ANCSA § 17(b) easement.¹³

The fact that the PAAD unit response only identified two RS-2477 trail easements in the vicinity of the ██████ claims does not mean that there are no other trails that might be eligible for assertion under the RS-2477 authority. The response memo states "This research is by no means conclusive and reflects only known RS 2477 rights of way. It is possible that there are presently unknown and unidentified RS 2477 rights of way within the research area."

R&M reaches a conclusion similar to Manzer; that access options based on section line easements, specified ANCSA 17(b) easements, easements by prescription and previously identified and asserted trail easements based on RS-2477 are either legally unavailable or represent an unreasonable alternative. In the next section we will discuss access options that may prove viable.

¹⁰ See Dillingham, 705 P.2d 4110 (Alaska 1985) and Puddicombe, 918 P.2d 1017 (Alaska 1996)

¹¹ See Fisher v. Golden Valley, 658 P.2d 127 (Alaska 1983)

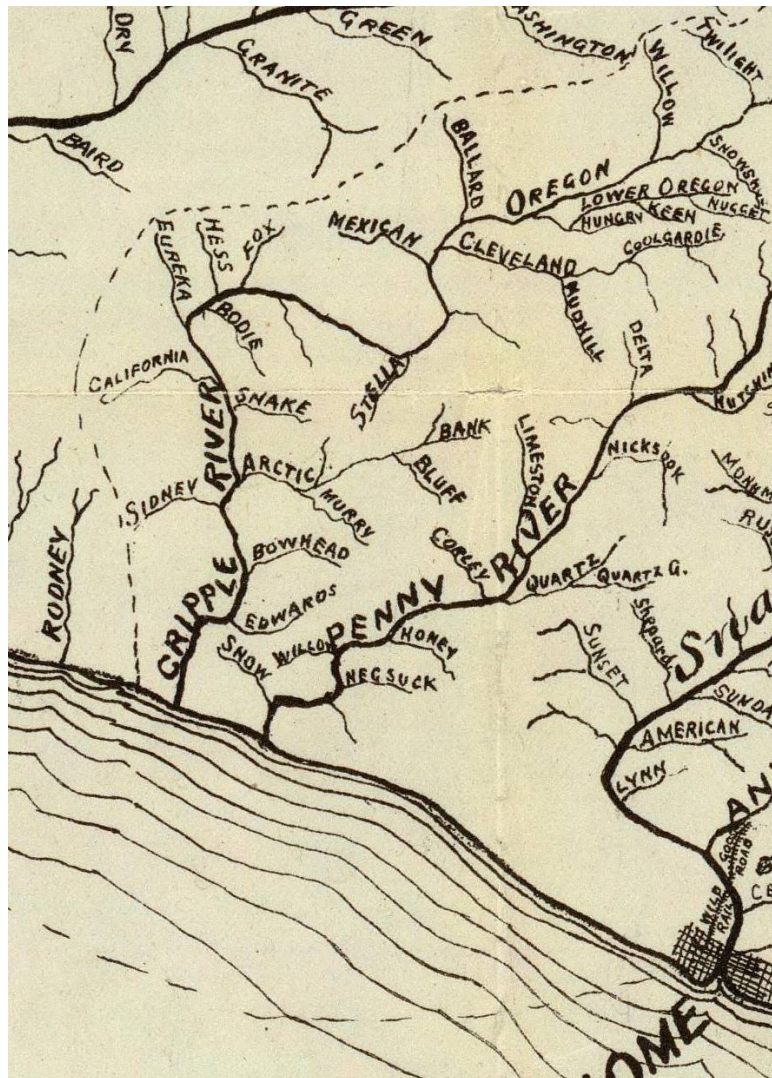
¹² In order to establish a 100- foot width for an RS-2477 right of way, the State legislature enacted Sec. 1, Ch. 35, SLA 1963 (Effective April 7, 1963): Establishment of Highway Widths. (a) It is declared that all officially proposed and existing highways on public lands not reserved for public uses are 100 feet wide. This section does not apply to highways which are specifically designated to be wider than 100 feet. AS 19.10.015.

¹³ See Scope of Klutina Lake Road Right-of-Way, Paul Lyle, Asst. Attorney General, July 17, 2002

Access Options (R&M)

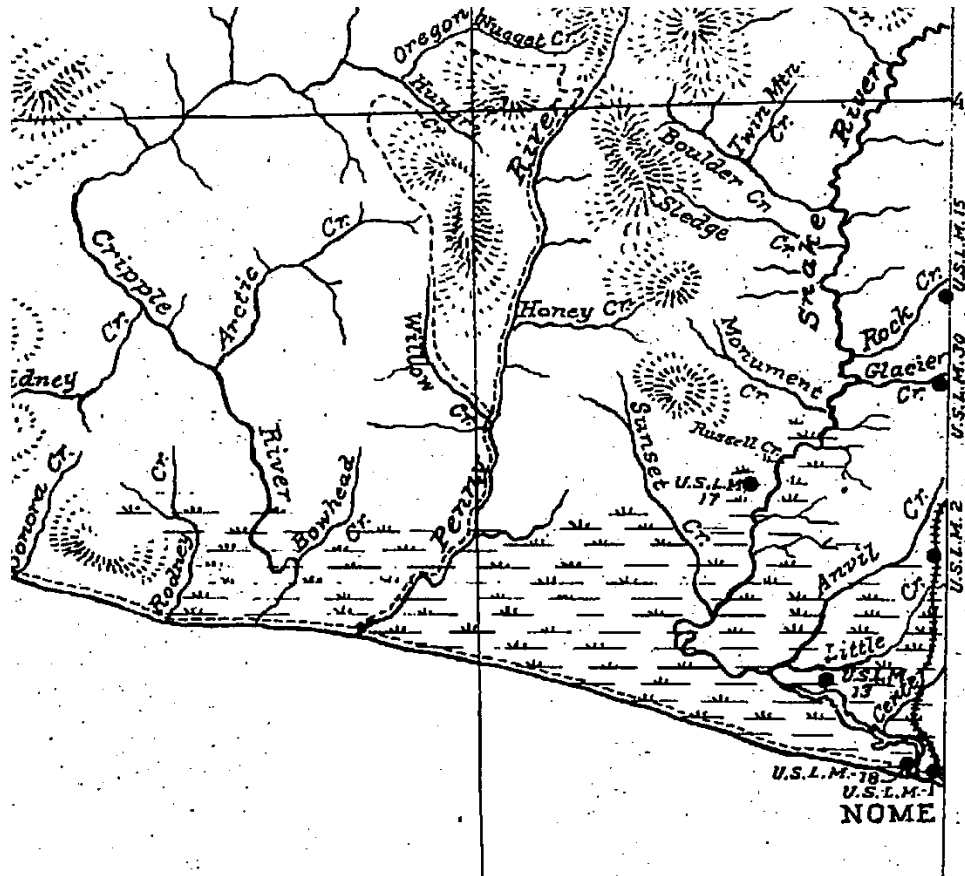
1. *RS-2477 Trail Easement along the Cripple River:* As opposed to the previous RS-2477 trail easement discussion; this section will consider an access assertion based on both public and private use of trails that were not identified in the DNR RS-2477 project. Specifically we will consider whether there is a basis for a claim of an RS-2477 right-of-way along the Cripple River and then along Arctic Creek up to its intersection with the Nome – Teller Highway.

For evidence of a trail that might meet the requirements of an RS-2477 we look to historic maps, reports, aerial photography and other documents that would support a location and a date. We have several early maps in the Nome area but few will show the detail necessary to identify a specific trail. For example, the following map titled “New Alaska Gold Fields” dated January, 1901 shows the Cripple River, several tributaries and a trail skirting the Cripple River drainage but does not provide sufficient detail to identify activity along the Cripple River.



Approximate Scale: 1" = 3.7 miles

The following map is from the Territorial Highway Plat book for Alaska 1918 – Board of Road Commissioners. It clearly shows the Nome – Teller coastal trail and the Penny River trail previously referenced by DNR as RST 158 and RST 170 respectively. There are no trails shown along the Cripple River.



Approximate Scale: 1" = 3.3 miles

Often, the most commonly used maps to identify an RS-2477 trail are the USGS Quadrangle maps. The USGS historical map server provides a variety of versions as they are updated over the years. The earliest USGS map in the Cripple River area at a suitable scale is the Nome C-2 quad map dated 1950 and based on 1950 aerial photography. This map clearly shows the Nome – Teller coastal trail along with short portions of a trail along the Cripple between Sidney Creek and Arctic Creek and a bit further to the south.

Some of the best historic references we have to support an RS-2477 assertion are the records and annual reports of the Alaska Road Commission:

- a. 1907 – p. 140 “Road to Ford on Cripple River (No. 32) – Cripple River enters Bering Sea about 2 miles to the west of Penny River. A road was built to the ford of the river as in the case of the Penny River. The length constructed was 0.8 mile.”

- b. 1909 – p. 23 “Cripple River road (No. 32), Penny River road (No. 33), and the Wireless Station road (No. 34), all described in previous reports, have need but slight maintenance this year. Two days’ labor from the local road tax were worked out on the cripple Creek road...”
- c. 1914 – p. 21 “Route 25A – Cripple River Road (13.5 miles).” (named in list) “During the period of this report repairs were required on about 6 miles of the above routes. They average \$58.72 per mile over the distance covered.”
- d. 1915 – p. 19 “Expenditures – Route 25A - \$7.50” – p. 16 “Route 25A – Cripple River Road (13.5 miles, total A and B).”
- e. 1916 – p. 17 “Route 25A – Cripple River Road (13.5 miles, total A and B).”
- f. 1917 – p. 32 “Route 25A – Cripple River Road (13.5 miles, total A and B).”
- g. 1918 – p. 20 Nome District “Route 25A. Cripple River Road (12 miles). Connects the coast with Cripple River. No expenditures were made on this road during the past year.”
- h. 1919 – p. 3885 Nome District “Route 25A. Cripple River Road (12 miles). This road connects the coast with Cripple River. No expenditures during the past year. A dredge has been constructed on Arctic Creek, supplies for which will be hauled over this route.”
- i. 1921 - p. 9 Expenditures by Alaska road Commission: Route 25A; Cripple River; 12 miles wagon road; Maintenance \$3,033.67; Construction \$2,057.97. p.43 “Routes 25 A-H (inclusive) – Nome Local Roads – All of the roads west of Nome are comprised under this heading. The Sinrok Valley Road was maintained and extensive repairs made in the Cripple River Road. Total expenditures \$381.20.”
- j. 1922 – p. 79 “Route 25A – Cripple River (12 Miles Wagon Road) This road commences at the beach at the mouth of Cripple River and follows the river for twelve miles to the workings near Willow Creek (emphasis added) and on to Arctic and Sidney Creeks. It is mainly on the left bank of the river. Total expenditure of \$64.95 was for temporary repairs to washout near the four mile post.” P. 86 “Route 77A – Ferries – Cripple River Ferry: This is a free ferry over the mouth of Cripple River which is at this point about one hundred feet wide. It consists of a whale boat on an endless cable.”
- k. 1923 – p. 101 – Route 25A – Cripple River - Notes same comment as 1922 report. “Expenditure: Alaska Road Commission \$0.00 – Territory of Alaska \$10.00”
- l. 1924 – p. 144 – Route 25A – Cripple River - Notes same comment as 1922 report. “Expenditure: Alaska Road Commission \$104 – Territory of Alaska \$150.00” Page 157 notes that both expenditures were for maintenance. Page 32 states the “Traffic Census” between July and September of 15 persons, 6 wagons, 10 Tonnage.
- m. 1925 – p. 18 – 25A – Cripple River – 12 mile wagon road – “Federal Appropriations and Alaska Fund F.Y. 1905 – ‘20’: \$5,991.64 “F.Y. 1921 – 1925”: \$525.20 “Contributed Funds F.Y. 1915 – ‘25”: \$2,284.95. Total: \$8,801.79. From this report forward there are no indications of additional expenditures.
- n. 1929 – 1940 Route 25A – Cripple River road is referenced in all these annual reports with a footnote that indicates the route is “abandoned”.
- o. 1932 – p. 49 – Route 25A – Cripple River “Total cost to June 30, 1932”: \$8,801.79 of which \$5,057.97 was attributed to construction and the remainder to maintenance.
- p. 1956 – Cripple River Route 25A – This is the latest report where Route 25A is referenced.

The ARC reports provide evidence of public construction, maintenance and expenditures that would support an RS-2477 assertion. The 1922 report states that the wagon road is 12 miles long and extends

to Willow Creek which is beyond the east end of MS 1134 in Section 35 of T. 9 S., R. 26 W., K.R.M. This would cover all of the [REDACTED] property along the Cripple River. The reports suggest that the wagon road was in place as of 1914 which would have only preceded the initial location dates for MS 1260 and MS 1162. As an RS-2477 can only apply to unreserved public lands and as the mining claimants rights vest upon location, it is likely that an RS-2477 trail could be asserted over these mineral surveys. The more significant issue is the application of an RS-2477 right-of-way outside of the mineral surveys and over Sitnasuak lands. Establishing the location of the RS-2477 trail can be difficult if it has moved over time as would be expected along a placer mining operation. The 1922 report states that "It is mainly on the left bank of the river." The short segments of trail observable on the 1950 USGS map appear to meander from one side of the river to the other. The current location of the most visible trail appears to be entirely on the left bank (east side) of the river and in some sections, quite a distance from the main channel. If a more defensible location for the RS-2477 right-of-way became necessary, we would recommend that the 1950 USGS aerial photography be reviewed by a photogrammetrist to determine whether more of the trail location can be discerned.

If an RS-2477 trail is asserted along the Cripple River, the next question is the usable width. As the construction and maintenance of the Cripple River road (Route 25A) was performed with both federal and territorial funds, we can rely on the 1917 Territorial dedication of right-of-way of 60-feet.¹⁴ Discussions with an Assistant Attorney General regarding other highway projects suggested that the 1917 Act would likely be interpreted as an acceptance of the RS-2477 grant.

The fact that Route 25A, Cripple River road is labeled as "abandoned" in ARC annual reports from 1929 to 1940 would not serve to defeat an assertion of an RS-2477 right-of-way. The earliest reference we have regarding a policy for abandonment of roads by the ARC is in August of 1950. The policy requires a formal written request, an approval by the Territorial Board of Road Commissioners and public notice. The general rule is that a public easement cannot be terminated by apparent abandonment or non-use, however long continued, unless accompanied by an affirmative act on the part of the owner of the easement indicating an unequivocal intention to abandon it. Without evidence beyond a mere footnote in an annual report, we do not believe that the public's interest in an RS-2477 trail easement along the Cripple River has been terminated.

2. *RS-2477 Trail Easement along Arctic Creek:* We have found no evidence of public construction, maintenance and expenditures along Arctic Creek that would support an assertion of RS-2477 in a manner similar to the Cripple River. However, an RS-2477 trail can also be established by a public user.¹⁵

The primary road access to the Cripple River appears to be along Arctic Creek from the Nome – Teller Highway. The evidence that would support the establishment of an RS-2477 by public user along Arctic Creek would be references in the Mineral Survey plats and field notes.

¹⁴ Ch 36, SLA 1917 Section 13 – "The Divisional Commission shall classify all public Territorial roads and trails in the divisions as wagon roads, sled road, or trails...The lawful width of right-of-way of all roads or trails shall be sixty feet (60)."

¹⁵ Hamerly v. Denton 359 P.2d 121 (Alaska 1961) "...before a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be a public user for such a period of time and under such conditions as to indicate that the grant had been accepted."

The plat for MS 1332 clearly shows a road running from its confluence with the Cripple River, northeasterly to the north end of the survey. On page 4 of the field notes in a section identifying the value and nature of improvements, the claimant is allotted "One-fifth interest in road construction on this survey and on Sur. 1332." On page 5 it is noted that "The above mentioned road construction consists of clearing out of brush and roots, leveling surface and graveling same along the banks of Arctic, Buff and Mammoth Creeks from mouth of Arctic Creek, for necessary wagon road to bring supplies and machinery to this survey and to Sur No. 1332 beginning near the mouth of Buff Creek and also owned by claimant herein." An attached report to the MS 1331 field notes identified "The workings otherwise on the claims consist of:" "13 – Wagon road construction along banks of Arctic Creek from line 6-1 B Association to mouth of Arctic Creek."

The plat for Mineral Survey No. 1332 also indicates road construction. The field notes on page 7 reproduce the preceding note describing the road construction but makes reference to the other claim benefitting from road as MS 1331. There are no calls in the field notes identifying a road to the northeast through the E. Association Placer that would coincide with the current road location and carry it through to the Nome – Teller Highway. As previously noted, if assertion of an RS-2477 is critical, further research into historical documents, maps and aerial photography might be able to fill that gap in the evidence.

3. *Cripple Creek Navigability*: In this section we consider whether the Cripple River could be considered as legal public access to the ██████ property (at least those portions along the Cripple River) by virtue of it being determined "navigable" for title purposes. The State of Alaska asserts ownership of the beds of navigable waters as an inherent attribute of state sovereignty protected by the U.S. Constitution.¹⁶ The issue of navigability is made difficult as a result of differing interpretations between BLM and the State of Alaska. Title to the beds of navigable waters in Alaska vested in 1959 at statehood. Assertions of state ownership over navigable waters could still be made against patents issued prior to statehood such as the ██████ properties. As the ██████ mineral patents are generally centered on the Cripple River, there is little to be gained except for where the claims are not continuous such as between the north end of MS 1102 and the south end of MS 1331 or where the river, if determined navigable meanders outside of the mineral patent boundaries.

A BLM report¹⁷ discusses a 1916 petition from Nome residents for a bridge across the mouth of the Cripple River to facilitate travel along the Nome to Teller coastal trail. A ferry was installed in 1920 by the Alaska Road Commission. With respect to the Cripple River (referenced as Cripple Creek), the report says that USGS members visited the gold district surrounding Nome in 1899 and that: "One or more of these men traveled to and mapped the Cripple Creek drainage. Their subsequent report included it along with the Snake, Nome, Penny, Solomon, and Bonanza rivers as a water body with a 'generally rather swift' current and up which 'small boats' could proceed '8 to 10 miles' to the placer fields." In addition, the report stated "The BLM has addressed the navigability of Cripple Creek in Tps. 9-11 S., R. 36 W. and most of its course in T. 9 S., R. 35 W., Kateel River meridian while processing Nome's ANCSA conveyance. An undated navigability report stated that shallow-draft boats were used in the area and that tidal influence extended about a half mile upstream. At no stage in its work did BLM evidence any inclination to determine the creek navigable; the State Director on the last day of 1981 declared the

¹⁶ *Utah v. United States*, 482 U.S. 193 (1987)

¹⁷ *Alaska's Northwest Region: A History*, by James H. Ducker, BLM, 1985

river nonnavigable, but stated that tidal influence extended to the north section line of Sec. 12, T. 11 S., R. 36 W., Kateel River Meridian.”

Communication with the Department of Natural Resources Navigability Sub-Unit (PAAD) confirmed that on the basis of the Ducker report, “The lower portion up the river from its mouth up to the north section line of Sec. 12, T. 11 S., R. 36 W., KRM is now indicated as tidal influence. The portion upstream of this point to the confluence of Unnamed Stream measured 10 miles is marked as conflict, DNR navigable, BLM non-navigable. Unnamed stream confluence with the Cripple River is located within Sec. 9, T. 10 S., R. 36 W. KRM. Upstream from this point there is no information regarding use.”

What this means is that based on the historical record, the State could assert ownership of the bed of the Cripple River from the coast and up to 10 miles north. While this may not be beneficial to the ██████’s ownership, it is important that they understand how the State views its rights based on an assertion of navigability. While the state’s assertion of navigability and ownership might provide limited connectivity between the mineral surveys, as a primary basis for access it could not be considered viable or reasonable.

4. *ANCSA 17(b)(2) “Valid existing right”*: Both of the previously mentioned Sitnasuak patents contain the following language¹⁸:

“THE GRANT OF THE ABOVE-DESCRIBED LANDS IS SUBJECT TO: 1. Valid existing rights therein, if any, including but not limited to those created by any lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Further, pursuant to Sec. 17(b)(2) of the Alaska Native Claim Settlement Act of December 18, 1971 (ANCSA), 43 U.S.C. § 1616(b)(2) (1976), any valid existing right recognized by ANCSA shall continue to have whatever right of access (emphasis added) as is now provided for under existing law;”

The last sentence in the paragraph above referencing Sec. 17(b)(2) of ANCSA appears to provide the key for a viable access option across Sitnasuak lands to the ██████ property. The text of Sec. 17(b)(2) states:

“That any valid existing right recognized by this Act shall continue to have whatever right of access (emphasis added) as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.”

The assertion in this section is that ██████ and their predecessors in interest have had valid legal access from the day the claims were located across public domain lands and that this legal access constitutes a “valid existing right” that Sitnasuak is obligated to recognize under the terms of their patent and ANCSA. The right of access across ANCSA lands to a mining claim was considered and supported in the Interior Board of Land Appeals case Herbert I. Stewart 82 IBLA 329¹⁹. In that case, the appellant argued that his right to access mining claims across public domain lands would not be protected unless BLM expressly reserved a private easement in the ANCSA conveyance. Furthermore, without such an express

¹⁸ Note: The paragraph included in Patent 50-82-0148 makes an additional reference to leases issued under Sec. 6(g) of the Alaska Statehood Act.

¹⁹ IBLA 84-148 decided September 7, 1984.

reservation, the appellant would have the “onus of establishing his entitlement to access” with respect to the ANCSA corporation and that this would likely require litigation. The court noted that there is no provision in ANCSA for an express reservation for a private right of access and that the appellant will continue to have whatever right of access existed prior to ANCSA under the terms of section 17(b)(2). The decision states “That right of access, impliedly granted by Congress under the general mining laws, for mining purposes across public land is well recognized by both the Department and the courts....However, with the conveyance of such public land into private ownership, if the right of access is not somehow preserved, it would be lost. Thus, section 17(b)(2) of ANCSA, *supra*, expressly stated that valid existing rights would ‘continue.’ This includes the right of access provided for under the 1872 mining law.” The court then acknowledged that maintenance of the right of access may require coordination with the ANCSA Corporation but that this would not necessarily result in court action.

We believe that ██████’s “valid existing rights” under ANCSA Section 17(b)(2) represents a viable and reasonable basis for access to their mineral patents along the Cripple River and Arctic Creek. As it represents an existing right, no permit or agreement for this right of access from Sitnasuak would be required. What we cannot say is whether the location of this access right pre-ANCSA is coincident with the location of the current access road. Logically, it would serve no purpose for Sitnasuak to argue the location of the access right where there is only a single apparent track and to do so would only result in duplicative roads in close proximity to each other.

5. *Chain of Title & Public Record:* Many of the access options discussed in this report are supported by historical records, maps and other documents. In order to ensure that that we would find sufficient references to support an access claim, I was assisted by Charlie Parr, SR/WA, who reviewed the Recorder’s Office records for leases, permits, patents, conveyances and filings for mining claims to see if there was any text that would provide support for an access assertion. While our review was necessarily limited to the constraints of the Statement of Services, we would advise the ██████s, if they have not already done so, to obtain a complete title report for their mining properties including pre-patent documents such as location notices and title transfers. A chronology of documents reviewed by Mr. Parr is included as an enclosure.

Summary & Conclusion

We have reviewed several access options under a variety of authorities that will allow the ██████s and their clients to cross Sitnasuak Native Corporation lands and reach their mineral patents without an obligation to enter into an easement agreement. Most of the options are either not legally or practically viable but one stands out as the most promising and defensible. The legal right to access across Sitnasuak lands as a valid existing right under ANCSA 17(b)(2) has the benefit of an IBLA case that considers a very similar scenario and reaches a decision beneficial to the ██████’s objectives.

Peter Brautigam

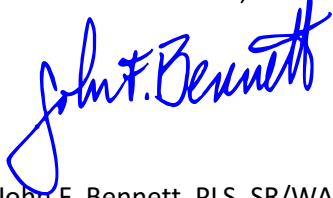
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Page 13

We appreciate the opportunity to provide this review. Should you have any questions, feel free to contact me directly at jbennett@rmconsult.com or 907.458.4304.

Sincerely,

R&M CONSULTANTS, INC.



John F. Bennett, PLS, SR/WA
Senior Land Surveyor

JFB: jfb

Cc: Bill Cohen

Enclosures: 82 IBLA 329 Herbert I. Stewart
[REDACTED]/Nome Claims draft Chronology 3/11/15