IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

REUBEN M. LOEWEN, and ROSALIE LOEWEN, Plaintiffs, v. STATE OF ALASKA, DEPT. OF NATURAL RESOURCES, ANTHONY P. CRUPI, LORI TEEL CRUPI, CHILKOOT INDIAN ASSOCIATION, HAINES ALASKA NATIVE BROTHERHOOD, CAMP 5, and SEALASKA CORPORATION, and all other parties, legal entities, successors and assigns unknown, claiming any right, title, estate, lien or interest in the real property or any part thereof described in the complaint herein, Defendants.	FILED IN CHAMBERS STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU BY: KJK ON: Sept. 19, 2016 Case No. 1JU-13-596 CI

MEMORANDUM DECISION AND ORDER

Trial was held in this case in Haines on April 11 and 12, 20116, and oral arguments were held in Juneau on April 13, 2016. This memorandum is intended to briefly summarize the court's decision, which will be set out in more detail in the court's Findings of Fact and Conclusions of Law. Broadly speaking, two questions were presented at trial.

The first is whether there is a public prescriptive easement over the "trail" over and adjacent to Parcel 4 for the purpose of vehicle access to the Chilkoot River for hooligan fishing. And the second is whether there is a public prescriptive easement over the accreted lands adjacent to Parcel 3 for the purpose of hooligan fishing.

I will answer the second question first, because I consider it a far easier question. I conclude that there is not a public prescriptive easement over the accretions to Parcel 3, because I find that use of that land has been permissive. The accretions to Parcel 3 are undeveloped or, stated another way, in a general state of nature. Occasional use of that property for the purpose of fishing for hooligan, or for other fish, has not placed the owners on notice that there is adverse use of the land, to which they must object or face the prospect of a prescriptive easement. I will therefore enter an order quieting plaintiffs' title to that land.

The question of whether there is a public prescriptive easement over the area adjacent to Parcel 4 presents a much closer question, and one upon which I reach a different answer. That parcel is not entirely in a state of nature. On the contrary, a trail usable by vehicles was left across that property following the construction of the new bridge in approximately 1979. That property has been used regularly for vehicle access to the river ever since. In particular, it has been used regularly for access to the hooligan fishery.

It is clear that the hooligan fishery in the Chilkoot River has been customarily and traditionally used by the Native people of the Haines area for centuries. Testimony was given by Sally Burratin that Austin Hammond gave permission many years ago on behalf of the Chilkoot people for the Chilkat people to use the Chilkoot River for hooligan fishing. Plaintiffs suggest that this indicates that use of the river by the public was permissive, and not pursuant to a claim of right. In my view, however, it shows exactly the opposite. It suggests that the Chilkoot people believed they had aboriginal rights to use the area for subsistence. While their use of the area has changed -- they now drive vehicles down the trail onto the beach, instead of paddling their canoes up Lutak Inlet, and they no longer use traditional hooligan pits -- their

use has been continuous since long before 1979, when the trail was built. And, in my view, it has been pursuant to a claim of right.

The combination of the vehicle ramp, constructed from Lutak Road down to the beach by the State's bridge contractor in 1979, and the ongoing use of that access trail for vehicle access for 37 years since then, causes me to reach a different conclusion about Parcel 4 than I do for Parcel 3.

Based on my review of the evidence, and as set forth in more detail in the Findings of Fact and Conclusions of Law, I conclude that there is a prescriptive public easement over the trail on Lot 4 for the purpose of vehicle access to the beach for hooligan fishing.

Plaintiffs shall prepare and submit to the court an order quieting title to the Parcel 3 accretions, suitable for recording. Defendant-Intervenors shall prepare a suitable form of final judgment. The court expresses no opinion at this time about which party is the prevailing party – or whether there is a prevailing party – in light of this decision.

Entered at Juneau, Alaska this 19 day of September, 2016.

Philip M. Pallenberg
Superior Court Judge

SEAL OF THE TRIAL COURTS OF THE STATE OF ALASKA FIRST JUDICIAL DISTRICT

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REUBEN M. LOEWEN, and ROSALIE LOEWEN, Plaintiffs, v. STATE OF ALASKA, DEPT. OF NATURAL RESOURCES, ANTHONY P. CRUPI, LORI TEEL CRUPI, CHILKOOT INDIAN ASSOCIATION, HAINES ALASKA NATIVE BROTHERHOOD, CAMP 5, and SEALASKA CORPORATION, and all other parties, legal entities, successors and assigns unknown, claiming any right, title, estate, lien or interest in the real property or any part thereof described in the complaint herein, Defendants.	FILED IN CHAMBERS STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU BY: KJK ON: Sept. 19, 2016 Case No. 1JU-13-596 CI

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial was held in the above-captioned matter in Haines, Alaska on April 11 and 12, 2016, and closing arguments were heard in Juneau on April 13, 2016. Being fully advised, the court enters the following findings of fact and conclusions of law.

Findings of Fact

Background:

1. Plaintiffs are the owners of Parcels 3 and 4 of Chilkoot River Subdivision according to Plat 79-6, located in the Haines Recording District, First Judicial District for the State of Alaska. These lots are also referred to as Parcels 3 and 4 of Tract C, Lot 1, U.S.

Survey No. 3707. The lots are located along Lutak Road, at the head of Lutak Inlet north of Haines, near the mouth of the Chilkoot River.

2. Most of Parcels 3 and 4 are located to the west, or upland, side of Lutak Road. However, smaller portions of each lot are located to the east of Lutak Road, between the road and the mouth of the Chilkoot River.

3. These parcels were originally part of a Native land allotment acquired by Robert ("Jeff") David in 1960. Mr. David conveyed the entire allotment to Richard Folta in 1979, after which Mr. Folta subdivided the property into 5 lots, Parcels 1 through 5. The Plaintiffs acquired the land in 2009 (Parcel 4) and 2010 (Parcel 3).

4. Mr. Folta testified that, when he bought and subdivided the property, he was well aware of the public's use of the trail and the tidelands for fishing, and he never interfered with this use. Mr. Folta testified that he and his family participated in the spring hooligan fishery.

5. Plaintiffs originally brought this action seeking to quiet title to the accretions to Parcels 3 and 4. They subsequently withdrew their claim to quiet title to the Parcel 4 accretions, and they now only seek a decree quieting title to the accretions to Parcel 3.

6. The metes and bounds description of the Parcel 3 accreted lands is as follows:

> A tract of land lying seaward/riverward of Parcel 3, Chilkoot River Subdivision according to Plat 79-6, records of the Haines Recording District, First Judicial District, State of Alaska, described as:
>
> BEGIN at the Southeast corner of Parcel 3, on the original BLM meander line for Lot 1, U.S. Survey 3707, run thence N 1° 52' 15" W 250.16 feet to the Northeast corner of said Parcel 3, thence East 120.26 feet to the surveyed mean high water lien of Chilkoot River established by R & M Engineering on August 30, 2012, thence along said mean high water line the following courses: S 8° 59' 00" W 12.88 feet; S 5° 39' 15" W 53.22 feet; S 3° 52' 28" W 54.93 feet; S 1° 34' 50"W 22.20 feet; S 17° 46' 35" W 46.78 feet; S 18° 20' 06" W 39.90 feet; S 13° 16' 19" W 25.54 feet; thence S 89° 55' 41" W 67.82 feet to the original BLM meander line and the point of beginning.

Said accretions/glacial uplift contain a total of 0.57 acres (24,956 square feet), more or less.

7. The plaintiffs' legal right to title to the Parcel 3 accreted lands is not disputed, and the State of Alaska has accepted the plat identifying the accreted lands.

8. In response to Plaintiffs' complaint for quiet title, Defendant-Intervenors Sealaska Corporation, Haines Alaska Native Brotherhood Camp 5, and Chilkoot Indian Association have asserted that the accreted land adjacent to both Parcels 3 and 4 has been traditionally and customarily used for fishing by Native Alaskans for hundreds of years, and that the same land is also used by many subsistence and sport fishing users as well as those who enjoy it for other recreational uses. The Defendant-Intervenors requested judgment declaring that a public prescriptive easement exists providing foot and vehicle access to the Chilkoot River for subsistence and recreational uses over the Plaintiffs' land and its accretions. The Defendant-Intervenors also requested a permanent injunction prohibiting the Plaintiffs from restricting, in any way, access to the easement.

Parcel 3:

9. In support of their claim to quiet title to the accretions to Parcel 3, the Plaintiffs presented a survey plat prepared by R&M Engineering, Inc., on October 15, 2013 (Trial Exhibit 4).

10. As to Parcel 3, Defendant-Intervenors sought a 50 foot public prescriptive easement along the riverward, eastern boundary of the accreted lands, based on historic and traditional subsistence activities along the bank of the Chilkoot River within this 50 foot strip. There are, no established paths or trails across the accreted lands to Parcel 3, although a path does exist on the river bank outside of the accreted land.

11. The accretions to Parcel 3 are unimproved and in a general state of nature. There was no evidence at trial that the Plaintiffs ever observed any member of the public using the Parcel 3 accretions to fish. Even if the Plaintiffs had ever seen any member of the public fishing on the Parcel 3 accretions, or walking along the accreted land to access fishing grounds, Plaintiffs had no knowledge, and no reason to believe, that any such member of the public was using the accreted lands pursuant to a claim of right.

Parcel 4:

12. Lutak Road passes in a north-south direction over Parcel 3. As it travels north across the boundary between Parcels 3 and 4, Lutak Road divides into two forks. The right fork turns to the east and crosses a bridge over the Chilkoot River, becoming Lutak Spur Road. The left fork continues in a northerly direction along the west bank of the Chilkoot River, becoming Chilkoot River Road.

13. Lutak Road generally follows a historic travel route along the west side of Lutak Inlet which was in use long before statehood in 1959. The road and an earlier bridge over the Chilkoot River were built in the 1950's, and a right of way was dedicated at that time in favor of the United States. That right of way was acquired by the State of Alaska at the time of statehood.

14. The Chilkoot River bridge was originally built in the 1950's at a location north of the present bridge. The bridge was rebuilt in 1979 at its present location. When the new bridge was built, the contractor built a dirt ramp on each side of the river to allow equipment to be moved from the level of the road down onto the tidelands for use in constructing the new bridge. The ramp on the west side of the river passed over the eastern portion of Parcel 4.

15. Although it has been narrowed by vegetation, and its grade may have changed over the years, that ramp remains in existence today on Parcel 4 as a well-established trail from Lutak Road down to the Chilkoot River. That trail has been used by Native Alaskans and others for subsistence and other recreational purposes since at least 1979.

16. Hooligan are small fish which run up the Chilkoot River in the spring. Hooligan have long been caught by Alaska Natives (and others), who typically render the fish into oil. Traditionally, the fish would be rendered in large pits dug in the ground.

17. The trail has been used by the public to drive vehicles down to the river bank during the spring hooligan run. Vehicles are driven down to the river to transport elders who may have difficulty walking to the river, and to haul large quantities of hooligan up to the road.

18. Witnesses Sonny Williams, Tim Ackerman, Sally Burattin, Ralph Strong, Valentino Burattin, Bob Duis, Paul Kelly Wilson, Lee Heinmiller, and Leonard Willard all testified that they have used the trail over Parcel 4 and its unclaimed accretions to access the Chilkoot River from Lutak Road for fishing and recreation. Mr. Williams, Mr. Ackerman, and Ms. Burattin testified that they have used the trail every hooligan season for as long as they can remember, since at least 1979. Mr. Burattin testified that when the hooligan are running, it is "like a fever," similar to the Gold Rush, and recounted one hooligan season, in 1991, when he fished for hooligan, using the trail and the adjoining fishing grounds, for 21 days straight.

19. Without the use of vehicles to drive down the trail, elders or others with limited mobility would have great difficulty in making it down to the bank of the river to participate in the annual hooligan run. It would also be difficult to haul the large quantities of hooligan which are caught in this location up to the road without vehicles.

20. The spring hooligan run has cultural significance to Alaska Natives living in the Haines area.

21. The extent to which the trail passes over Parcel 4 was the subject of some dispute at trial, depending upon the width and location of the road right-of-way. The State of Alaska initially determined that the Lutak Road right of way was just 60 feet wide. However, State of Alaska Right-of-Way expert John Bennett concluded that the right of way is actually 100 feet wide.

22. If the right of way is 100 feet wide along the route of Lutak Spur Road, then most of the existing trail falls within the right of way. Based on a survey by Bill Pence (exhibit AA), only a tiny three square foot triangular portion of Parcel 4 lies outside of the right of way on the trail.

23. In addition to the dispute about the width of the right of way, there is uncertainty about its location. When the right of way for Lutak Spur Road was created, the old Chilkoot River bridge was some unknown distance north of the current bridge. There is no evidence that any legal action was taken to dedicate a new right of way when the bridge was rebuilt in a location farther to the south. Even if Mr. Bennett is correct that a 100 foot right of way was dedicated, it would seem that the center line of that right of way would have been located along the center of the original bridge, not the current bridge. If the bridge was built in 1979 outside the boundaries of the original right of way, it seems likely that a prescriptive easement would exist in favor of the State of Alaska, but a prescriptive easement for the road would likely not be 100 feet wide. Because this issue arose after Mr. Bennett testified, it is not clear how he

concludes that there is a 100 foot right of way centered along the location of the current bridge, built in 1979.

24. It is not necessary to determine either the precise location or width of the right of way for the purpose of this case, however. Whether the right of way is along the path of the old bridge or the new bridge, and whether the right of way is 60 feet wide or 100 feet wide, the existing trail passes over a portion of Parcel 4. Thus the court declines to enter an order specifying the width or location of the right of way, as it is not necessary to do so to decide this case (and the State of Alaska, whose interests are directly affected by any determination about the right of way, did not participate in the trial in this case).

25. In 2011, the Plaintiffs began clearing land for a home on the uplands portion of Parcel 4, to the west of Lutak Road. Their homesite overlooks the existing trail and the fishing grounds. In order to prevent the public from driving vehicles down the existing trail to the river, the Plaintiffs began blocking the upper portion of the trail, near where it abuts Lutak Road. Each time the Plaintiffs blocked the upper portion of the trail, local residents responded by removing the obstructions as soon as the spring hooligan run began. Upon removing the obstructions, the local residents resumed their traditional and customary practice of using vehicles to access the river.

26. The area between the eastern boundary of Parcel 4 and the mean high water mark is either part of the State highway right of way, or it is land accreted to Parcel 4, to which Plaintiffs are not currently seeking to quiet title. Because Plaintiffs are not seeking a decree of quiet title to the Parcel 4 accretions at this time, it is not necessary to decide precisely which areas fall into which of these categories.

27. The public's use of the trail to access this area for hooligan fishing, including use with vehicles, has been highly visible, open and notorious, since at least 1979. Photographs introduced into evidence by both parties illustrate that the existing trail is well-worn, and the area where people park and fish is in plain view from Lutak Road and from the Chilkoot River Bridge. Witnesses Ben Kirkpatrick and Richard Buck, who have to drive over the Chilkoot River bridge every day to get to and from their homes, testified that they have seen vehicle use on the trail ever since the new bridge was completed in 1979.

28. Witnesses Sonny Williams, Tim Ackerman, Lee Heinmiller, Sally Burattin, Valentino Burattin, Bob Duis, Ralph Strong, Paul Kelly Wilson, and Leonard Willard testified that they never asked anyone's permission to use the trail, nor did anyone ever grant or deny them permission. They testified that they used the trail and fishing grounds as if these lands were their own. No witness testified that the Plaintiffs, or the previous owners of Parcels 3 and 4 (Walter and Catherine Loewen, and Arthur and Mary Sundt, respectively) ever granted or denied anyone permission to access the Chilkoot River via the existing trail. Richard Folta testified that he understood that the public already had acquired the right to use the existing trail and fishing grounds, and he had no intention of interfering with that right.

Conclusions of Law:

1. Alaska courts have long recognized prescriptive easement claims brought on behalf of the general public as well as private individuals.[1] Obtaining rights in another's property by prescription is distinguished from obtaining rights by adverse possession.[2]

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[1] *Interior Trails Preservation Coalition v. Swope*, 115 P.3d 527, 530 (Alaska 2005).
[2] *Id.* at 529.

Prescription applies to servitudes while adverse possession is applied to possessory estates.[3] When considering a claim for a prescriptive easement the focus is on use, not possession.[4] "The level of use also determines whether a claimant acquires a fee title estate via adverse possession or merely a prescriptive easement."[5]

2. To succeed on a public prescriptive easement claim, the claimant is required to show by clear and convincing evidence[6] that:

> (1) the use was continuous and uninterrupted for the same ten-year period that applies to adverse possession; (2) the [public] acted as an owner and not merely as a person having the permission of the owner; and (3) the use was reasonably visible to the record owner.[7]

These elements were established by the Alaska Supreme Court as a simple means of describing the familiar requirement, originating in the adverse possession context, that the use be "open, notorious, adverse, hostile, and continuous."[8]

3. In 2003, the Alaska Legislature limited claims for adverse possession to cases in which the claimant either had color of title, or a good faith but mistaken belief that the claimant owned the land in question.[9] These amendments, however, do not apply to claims for prescriptive easements.[10] As a result, both before and after the 2003 amendments, a prescriptive easement is created after ten years of continuous, uninterrupted, adverse, open and notorious use.

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[3] *Id.*
[4] *Id.*
[5] *Tenala, Ltd. v. Fowler*, 921 P.2d 1114, 1119 (Alaska 1996).
[6] *McDonald v. Harris*, 978 P.2d 81, 83 (Alaska 1999); *Interior Trails,* 115 P.3d at 530.
[7] *Interior Trails, supra,* 115 P.3d at 530, *citing Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410, 416-17 (Alaska 1985).
[8] *Dillingham Commercial Co. v. City of Dillingham,* 705 P.2d 410 at 416-17.
[9] AS 09.45.052; AS 09.10.030; Ch. 147, SLA 2003, §§1-3.
[10] *See,* AS 09.45.052(d); Ch. 147, SLA 2003, §4.

4. As a general rule, Alaska law establishes a presumption that use of land by an alleged easement holder was permissive unless a claimant proves "a distinct and positive assertion of a right hostile to the owner."[11] This is referred to as the presumption of permissive use. Permissive use cannot give rise to a prescriptive easement.

5. Prior to 1979, one can infer that Jeff David, the owner of the Native allotment of which these parcels were a part, gave permission for his fellow Natives to use his property to access the fishing grounds. There was nothing hostile about the public use prior to 1979. On the contrary, the evidence was that Mr. David fished alongside his friends and neighbors.

6. The Alaska Supreme Court has said that, "when use has begun permissively, it cannot become hostile until the presumption of permissive use is rebutted 'by proof of a distinct and positive assertion of a right hostile to the owner of the property.'".[12] The conveyance of a servient estate by an owner who granted permission "does not ipso facto transform a permissive use into an adverse one."[13] Thus Mr. David's conveyance of the property to subsequent property owners who took no steps to revoke permission to use the property did not "ipso facto" transform the previously permissive use into an adverse one.

7. Along with conveyance of the property, however, another event occurred in 1979 which significantly affected use of the area in question. That was the construction of the new bridge, and in particular the construction by the State's contractor of a dirt ramp from Lutak Road down to the tidelands. The evidence showed that this ramp or access way has been used

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[11] *See, McDonald v. Harris*, 978 P.2d 81, 85 (Alaska 1999).
[12] *Cowan v. Yeisley*, 255 P.3d 966, 974 (Alaska 2011), *quoting City of Anchorage v. Nesbett*, 530 P.2d 1324, 1328-39 (Alaska 1975).
[13] *City of Anchorage v. Nesbett*, 530 P.2d at 1329, *citing Sturnick v. Watson*, 142 N.E.2d 896, 898 (1957); *Johnson v. Szumowicz*, 179 P.2d 1012, 1021 (1947).

every year since it was built for vehicle access to the Chilkoot River during the spring hooligan fishery.

8. Given the uncertainty about the boundaries of the State right of way, it is unclear whether any portion of this ramp itself was constructed on Parcel 4. However, there is no question that vehicle access down the ramp passed over a portion of Parcel 4. The effect was to create a vehicle path over Parcel 4 where none previously existed. While there was some evidence that vehicles may have driven from Lutak Road down to the tidelands before 1979, there was no evidence that any improved means of vehicle access existed prior to construction of this ramp.

9. In *Weidner v. State, Dept. of Transp. And Public Facilities,* the Alaska Supreme Court held that the trial court did not err in finding that realignment by the State of Alaska of a public roadway to a new location over private property overcame the presumption of permissive use, and established adverse use sufficient, after ten years, to create a prescriptive easement.[14] In essence, the *Weidner* court found that the State's act of building and maintaining a public road over Weidner's property was sufficiently adverse that it overcame the presumption of permissive use. Similarly here, I find that the combination of the act of the State's contractor in building a vehicle ramp either on or adjacent to Parcel 4, and its use for the succeeding 37 years for vehicle access, including driving vehicles over Parcel 4 to access the ramp and the beach, was a sufficiently adverse act that it overcame the presumption of permissive use. I thus conclude by clear and convincing evidence that establishment of the new vehicle ramp in 1979, together with its continuous use ever since for vehicle access to the

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[14] 860 P.2d 1205, 1210 (Alaska 1993).

hooligan fishery, constituted the sort of a "distinct and positive assertion of a right hostile to the owner of the property" that rebutted the presumption of permissive use as to the vehicle path.

10. Members of the public who drove their cars down this path after 1979 never asked anyone for permission. No one ever gave or denied them permission to use the property (until 2011 when the Loewens attempted to deny permission). These members of the public acted as if they had a right to use the area to harvest hooligan, as they and their ancestors had for hundreds if not thousands of years. This use of the property was visible to anyone who passed on the road.

11. After Jeff David sold the land, the owners of Parcels 3 and 4 certainly acquiesced in this use by the public, until the Plaintiffs took steps to block the trail. Mere acquiescence by the record owners, however, is not inconsistent with a finding of hostile or adverse use, and does not render this use permissive.[15]

12. I conclude that a prescriptive easement exists over Parcel 4 for the purpose of vehicle access to the Chilkoot River during the spring hooligan fishery. I will set out my conclusions about the exact scope of the easement below.

13. As to Parcel 3, however, I reach a different conclusion. The hooligan fishing along the waterline adjoining Parcel 3 has generally been below mean high water -- that is, outside the area of accreted lands. While the evidence showed that members of the public would sometimes walk over the Parcel 3 accretion to access the fishing grounds, and on occasion they might even have fished from the accreted lands, this use involved no "distinct

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[15] *See, Peters v. Juneau-Douglas Girl Scout Council,* 519 P.2d 826, 833 (Alaska 1974).

and positive assertion of a right hostile to the owner of the property." I thus cannot conclude that this use was adverse or hostile. I therefore deny the claim for a prescriptive easement over Parcel 3.

Scope of Relief Ordered:

14. In order to be usable, a vehicle path must include the right to turn vehicles around, and for two vehicles to pass. Plaintiffs request a 25 foot wide easement, which I find to be a reasonable request.

15. It is inherent in this finding of a prescriptive easement that the right to use the easement includes the right to fish. It appears that the bulk of the fishing activity would occur below mean high water, which would mean it occurs on State land. Much of the fishing area adjacent to Parcel 4 is likely on the State right of way or on State tidelands. It is possible, however, that fishing might occur on an extreme tide above the mean high water mark. To the extent that the Plaintiffs have an ownership interest in accreted lands adjacent to Parcel 4, I will grant a prescriptive easement along a 50' wide strip of land above mean high water over Plaintiffs' unclaimed Parcel 4 accretions. This will provide sufficient space to turn vehicles around after they pass down the vehicle path.

16. I will further enter a permanent injunction prohibiting Plaintiffs from interfering with vehicle or pedestrian access to the vehicle path where it crosses Parcel 4, or where it passes over the State right of way, or with hooligan fishing in the prescriptive easement area.

17. Nothing in this order should be construed to restrict the power of federal, State or municipal regulators to enforce any laws or regulations which may impact the rights conferred

in this order. Nor should anything in this order be construed to determine the width or location of the State right of way.

Entered at Juneau, Alaska this 19 day of September, 2016.

Philip M. Pallenberg
Superior Court Judge

SEAL OF THE TRIAL COURTS OF THE STATE OF ALASKA FIRST JUDICIAL DISTRICT

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