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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Carey Mills Plaintiffs, Vs. UNITED STATES OF AMERICA, KEN SALZAR, in his capacity as Secretary of the Department of Interior, et al. Defendants,	) Case No.:4:10-CV-00033-RRB) PLAINTIFF'S MEMORADUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DOYON LIMITED'S MEMORENADUM AND MOTION TO DISMISS (Docket 157)

PLANITIFFS' MEMORANDUM
OF POINT AND AUTHORITIES IN OPPOSITION TO
DOYON LIMITED'S MEMORANDUM AND MOTION TO DISMISS

REQUEST FOR ORAL ARGUMENT

Given the complexity regarding the issues that are at bar in this case, the Plaintiff believes that oral argument provides an opportunity for communication between the bench and counsel, with the judge being able to asking questions based on what the briefs and other parts of the record have conveyed about the case. Therefore, the Plaintiff honorable requests that this Court to allow for oral argument at a hearing of this case.

INTRODUCTION

The lack of publically recorded and defined routes of access across private and federal public land to public land owned by the State of Alaska through the use of RS 2477 rights-of-way has been in contention for over 30 some years now. The Public and Private contenders in the RS 2477 rights-of-way conflict have only sought judicial resolution over a few RS 2477 rights-of-way with in that time. Each of those Alaskan Quiet Title disputes resulted in a negotiated settlement resulting in no clear case precedence being achieved. The Plaintiff in this case has taken on the task of respectfully requesting a judicially determination of one of the over 600 RS 2477 rights-of-way listed in Alaska Statute AS 19.30.400 (d), the Fortymile Station-Eagle Trail. (RST 1594) The only purpose for pursuing this RS 2477 rights-of-way was for the ability to access the Plaintiff's mining claims via the road that travels along the stream bed of Teddys Fork from the Taylor highway.

STATEMENT

The Plaintiff adopts as part of this memorandum the PLANITIFFS' MEMORANDUM OF POINT AND AUTHORITIES IN OPPOSITION TO THE MOTION TO DISMISS OF THE UNITED STATES (Docket 163) with respect to the parallel legal positions and arguments of Doyon Limited and the Federal Defendants.

Within this memorandum the Plaintiff will respond to those legal positions and arguments that are unique to Doyon Limited memorandum. Doyon Limited Patent documents and Official Department Decisions Exhibit 1, 3 and 4 of Docket 80 all state that the Patents are subject to "valid existing rights therein" The Third Amended Complaint with respect to the non-

federal Defendants is constructed and based upon the **valid existing cognizable right** of "continued right of public access along the non-exclusive" RS 2477 rights-of-way known as Fortymile Station-Eagle Trail (RST 1594).

The relief sought is:

Quieting title to the Fortymile Station-Eagle Trail (RST 1594) to the State of Alaska as rights-of-way created under R.S.2477 for the benefit of the Plaintiff as well as the general public in accordance with Alaska Statue (AS 19.30.400.).

A declaration that the property interests claimed by the non-federal Defendants are subject to the "valid existing rights" RS 2477 Fortymile Station-Eagle Trail (RST 1594) rights-of-way where they conflict.

A decree against the non-federal Defendants quieting title to the Fortymile Station-Eagle Trail (RST 1594) in the State of Alaska where such rights-of-way crosses land in which a non-federal Defendant claims an interest, pursuant to AS 09.45.010.

The relief sought by the Plaintiff is very simply: all private property owners are subject to the laws of the State of Alaska. In this case the law is AS 19.30.400 which recognizes the Fortymile Station-Eagle Trail (RST 1594) as public rights-of-way.

This Court did dismiss the previous complaint (the "Amended Complaint", Docket 63), holding that plaintiff, as a private party, lacks prudential standing to assert his R.S. 2477 claim. However, this Court did not apply Alaska State Law as required in determining prudential standing in asserting RS 2477 rights-of-way. Furthermore, the introduction of new evidence in the Plaintiffs Brief (Docket 163) Id at 17-19., clearly and unequivocally establishes the fact that a private citizen does have the right to assert the RS 2477 rights-of-way and therefore, does in fact have prudential standing.

The Third Amended Complaint is predicated on the completely different foundation. It is that the RS 2477 Statute created legal, binding and judicially enforceable rights for the general public and these general public rights were in fact individual rights which conveyed access rights-of-way for individual citizens as well as the newly discovered evidence signed by the Federal Defendants Department of Interior's Bureau of Land Management agent that establishes

the fact that: "It is understood by all parties that individual citizens may be entitled to assert rights-of-way under RS 2477 notwithstanding this agreement."[1]

Additionally, the denial of the State of Alaska to prosecute the rights of the State, the Public and the Residents of Alaska rights of access through a Quiet Title Action necessitate the Plaintiff to don the role of State Attorney General under the "Private Attorney General Concept" in the Third Amended Complaint. The controlling case cited by Court's Tentative Order, Docket 126, *Id* at 18 states: "Certainly he who is "likely to be financially" injured, FCC v. Sanders Bros. Radio Station, 309 U. S. 470, 477, may be a reliable private attorney general to litigate the issues of the public interest in the present case." *Association of Data Processing Service Organizations, Inc. v. Camp, 397 US 150 - Supreme Court 1970.*

It is the Plaintiff belief and legal assertion that this Court should finally end these expensive, wasteful and meritless affirmative defenses and apply the "Doctrine of Judicial Estoppel" to this case by requiring all of the Defendants to either admit or deny that the Plaintiff as well as the public have the "continued right of public access along the non-exclusive" RS 2477 rights-of-way known as Fortymile Station-Eagle Trail (RST 1594) over private land as previously stated in official acts and official records. (See Third Amended Complaint (Plaintiff's Exhibit 008 and 009).

"COUNTERPOINTS" I. FACTUAL BACKGROUND

The non-federal Defendants Doyon Limited and Hungwitchin Corp's[2] Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12 (b) (1) and 12 (b) (6) Rule is the traditional unjustified and warrantless judicial impediment to the merits of this case. In order to maintain continuity in presenting a response, this memorandum will attempt to mirror with "COUNTERPOINTS" to each section of Federal Defendants Memorandum and then in "ADDITIONAL POINTS" the Plaintiff will address original points and authorities believed to be controlling and of importance.

The non-federal Defendants Doyon Limited supplements their short statement of facts with adoption by reference of the additional information concerning official acts and official

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[1] See (Docket 163) Id at 17-19.

[2] Non-federal Defendant Hungwitchin Corp. has joined Doyon Limited's Motion to Dismiss pursuant to (Docket # 158).

records. Because this information constitutes official acts and official records concerning the conveyance of lands to Doyon by the United States pursuant to ANCSA, this Court may take judicial notice of these matters without converting the Defendants' motion to dismiss into a summary judgment motion, for the reasons stated in footnote 10, pp. 21-22 of Doyon's Memorandum Supporting Motion to Dismiss (Docket 80)

These official acts and official records are exactly what the Plaintiff is previously referring to regarding "valid existing rights therein" Mark Fullmer, Chief, Branch of Resolution. Acting Chief, Lands and Realty Division of Alaska Lands of the Bureau of Land Management, sent an e-mail stating:

> "Any RS 2477 rights-of-way that is determined to be valid is already included in the general reservation of "valid existing rights" which appears in every conveyance document we issue. Only the courts can adjudicate an RS 2477 rights-of-way." (See Third Amended Complaint (Plaintiffs Exhibit 013)
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> "Our conveyance documents, including the Patent involved in Mr. Mills' issue, DO reserve and protect any valid existing right under RS 2477. Our position is that we do not have authority to adjudicate (make a final determination) as to whether an asserted RS 2477 is valid or not, that is up to the courts. We have no authority to recognize, or reject, an asserted RS 2477." (See Third Amended Complaint (Plaintiffs Exhibit 014)

The ultimate question then remains, is the Fortymile Station-Eagle Trail (RST 1594) a valid RS 2477rights-of-way? The answer to that question has already been determined by official acts and official records: the grant of private land has been made subject to "continued right of public access along the non-exclusive use Fortymile Station-Eagle Trail not to exceed on hundred (100) feet in width"(See Third Amended Complaint (Plaintiff's Exhibit 008 and 009).

The Third Amended Complaint also challenges the validity of non-federal Defendant Scott Wood's mining claims because the Bureau of Land Management has made an official act in a determination that the unpatented federal mining claims are pre-1955 mining claims.[3] The

[3] December 17, 2009, Melody Smyth, Mineral Law Specialist of the Bureau of Land Management made the determination that Defendant Scott Wood's Federal mining claims (4 thru 12 Above Discovery) qualify as pre July 23, 1955 claims. (See Third Amended Complaint (Plaintiffs Exhibit 055) and IBLA Case # 2010-116 (See Third Amended Complaint (Plaintiffs Exhibit 016)

Third Amended Complaint also challenges the validity of these claims and establishing the mining claims to have "exclusive surface rights" these exclusive surface rights are in fact "valid existing rights" reserved in the Patent document. Consequently, if the mining claims are indeed valid pre-1955 mining claims then Defendant Scott Wood's exclusive surface rights would supersede any surface rights of the non-federal Defendants Doyon Limited and Hungwitchin Corp. Even though Doyon has been granted administration of those claims by the United States, and that the Department of the Interior has no further current role in administering them the "valid existing rights" again would take precedence and are superior in title to the non-federal Defendants Doyon Limited and Hungwitchin Corp title.

Other relevant and substantial information omitted by the non-federal Defendants current memorandum[4] is the fact that the Court's FINAL ORDER RE PENDING MOTIONS (Docket 141) specifically stated: "Plaintiffs' First, Second, Third, Fourth, and Sixth Claims for Relief in Count 1 are **DISMISSED** in their entirety, with leave to amend."

"ADDITIONAL POINTS" I. FACTUAL BACKGROUND

The Third Amended Complaint expressly aims and purposes to comply with all of the Court's Orders while correcting the objections and deficiencies raised by the non-federal Defendants in prior Motions to Dismiss under Rule 12 (b) (1) and (6) of the Federal Rules of Civil Procedure. Thus, compelling the non-federal Defendants to actually answer the allegations of the complaint; ending the debate over whether State Statute AS 19.30.400 apply to Native Corporation formed under the laws of the State of Alaska.

UNIQUELY DIFFERENT JURISDICTIONAL LAW

The Third Amended Complaint relies on separate and uniquely different controlling law compared to the previous complaints filed in this case.

Count One First Claim for Relief relies on legal foundation that this court has original jurisdiction over this action due to an Act of Congress 28 U.S.C. § 1346 (a) (2), (United States as Defendant). The Act of Congress has created case or controversy between the Plaintiff and the Federal Defendants because the Federal Defendants currently lack the authority and jurisdiction

[4] Docket # 157.

to recognize, manage, or determine the validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) but the Federal Defendants have denied the Plaintiff the use of the RS 2477 Fortymile Station- Eagle Trail.

Count One Second Claim for Relief does in fact rely on the same legal foundation that this court has issued an order on but the claim is distinctive in that the claim seeks only to establish the individual cognizable right to the "continued right of public access along the non-exclusive" RS 2477 rights-of-way known as Fortymile Station-Eagle Trail (RST 1594). .

Count One Third Claim for Relief relies on legal foundation that an individual is allowed to assume the role of State Attorney General under the "Private Attorney General Concept" especially when the Alaska State Attorney General refused to act on the State of Alaska's behalf and become a party to the complaint. The controlling case cited by this Court's Tentative Order, Docket 126, *Id* at 18 states: "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved "persons" is symptomatic of that trend". "Certainly he who is "likely to be financially" injured, FCC v. Sanders Bros. Radio Station, 309 U. S. 470, 477, may be a reliable private attorney general to litigate the issues of the public interest in the present case." *Association of Data Processing Service Organizations, Inc. v. Camp, 397 US 150 - Supreme Court 1970*

Count One Fourth Claim for Relief specifically makes the claim that under State of Alaska Law and the "Private Attorney General Concept"; a private citizen has the right and prudential standing to enforce the rights of the public at large and the Courts jurisdiction is rooted in 28 U.S.C. § 2201; (Creation of Remedy) "...any court of the United States , upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration..." and 28 U.S.C. § 1367, (Supplemental Jurisdiction) "...the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution...". The Plaintiff is entitled to a declaration that the property interests claimed by the non-federal defendants are subject to the State of Alaska rights-of way listed in Alaska Statue AS 19.30.400 and the public right of usage

of the Fortymile Station-Eagle Trail (RST 1594) where they conflict regarding only against the non-federal Defendants.

Count One Fifth Claim for Relief specifically makes the claim that under State of Alaska Quiet Title Law AS 09.45.010; a private citizen has the right and prudential standing to enforce the rights of the public at large as well as under the "Private Attorney General Concept. The Courts jurisdiction is rooted in 28 U.S.C. § 2201; (Creation of Remedy) "...any court of the United States , upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration..." and 28 U.S.C. § 1367, (Supplemental Jurisdiction) "...the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution...". The Plaintiff is entitled to a declaration that the property interests claimed by the non-federal defendants are subject to the State of Alaska rights-of way listed in Alaska Statue AS 19.30.400 specifically, the Fortymile Station-Eagle Trail (RST 1594) where they conflict regarding only against the non-federal Defendants.

Count One Sixth Claim for Relief specifically pleads in the alternative a private citizen has the right and prudential standing to enforce the rights of the public at large as well as under the "Private Attorney General Concept. AS 09.45.630 which provides for the State of Alaska to have the present right of possession of the Fortymile Station-Eagle Trail (RST 1594)

Count Two claims are specifically targeted towards Defendant Scott Wood, the Federal Defendants as well as the non-federal Defendants have taken the legal position that the Defendant Scott Wood has "exclusive surface rights" even against the Federal Defendants. Consequently, any legal or factual argument or position to the contrary by the Defendants' must be estopped under the judicial estoppel doctrine. Count Two relies on 30 USC § 49b Mining laws relating to placer claims extended to Alaska states: "The general mining laws of the United States so far as they are applicable to placer-mining claims, as prior to May 4, 1934, extended to the Territory of Alaska, are declared to be in full force and effect in said Territory:..." and 30 USC § 35 - Placer claims; entry and proceedings for patent under provisions applicable to vein or lode claims; conforming entry to legal subdivisions and surveys; limitation of claims; homestead

entry of segregated agricultural land which states: "Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims;...".

Furthermore, Count Two challenges the validity of these claims and establishing the mining claims to have "exclusive surface rights". Consequently, if the mining claims are indeed valid pre-1955 mining claims then even though Doyon has been granted administration of those claims by the United States, and that the Department of the Interior has no further current role in administering them the "valid existing rights" again would take precedence and are superior in title to the non-federal Defendants Doyon Limited and Hungwitchin Corp title.

Count Three (previously Count 1 Fifth Claim for Relief) is now utilizing correctly the controlling law of 42 U.S.C. § 1983 (Civil Action for Deprivation of Rights), 18 U.S.C. § 241 (Conspiracy Against Rights). Also, Count Three provides factual allegations of conspiring with government officials.

"COUNTERPOINTS" II. PROCEDURAL BACKGROUND

"Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. See All Hawaii Tours, Corp. v. Polynesian Cultural Center, 116 F.R.D. 645, 648 (D. Hawaii 1987), rev'd on other grounds, 855 F.2d 860 (9th Cir.1988). There may also be other, highly unusual, circumstances warranting reconsideration." *School Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F. 3d 1255 - Court of Appeals, 9th Circuit 1993*

(1.) Regarding "prudential standing" the Court granted the plaintiffs leave to amend most of the claims in the previous complaint. Doyon and the Federal Defendants memorandums have interpreted the Courts' Orders differently than the Plaintiff, partially for the reason that the Court committed clear error in that it did not apply the Laws of the State of Alaska or the "Private Attorney General Concept" to the prudential standing issue. Also, the Court erred in that it did not apply the case law regarding the Quiet Title Act correctly due to the fact that the Court in its Orders did not apply the case law by specifically citing that the Court considered the Alaska case

law in making its decision such as the other Courts did in their citing's: The court in Friends of Panamint Valley adopted this reasoning and held that the plaintiffs did not demonstrate, under federal or **State of California law**, that they had a right, interest, or title to assert a claim under the QTA. (Emphasis Added) *Friends of Panamint Valley v. Kempthorne, 499 F. Supp. 2d 1165 (E.D. Cal. 2007* "Plaintiffs "interest" in using the "Chetco or Emlly Routes" as members of the public is not an interest in real property as contemplated by the Quiet Title Act. Kinscherff v. U.S., 586 F.2d at 160. Although the court in Kinscherff relied in part on **New Mexico state law** in determining that only parties claiming title may bring a quiet title action for a public road, **Oregon law** also only allows parties claiming title to the property to bring a quiet title action. See Ellis v. Municipal Reserve and Bond Co., 60 Or.App. 567, 570-571, 655 P.2d 204 (1982). *Alleman v. US, 372 F. Supp. 2d 1212 - Dist. Court, D. Oregon 2005* (Emphasis Added)

If this Court would have consulted the Alaska State and Alaska case law regarding the Quiet Title Act the Court's decision obviously would have been that the Plaintiff does have prudential standing because the Case law in Alaska allows for a private individual to assert rights, interests and title under the Quiet Title Act.

(2.) With respect to 30 U.S.C. § 41 and how it applies under the facts of this case. The Court erred in that it did not apply the other Federal Statutes that were applicable to placer mining claims specifically:

> 30 USC § 49b Mining laws relating to placer claims extended to Alaska states: "The general mining laws of the United States so far as they are applicable to placer-mining claims, as prior to May 4, 1934, extended to the Territory of Alaska, are declared to be in full force and effect in said Territory:..." and
>
> 30 USC § 35 - Placer claims; entry and proceedings for patent under provisions applicable to vein or lode claims; conforming entry to legal subdivisions and surveys; limitation of claims; homestead entry of segregated agricultural land which states: "Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims;...".

As well as the case law Calhoun Mining Co. v. Ajax Gold Mining Co., 182 U.S. 499 (1901). In Calhoun Mining, as relevant to this case, in construing R.S. 2336, the predecessor to § 41, in the part quoted by Plaintiffs, the Supreme Court held:

> Section 2336 imposes a servitude upon the senior location, but does not otherwise affect the exclusive rights given the senior location. **It gives a right of way to the junior location.** To what extent, however, there may be some ambiguity; whether only through the space of the intersection of the veins, as held by the supreme courts of California, Arizona, and Montana, or through the space of intersection of the claims, as held by the supreme court of Colorado in the case at bar. It is not necessary to determine between these views. (Emphasis Added)

The junior location is the Plaintiff's mining claims[5] and consequently, the plaintiff has rights-of-way through the senior location, which are Scott Wood's mining claims.

A right of way is not an exception, but a reservation, which may be inferred from any wording indicating an intention to create an easement. It takes nothing from the body of the grant of the first locator, but compels the first locator to use or hold his grant or claim subject to a right or privilege to the junior or overlapping claimant of reaching the other end of his claim by passage through the senior location." Calhoun Gold-Min. Co, v. Ajax Gold-Min. Co. Nov 20, 1899, 50 L.R.A. 209 Colo. 1, 59 P.607

(3.) Concerning the plaintiff's conspiracy claim, at least as against Doyon Limited and Hungwitchin Corp's; the insufficiencies' claimed and upheld by the Court have been addressed in the Third Amended Complaint. Now utilizing correctly the controlling law of 42 U.S.C. § 1983 (Civil Action for Deprivation of Rights), 18 U.S.C. § 241 (Conspiracy Against Rights). Also, Count Three provides factual allegations of conspiring with government officials and complies with Rule 8 where the Supreme Court has stated: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson, 355 US 41 - Supreme Court 1957."*

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[5] In Docket # 49 the Plaintiff clearly exhibited the fact that the Plaintiff holds real property interests in State of Alaska Mining Claims ADL 611494-611496 and ADL 611578-611581.

"COUNTERPOINTS" III. APPLICABLE LAW

1. RULE 12 (b) (1) AND SUBJECT MATTER JURISDICTION

"Accepting all of the allegations in respondent's complaint as true, the court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" petitioners. *Id.*, at 136a-137a (relying on *Conley v. Gibson,* 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957))." *Ashcroft v. Iqbal, 129 S. Ct. 1937 - Supreme Court 2009*

The Supreme Court also stated: "In reversing, we stated the applicable prudential standing requirement to be "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Data Processing, supra, at 153. Data Processing, and its companion case, Barlow v. Collins, 397 U. S. 159 (1970), applied the zone-of-interests test to suits under the APA, but later cases have applied it also in suits not involving review of federal administrative action, see Dennis v. Higgins, 498 U. S. 439, 449 (1991); Boston Stock Exchange v. State Tax Comm'n, 429 U. S. 318, 320-321, n. 3 (1977);" *Bennett v. Spear, 520 US 154 - Supreme Court 1997*

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader. "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U. S. 41, 45-46 (1957) (footnote omitted). See also Gardner v. Toilet Goods Assn., 387 U. S. 167, 172 (1967)." *Scheuer v. Rhodes, 416 US 232 - Supreme Court 1974*

"Under the law of the case doctrine, a court is precluded from reconsidering an issue that it has already decided unless "there has been an intervening change of controlling authority, new

evidence has surfaced, or the previous disposition was clearly erroneous and would work a manifest injustice." *Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc., 389 F. Supp. 2d 1145, 1156 (D. Alaska 2005)*

"Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. See All Hawaii Tours, Corp. v. Polynesian Cultural Center, 116 F.R.D. 645, 648 (D. Hawaii 1987), rev'd on other grounds, 855 F.2d 860 (9th Cir.1988). There may also be other, highly unusual, circumstances warranting reconsideration." *School Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F. 3d 1255 - Court of Appeals, 9th Circuit 1993*

"The irreducible constitutional minimum of standing contains three requirements. *Lujan v. Defenders of Wildlife,*103 supra, at 560* First and foremost, there must be alleged (and ultimately proved) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not `conjectural' or `hypothetical.' "*Whitmore v. Arkansas, supra, at 149, 155 (quoting Los Angeles v. Lyons, 461 U. S. 95, 101-102 (1983))* Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization, 426 U. S. 26, 41-42 (1976).* And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury. Id., at 45-46; see also *Warth v. Seldin, 422 U. S. 490, 505 (1975).* This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence. See FW/PBS, Inc. v. Dallas, 493 U. S. 215, 231 (1990)". *Steel Co. v. Citizens for Better Environment, 523 US 83-Supreme Court 1998*

"When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. . . . This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. . . . But under Article III, Congress

established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Stark* v. *Wickard,* 321 U. S. 288, 309-310 (1944) (footnote omitted). "Individual rights," within the meaning of this passage, do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public. See also *Sierra Club,* 405 U. S., at 740-741, n. 16. **Nothing in this contradicts the principle that "[t]he . . . injury required by Art. III may exist solely by virtue of `statutes creating legal rights, the invasion of which creates standing.'** " *Warth,* 422 U. S., at 500 (quoting *Linda R. S.* v. *Richard D.,* 410 U. S. 614, 617, n. 3 (1973))." *Lujan v. Defenders of Wildlife, 504 US 555 - Supreme Court 1992* (Emphasis Added)

"Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation of N.Y. v. County of Oneida 414 U.S. 661, 666 (1974);* see also *Romero v. International Terminal Operating Co.358 U.S. 354, 359 (1959) Steel Co. v. Citizens for Better Environment, 523 US 83-Supreme Court 1998*

2. RULE 12 (b) (1) AND SUBJECT MATTER JURISDICTION AND STATE LAW

This memorandum describes in adequate detail the Courts errors in its initial decision by not correctly consulting the State of Alaska laws and case law in Alaska and allows for reconsideration of the allegations of the Third Amended Complaint

"28 USC § 2409a - Real property quiet title actions (d)The complaint shall set forth with particularity the **nature of the right**, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.(Emphasis Added)

"The Quiet Title Act is the exclusive means by which adverse claimants can challenge the United States' title to real property. Leisnoi, Inc. v. U.S., 170 F.3d 1188, 1191 (9th Cir.1999). The Quiet Title Act provides in part that: The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the

circumstances under which it was acquired, and the right, title, or interest claimed by the United States. 28 U.S.C. § 2409a (d)."

"Plaintiffs "interest" in using the "Chetco or Emlly Routes" as members of the public is not an interest in real property as contemplated by the Quiet Title Act. Kinscherff v. U.S., 586 F.2d at 160. Although the court in Kinscherff relied in part on New Mexico state law in determining that only parties claiming title may bring a quiet title action for a public road, Oregon law also only allows parties claiming title to the property to bring a quiet title action. See Ellis v. Municipal Reserve and Bond Co., 60 Or.App. 567, 570-571, 655 P.2d 204 (1982). *Alleman v. US, 372 F. Supp. 2d 1212 - Dist. Court, D. Oregon 2005*

Generally, when state law claims are brought in federal court, the "state law as announced by the highest court of the State is to be followed." *Vacation Village, Inc. v. Clark County, Nev., 497 F.3d 902, 915 (C.A.9 (Nev.), 2007) (quoting Comm'r v. Estate of Bosch, 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967)).*

In Fitzgerald v. Puddicombe, the Alaska Supreme Court recognized that individuals may sue to enforce RS 2477 rights-of-way. *Fitzgerald v. Puddicombe, 918 P.2d 1017 (Alaska 1996); see also Puddicombe v. Fitzgerald, 1999 WL 33958803,*

Interior Trails Preservation Coalition v. Swope clarified that a single plaintiff had standing to enforce the rights of the public at large. *115 P.3d 527 (Alaska 2005)*

Both the United States Supreme Court and the Ninth Circuit have held that state law determines whether a right-of-way was perfected under R.S. 2477. In 1932, the Supreme Court upheld a right-of-way that it found to have been established according to California law. *Central Pac. Ry. Co. v. Alameda County*, 284 U.S. 463, 473 (1932). The road in that case was "formed by the passage of wagons, etc., over the natural soil" and was declared by the county to be a county highway in 1859. *Id.* at 465-467. The Court found:

> It follows that the laying out by authority of the state law of the road here in question created rights of continuing user to which the government must be deemed to have assented. Within the principle of the decisions of this court heretofore cited, they were such rights as the government in good conscience was bound to protect against impairment from subsequent grants. The reasons for so holding are too cogent to be denied.

Id. at 473.

In 1974, the Ninth Circuit determined that an R.S. 2477 right-of-way was established when the public highway was established in accordance with state law. *Standage Ventures, Inc. v. State of Ariz.*, 499 F.2d 248, 250 (9th Cir. 1974). Finally, in 2006, in the *Southern Utah Wilderness Alliance* case the Tenth Circuit squarely and thoroughly addressed the issue and held that federal law incorporates state law to determine if a right-of-way offered by R.S. 2477 was accepted and perfected. Several factors convinced the Court of that conclusion. One involves the traditional position taken by the BLM on the issue. The BLM has been at the point of the spear on R.S. 2477 issues for over a century. Its position has traditionally and exclusively been that state law governs whether a right-of-way under R.S. 2477 has been established and that state courts are the forum in which the existence of the right-of-way is properly determined. *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d at 755, fn 7[2] (Footnote included below). The Court found:

The BLM also has been reluctant, until very recently, to issue regulations governing R.S. 2477 rights-of-way. In fact, its earliest regulation on the subject disclaimed any role for the federal government in implementing R.S. 2477. That regulation states, in its entirety: The grant [under R.S. 2477] becomes effective upon the construction or establishing of highways, in accordance with the State laws, over public lands not reserved for public uses. No application should be filed under said R.S. 2477 as no action on the part of the Federal Government is necessary. 43 C.F.R. § 244.55 (1939) (footnote omitted).

This regulation reflects the position that R.S. 2477 gives the BLM no executive role, and indicates that the BLM interpreted the grant to take effect without any action on its part. Subsequent editions of the Code of Federal Regulations carried forward the same language, (Footnote omitted.) which was not repealed until the code underwent extensive post-FLPMA (and, thus, post-R.S. 2477) revisions in 1980. *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d at 755-756.

3.RULE 12 (b) (6) AND PLEADING A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Furthermore, the Third Amended Complaint corrects the insufficient factual allegations to overcome a Rule 12 (b) (6) attach. "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson, 355 US 41 - Supreme Court 1957.*" Surely, the facts set forth in the Third Amended Complaint comply with Rule 8.

"The grant or denial of leave to amend is committed to the sound discretion of the district court." Triad at Jeffersonville I, LLC v. Leavitt, 563 F.Supp.2d 1, 11 (D.D.C.2008) (citing Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C.Cir. 1996)). While leave to amend a complaint should be freely granted when justice so requires, see FED.R.CIV.P. 15(a)(2)" *Stoddard v. District of Columbia, 764 F. Supp. 2d 213 - Dist. Court, Dist. of Columbia 2011*

"If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis, 371 US 178 - Supreme Court 1962*

"In making the legal determination that an amended complaint is futile, a court may examine the merits of the case. See Gabrielson v. Montgomery Ward & Co., 785 F.2d 762, 766 (9th Cir. 1986). To survive a 12(b) (6) motion for failure to state a claim, a complaint must meet the requirements of Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief," so that the defendant has "fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957))." *Haug v. MIDSTATE MECHANICAL, INC., Dist. Court, D. Arizona 2012*

"Rather, the district court has jurisdiction if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," id., at 685, unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Id., at 682-683; see also Bray v. Alexandria Women's Health Clinic, 506 U. S. 263, 285 (1993); The Fair v. Kohler Die & Specialty Co., 228 U. S. 22, 25 (1913). Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." Oneida Indian Nation of N. Y. v. County of Oneida, 414 U. S. 661, 666 (1974); see also Romero v. International Terminal Operating Co., 358 U. S. 354, 359 (1959)." *Steel Co. v. Citizens for Better Environment, 523 US 83 - Supreme Court 1998*

We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U. S. 41, 45-46 (1957). See Dioguardi v. Durning, 139 F. 2d 774 (CA2 1944). *Haines v. Kerner, 404 US 519 - Supreme Court 1972*

"ADDITIONAL POINTS" III. APPLICABLE LAW

" No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act." (Department of the Interior and Related Agencies Appropriations Act, § 108, enacted by the Omnibus Consolidated Appropriations Act, 1997, Pub L., No. 104-208, 110 Stat. n 3009 (1996))

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court." *Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 US 837 - Supreme Court 1984*

4. JUDICIAL ESTOPPEL DOCTRINE

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." Davis v. Wakelee, 156 U. S. 680, 689 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." Pegram v. Herdrich, 530 U. S. 211, 227, n. 8 (2000); see 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (hereinafter Wright) ("absent any good explanation, a party should not be allowed

to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory"). *New Hampshire v. Maine, 532 US 742 - Supreme Court 2001*

"COUNTERPOINTS" DISCUSSION

The Court dismissed the Plaintiff's previous complaint in its entirety, granting the Plaintiff leave to amend most of his claims. The plaintiff's Third Amended Complaint is absolutely and comprehensively unlike the Plaintiff's previous complaints. The Plaintiff's Third Amended Complaint is centered on and exclusively about **INDIVIDUAL'S RIGHTS;**

- The individual's "valid existing rights" reserved in all non-federal Defendants Patent Documents and the "continued right of public access along the non-exclusive" RS 2477 rights-of-way known as Fortymile Station-Eagle Trail (RST 1594).
- The individual's right of due process of law to redress an "Act of Congress".
- The individual's right of due process of law to redress the "valid existing rights" and the "cognizable right" in real property under the 28 U.S.C. section 2409a (the "Quiet Title Act")
- The individual's right of due process of law under the "Private Attorney General Concept" to redress the general public's rights when the appropriate Governmental Authorities fails or refuse to protect the public's rights of free access across land protected in and by Federal Statutes.
- The individual's right of due process of law to redress free access across individual mining claims in order to access other mining claims, enacted by and protected in Federal Statutes.
- The individual's right of due process of law to redress the abuses and injuries suffered under the "color of law" by Governmental Authorities.

A. **Count I**

28 USC § 2409a - Real property quiet title actions (d)The complaint shall set forth with particularity the **nature of the right**, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.(Emphasis Added)

The RS 2477 Statute created legal, binding and judicially enforceable rights for the general public and these general public rights were in fact individual rights which conveyed access rights-of-way for individual citizens.

The "Prayer for Relief" is in fact similar to the previous complaints. However, the claim for relief is drastically different on various separate and distinct areas: there has been an intervening change of controlling authority, new evidence has surfaced, the fact based allegations are now included and are clear and concise, the prudential standing issue has been proven.

1. **R.S.2477**

The Third Amended Complaint claims included in Count One are **NOT** merely a reiteration of the claims the Court has already adjudicated and dismissed through its Tentative and Final Orders. The Third Amended Complaint is mainly about determining the Plaintiff's "valid existing rights" to use "continued right of public access along the non-exclusive"[6] RS 2477 rights-of-way known as Fortymile Station-Eagle Trail (RST 1594). The Third Amended Complaint seeks only to quiet title the Fortymile Station-Eagle Trail (RST 1594) to the State of Alaska as rights-of-way created under R.S. 2477 and the individual rights created thereby; because the non-federal Defendants deny those rights even though they have previously argued in prior legal settings: "Doyon argues that there are R.S. 2477 trails on public land that provide reasonable alternatives that the reservations of some easements unnecessary. SOR at 39, 44-47; Reply at 14-15". *IBLA 2009-203 DOYON, LIMITED Decided May 31, 2011 at 181 IBLA 154.* (See copy of IBLA Decision attached hereto as (Plaintiffs Memorandum Exhibit 04) and made a part hereof by reference.)

Moreover, non-federal Defendants have argued: "Doyon suggests that those hunters could travel further south on the Taylor highway and access public land through R.S. 2477 trails."(See (Plaintiffs Memorandum Exhibit 04) 181 IBLA 161)

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[6] The BLM in an Official Departmental Decision has made a 40 acre Native Allotment approximately 17 in along the Fortymile Station-Eagle Trail subject to "The continued right of public access along the non-exclusive use Forty Mile Station-Eagle Trail not to exceed one hundred (100) feet in width." (See Third Amended Complaint (Plaintiffs Exhibit 008))

This Court must allow the Third Amended Complaint to prevail against the Motion to Dismiss by the non-federal Defendants through applying judicial estoppel. Clearly even the non-federal Defendants recognize the continued right of public access along the non-exclusive use Forty Mile Station-Eagle Trail.

2. <u>The Law of the Case Affirms the Plaintiff right to Relitigating this Issue and Requires Defendants Motion to Dismiss to fail Regarding R.S. 2477 Claims.</u>

The new evidence submitted with this memorandum along with the new evidence submitted in PLANITIFFS' MEMORANDUM OF POINT AND AUTHORITIES IN OPPOSITION TO THE MOTION TO DISMISS OF THE UNITED STATES Docket 163 and the fact based allegations of the Third Amended Complaint unmistakably demonstrate jurisdictional standing including "prudential standing" in this case.

Relying in part upon the Tenth Circuit's en banc ruling in The Wilderness Society v. Kane County, 632 F.3d 1162 (10th Cir. 2011), this Court ruled that the plaintiff lacks prudential standing to assert an R.S. 2477 right-of-way. However, this Court failed to determine the fine point of the case as compared to the case currently at bar.

Specifically:

- "First, the County has not filed a quiet title action in this case, and, second, even if it had done so, TWS is not the proper party to sue for quiet title."
- "The question of prudential standing is often resolved by the nature and source of the claim. Id. "Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Id. In some situations, an implied right of action may exist."
- "TWS rests its claims on the federal government's property rights. TWS does not assert a valid right to relief of its own."
- "Sometimes a case may present "countervailing considerations" which "may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties." Warth, 422 U.S. at 500-01, 95 S.Ct. 2197; see also Kowalski v. Tesmer, 543 U.S. 125, 129-30, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004)."

This court is the only legal authority to make a determination of the Plaintiff's "valid existing rights" to use the RS 2477 rights-of-way known as the Fortymile Station-eagle Trail for legal access to the Plaintiff's mining claims especially since other governmental institutions have

made the official determination that the court made it clear that determining the validity of a claim under RS 2477 was a judicial, not an executive branch, function and judicial intervention is proper and necessary to protect individual rights.

All six claims for relief in Count I of the Third Amended Complaint seek judicial recognition of the previously official determined R.S. 2477 Fortymile Station-Eagle Trail right-of-way. The only way for the Plaintiff to be legally allowed to use the R.S. 2477 Fortymile Station-Eagle Trail right-of-way is for this Court to make the Declaration that the Fortymile Station-Eagle Trail right-of-way is in fact a valid RS 2477.

The intervening change of controlling authority is that Count I now is based upon the **individual's rights and not the States rights**. The Plaintiff has abandoned the "sinking ship" and boarded a "new ship" the non-federal Defendants haven't realized that fact. The "new ship" is filled with clear factual allegations, new definitive jurisdictional controlling authorities, new evidence and the Plaintiff's memorandums demonstrate that if this Court; applies judicial estoppel properly in this case all the Defendants' Motion to Dismiss will fail.

Simply put, under prevailing law, a private party – such as Plaintiff Mills – can claim a right recognized by State Law in a R.S. 2477 public right-of-way cognizable under the Quiet Title Act.

3. When This Court Reaches Plaintiff's R.S 2477 Issues, It Must Hold That The Prudential Standing Doctrine Allows The Plaintiff to Assert Individual Rights Under R.S. 2477even though the Rights-of-way Belongs to The State of Alaska.

The Plaintiff can find no better words to argue the Plaintiff's "valid existing rights" argument then to quoted the Supreme Court here: "Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, e. g., Flast v. Cohen 392 U. S. 83, 99 (1968), it often turns on the nature and source of the claim asserted. The actual or threatened injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing . . . ." See Linda R. S. v. Richard D., supra, at 617 n. 3; Sierra Club v. Morton, 405 U. S. 727, 732 (1972). Moreover, the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes.

Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties. See United States v. Raines, 362 U. S., at 22-23. In such instances, the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff. See Pierce v. Society of Sisters, 268 U. S. 510 (1925); Sullivan v. Little Hunting Park, Inc., 396 U. S. 229, 237 (1969). See generally Part IV, infra. Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. E. g., United States v. SCRAP, 412 U. S. 669 (1973). But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim. E. g., Sierra Club v. Morton, supra, at 737; FCC v. Sanders Radio Station, 309 U. S. 470, 477 (1940)." *Warth v. Seldin, 422 US 490 - Supreme Court 1975*

4. <u>Because the Plaintiff Has Prudential Standing To Assert An R.S. 2477 Right-Of-Way, He Does Also Under The Federal Quiet Title Act, And The Federal Declaratory Judgment Act Does Provide Additional Jurisdictional Authority to The Quiet Title Act.</u>

In the First Claim for Relief in Count I of the Third Amended Complaint, the Plaintiff asserts is an action for declaratory relief, adjudicating an Act of Congress and to recognize and validate the RS 2477 rights-of-way commonly called the "Fortymile Station-Eagle Trail" against the Federal Defendants under the federal Declaratory Judgment Act ("DJA"). 28 U.S.C. § 2201 The Second, and Third Claims for Relief in Count I of the Third Amended Complaint, the Plaintiff asserts an R.S. 2477 right-of-way against the Federal Defendants under the federal Quiet Title Act ("QTA"), 28 U.S.C. § 2409a. The Plaintiff here for brevity purposes relies on the previously presented PLANITIFFS' MEMORANDUM OF POINT AND AUTHORITIES IN OPPOSITION TO THE MOTION TO DISMISS OF THE UNITED STATES Docket 163.

Furthermore, the Plaintiff in the Third Amended Complaint adequately pleads with particularity the interest held by the United States in the property traversed by the Forty Mile Station-Eagle Trail; for these additional reasons, Count I, Claims 1-4 must be affirmed.

5. The Plaintiff Can Assert An R.S. 2477 Right-Of-Way Under AS 09.45.010 Or AS 09.45.630.

The Plaintiff's utilizes the State of Alaska quiet title statute and ejectment statutes which clearly apply when determining the "valid existing rights" and the validity of the Forty Mile Station-Eagle Trail. The Plaintiff's State law claims do not defeat the federal case law requirements. However, the federal requirements mandate this Court to consider the State law and in Alaska the State law is clear. In essence, Alaska law allows a private citizen assertion of an R.S. 2477 right-of-way against the non-federal defendants.

(a) These New Claims are Within This Court's Prior Ruling and Can be Relitigated, Under the Law of the Case.

The substance of the claims for quiet title and ejectment is simply an assertion that a private citizen is entitled under the Laws of the State of Alaska to obtain judicial recognition of a valid R.S. 2477 claims. This Court did not address this issue in any of its previous orders. Furthermore, federal policy granting lands to Alaska Natives specifically reserve the "valid existing rights" in all Patent documents. Thus, legally, the "valid existing rights" are indistinguishable from any R.S. 2477 claims whether asserted by a State Government or a private citizen.

(b) The Plaintiff Has Valid Claim Under AS 09.45.010 To Quiet Title To The Claimed Right-Of-Way.

Under state law, the Plaintiff asserts "As the superior court noted, we have held that "[t]he general rule is that the term `right of way' is synonymous with `easement.'"[12] We have described a right of way as "primarily a privilege to pass over another's land,"[13] and we have consistently used the phrase "right of way" to refer to strips of land used for passage of people or things.[14] *Cowan v. YEISLEY, Alaska: Supreme Court 2011*

The Plaintiff's property rights are rooted in the reservation of the "valid existing rights" in all Patent documents even those Patent documents of the non-federal Defendants. Doyon holds fee title to the surface and subsurface of some of the affected lands, and as to other affected lands, holds the subsurface estate in the property and Hungwitchin Corporation holds title to the surface estate; the plaintiff holds rights reserved in those patent documents and claims a right as a member of the general public to use Doyon's property as a holder of a disputed easement or the RS 2477 rights-of-way commonly called the "Fortymile Station-Eagle Trail".

(c) The Plaintiff Has a Right To Bring An Action In Ejectment Under AS 09.45.630.

Similarly, the plaintiff may use the State of Alaska statute governing recovery of possession of real estate to obtain the "valid existing rights" reserved in those Patent documents of the non-federal Defendants Doyon under R.S. 2477.

AS 09.45.630 provides, "A person who has a legal estate in real property and has a present right to the possession of the property may bring an action to recover possession. The Patent documents of the non-federal Defendants Doyon specifically acknowledge and reserve the present "legal estate" of "valid existing rights". Thus, the Plaintiff has the right to recover those rights, specifically, "continued right of public access along the non-exclusive" RS 2477 rights-of-way known as Fortymile Station-Eagle Trail (RST 1594). Furthermore, the Plaintiff is entitled to the rights provided for in AS 19.30.400 which recognizes the Fortymile Station-Eagle Trail (RST 1594) as public rights-of-way.

B. Count II

Count II of the Third Amended Complaint is directed specifically against non-federal Defendant Scott Wood. The Plaintiff agrees and approves of the statement by the Doyon Limited's attorney that: "these issues do not directly affect Doyon lands, and thus do not affect this Doyon motion to dismiss". Furthermore, any and all arguments, assumptions, conjectures, legal citations or formal positions contrary to the aforementioned position must be stricken from the record under Rule 12 (f) and should be viewed by this Court as a violation of the Federal Rules of Civil Procedure Rule 11 (b).

However if this Court considers any of the non-federal Defendant Doyon Limited's memorandum regarding Count II; the Plaintiff request this Court to consult the PLANITIFFS' MEMORANDUM OF POINT AND AUTHORITIES IN OPPOSITION TO THE MOTION TO DISMISS OF SCOTT WOOD where the Plaintiff will address Count II of the Third Amended Complaint.

C. Count III

A pro se litigant must be given leave to amend his or her complaint unless it is "absolutely clear that the deficiencies of the complaint could not be cured by amendment." Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir.1980) (Per Curiam) *Noll v. Carlson, 809 F. 2d 1446 - Court of Appeals, 9th Circuit 1987*

Obviously, the Third Amended Complaint scrutinized judiciously can ascertain it bases the Jurisdiction and Venue completely different from the previous complaints, the conspiracy claim is grounded in violations under the "color of law" and not "common law".

The Third Amended Complaint specifically states:

"**JURISDICTION AND VENUE**

1. This court has jurisdiction over this action pursuant to 42 U.S.C. § 1983 (Civil Action for Deprivation of Rights), 18 U.S.C. § 241 and 242, (Conspiracy Against Rights).
2. The events or omissions under color of legal authority that are the subject of this action were located within the boundaries of the District of Alaska and venue of the claims stated herein is proper pursuant to 28 U.S.C. § 1391 (e) (2) (Venue Generally) and 28 U.S.C. § 81A (Alaska).
3. This court has jurisdiction with respect to the plaintiff and defendant Scott Wood in accordance with 28 U.S.C. Section 1332 because of diversity of citizenship.

This court has supplemental jurisdiction over the pendant state law claims pursuant 28 U.S.C. § 1367 (a), (Supplemental Jurisdiction).

None of the previous complaints ever cited the aforementioned jurisdictional information. Also there were no actual fact based allegations; the previous complaint encompassed only general allegations. Count Three of the Third Amend Complaint is completely new incorporating newly discovered evidence as well as the newly discovered

evidence attached hereto qualifies this color of law conspiracy claim as separate and distinct conspiracy claim.

Furthermore, there are no monetary amounts in any of the controlling jurisdiction statutes that would preclude this Court's jurisdiction as presented by the Federal Defendants in Docket 155.

"ADDITIONAL POINTS" DISCUSSION

A. The Non-Federal Defendants Are Estopped From Asserting Any Affirmative Defense Regarding RS 2477 Rights-of-Way

Due to the fact the non-federal Defendants have already taken an Official position in Official Government proceedings regarding RS 2477 rights-of-way specifically; "Doyon argues that there are R.S. 2477 trails on public land that provide reasonable alternatives that the reservations of some easements unnecessary. SOR at 39, 44-47; Reply at 14-15". *IBLA 2009-203 DOYON, LIMITED Decided May 31, 2011 at 181 IBLA 154.* (See Plaintiffs Memorandum Exhibit 04)

Moreover, non-federal Defendants have argued: "Doyon suggests that those hunters could travel further south on the Taylor highway and access public land through R.S. 2477 trails."(See (Plaintiffs Memorandum Exhibit 04) 181 IBLA 161)

It appears that the non-federal Defendants want to choose when to acknowledge a valid RS 2477 rights-of-way when it suits their argument and then transform their position and oppose RS 2477 rights-of-way even when there is insurmountable evidence to prove the, "continued right of public access along the non-exclusive" RS 2477 rights-of-way known as Fortymile Station-Eagle Trail (RST 1594) and that Alaska Statute specifically: AS 19.30.400 recognizing the Fortymile Station-Eagle Trail (RST 1594) as public rights-of-way. These alternating and opposing positions taken by the non-federal Defendant Doyon Limited is an intentional exploitation of the fact that the RS 2477 issue as a whole within the State of Alaska is in a state of flux and instability. The Bureau of Land Management cannot make any final determinations regarding the validity of RS 2477 rights-of-way and the State of Alaska has been unwilling to prosecute thus far the over 600 trails listed in Alaska Statute As 19.30.400 leaving the individual citizens and the public subject to the obstruction of reasonable right of access to public lands.

The non-federal Defendants must not be allowed to manipulate the legal process and change the position in another legal proceeding to the contrary of determinations in the past and the detriment of the Plaintiff. This Court must apply judicial estoppel in this case regarding the Fortymile Station-Eagle Trail RS 2477 rights-of-way.

CONCLUSION

NOW AND THEREFORE, the Plaintiffs prays for Judgment on the Pleadings as follows:

a. Dismiss in its entirety the non-federal Defendants' Motion to Dismiss under Rule 12 (b) (1) and (6) (Docket 156)
b. Issue an Order requiring the Federal Defendants to specifically answer each item of the Third Amended Complaint (Docket 149).
c. Such other relief as the Court deems appropriate.

Respectfully submitted this 16th day of March, 2012

Carey Mills

PRO SE

CERTIFICATE OF SERVICE

I, Carey Mills, hereby certify that on March 16, 2012, a true copy of the PLANITIFFS' MEMORANDUM OF POINT AND AUTHORITIES IN OPPOSITION TO DOYON LIMITED'S MEMORANDUM AND MOTION TO DISMISS (Docket 156 and 157) was served by United States mail, first class, postage paid to the following Defendant and counsel for Defendants.

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Respectfully submitted this 16th day of March, 2012 at Fairbanks, Alaska

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DOYON, LIMITED

IBLA 2009-203 Decided May 31, 2011

Appeal from a decision of the Alaska State Office, Bureau of Land Management, reserving public easements in a conveyance of land to Doyon, Limited. F-21901-24, *et al.*

Affirmed in part; set aside and remanded in part.

1. Alaska Native Claims Settlement Act: Conveyances: Easements--Alaska Native Claims Settlement Act: Easements: Public Easements

When the Secretary conveys land to an Alaska Native Regional Corporation under section 12(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(c) (2006), he is required to reserve public easements under section 17(b) and (c), 43 U.S.C. § 1616(b), (c). The easements he is required to reserve are not limited to those which were *strictly* necessary for a *limited* use of public land, but those which are *reasonably* necessary to guarantee international treaty obligations, *a full right of public use and access* for recreation, hunting, transportation, utilities, docks, and such other public uses as the planning Commission determines to be important." 43 U.S.C. § 1616(b)(1) (1976). Although the primary standard for determining whether an easement is necessary is "present existing use," an easement may also be reserved "if there is no reasonable alternative route or site available, or if the public easement is for access to an isolated tract or area of publicly owned land," but BLM may not reserve an easement for recreating, hunting, or fishing "on or from lands conveyed pursuant to [ANCSA]." 43 C.F.R. § 2650.4-7(a)(3), (7).

Plaintiffs Memorandum

Exhibit 04

2. Administrative Procedure: Burden of Proof--Alaska Native Claims Settlement Act: Conveyances: Easements--Alaska Native Claims Settlement Act: Easements: Decision to Reserve

A party challenging a BLM easement decision with respect to a conveyance to a Native Regional Corporation bears the burden of proving that the decision is in error. That showing can be accomplished by demonstrating that BLM's action is not consistent with statutory and regulatory principles established for reservation of easements in conveyances to Native corporations.

APPEARANCES: James D. Linxwiler, Esq., Anchorage, Alaska, for appellant; Dennis Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

By decision dated March 16, 2009, the Alaska State Office, Bureau of Land Management (BLM), approved 161,266 acres of land for conveyance to Doyon, Limited (Doyon), pursuant to section 12(c) of the Alaska Native Claims Settlement Act (ANCSA or the Act), 43 U.S.C. § 1611(c) (2006).[1] Doyon, a Native regional corporation, has appealed BLM's decision to the extent the conveyance is made subject to certain public easements for trails and a campsite. Doyon contends that the easements are not reasonably necessary to provide access to public land as required by 43 U.S.C. § 1616(b)(1) (1976)[2] and 43 C.F.R. § 2650.4-7(b).[3] In

[1] BLM's decision involved the following selection applications filed by Doyon on Dec. 18, 1975: F-21901-24; F-21901-25; F-21904-49; F-21904-64; F-21904-85; F-21904-86; F-21905-19; F-21905-20; F-21905-21; F-21905-25; F-21905-26; F-21905-27; F-21905-33; F-21905-36; and F-21905-75. The acreage approved by BLM involves more than 250 sections spread across 12 townships.

By order dated Dec. 1, 2009, the Board set aside and remanded BLM's decision in part with respect to 136,554 acres not affected by the easements in controversy herein. The Board's order responded to a joint stipulation of the parties calling for conveyance of those lands to Doyon.

[2] Subsections 17(a) and (b) of ANCSA, formerly codified at 43 U.S.C. § 1616(a) and (b) (1976), established the Land Use Planning Commission (LUPC or Commission) and defined its mission with respect to easements. These subsections were omitted from later editions of the U.S. Code after the LUPC

(continued...)

order to place Doyon's challenge to BLM's decision into legal and factual perspective, we will begin with a review of the legal principles that govern the reservation of easements as well as the general geographic setting in which the easements are to be reserved.

LEGAL BACKGROUND

In 1971, Congress enacted ANCSA, 43 U.S.C. §§ 1601-1629a (2006), to provide a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims. 43 U.S.C. § 1601(a) (2006). The settlement provided the Natives with nearly one billion dollars and 40 million acres of land in Alaska. *See* 43 U.S.C. §§ 1605, 1607, 1613 (2006). Under the Act, 13 Regional Corporations and numerous Village Corporations were given the right to select land from the public domain. 43 U.S.C. §§ 1611, 1613(h) (2006). As part of this land selection and conveyancing process, the Act requires the Secretary of the Interior to reserve public easements as he deems necessary upon the lands selected prior to granting the patents. 43 U.S.C. § 1616(b)(3) (1976).

[1] In *Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664, 674 (D. Alaska 1977), the court noted: "Congress was justifiably concerned that certain portions of the State which were to remain in the public domain would become inaccessible, or landlocked by Native lands." To remedy this concern, the Act established the LUPC and required it to identify easements to be included in the conveyances. *See* 43 U.S.C. § 1616(a) (1976). The easements that the LUPC was required to identify were not limited to those which were *strictly* necessary for a *limited* use of public land, but those which "are *reasonably necessary* to guarantee international treaty obligations, *a full right of public use and access* for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important." 43 U.S.C. § 1616(b)(1) (1976) (emphasis added); *see* 43 C.F.R. § 2650.4-7(b). Although the primary standard for determining

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[2] (...continued)
ceased to exist in June 1979, but rules implementing ANCSA have nonetheless retained their substantive requirements. *State of Alaska*, 168 IBLA 334, 335 n.2 (2006); *see Mendas Cha-Ag Native Corp.*, 93 IBLA 250, 254 (1986); 43 C.F.R. § 2650.4-7(a)(1) ("Only public easements which are reasonably necessary to guarantee access to publicly owned lands . . . shall be reserved.").

[3] The subject decision is one of a series of decisions approving 604,962 acres for conveyance to Doyon. BLM Answer at 2. Additional conveyances are pending. The land subject to the decision under appeal is in the vicinity of the towns of Chicken and Eagle, in eastern Alaska, in the watershed of the Fortymile Wild and Scenic River, to the west of the Taylor Highway.

whether an easement is necessary is "present existing use,"[4] an easement may also be reserved "if there is no reasonable alternative route or site available, or if the public easement is for access to an isolated tract or area of publicly owned land," but BLM may not reserve an easement for recreating, hunting, or fishing "on or from lands conveyed pursuant to [ANCSA]." 43 C.F.R. § 2650.4-7(a)(3), (7); *see State of Alaska*, 137 IBLA 288, 293 (1997); *State of Alaska*, 132 IBLA 197, 204 (1995).

The parties disagree as to the breadth of the Secretary's authority to reserve easements under this provision, with Doyon emphasizing a narrow interpretation of "reasonably necessary." Statement of Reasons (SOR) at 4-23; Reply at 2-3. BLM argues that Doyon fails to give effect to the requirement that easements provide a full right of public access. Answer at 4-5. Doyon asserts that a broad approach was rejected by the court in *Alaska Public Easement Defense Fund*, "which adopted a much narrower construction of ANCSA § 17(b)(1), and restricted the Secretary's discretion to reserve easements to the purposes stated in that provision." SOR at 6. A closer examination of that decision, however, shows that the issue was not so much the breadth or narrowness of the term "reasonably necessary" in subsection (b)(1) of ANCSA § 17, but whether the Secretary had authority to reserve easements under subsection (b)(3) without adhering to the criteria in subsection (b)(1).

Subsections 17(b)(1) and (b)(2) of ANCSA referred to the work of the LUPC. Subsection (b)(1) required the LUPC to identify "reasonably necessary" public easements across lands selected by Native Corporations, and subsection (b)(2) required the LUPC "to consult with appropriate agencies and interested persons on the need for and location of easements, . . . review proposed transportation plans, and . . . receive and review statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements."

Subsection (b)(3) required the Secretary to consult with the LUPC and "reserve such public easements *as he determines are necessary*." Although the Native

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[4] The regulations define "present existing use" as use by either the general public or a governmental entity on or before Dec. 18, 1976, "or the date of selection, whichever is later." 43 C.F.R. § 2650.0-5(p). However, the Secretary is not limited to reserving easements for uses that existed at that time. The statutory provision requiring reservation of easements

> was intended to preserve the right of public access to lands remaining in the public domain after Native selection. It is entirely possible that such lands may not have been used at all prior to December 18, 1976, and that it would still be appropriate to reserve an easement to them for future use.

Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp at 678.

Corporations argued that the Secretary was limited to selecting easements recommended by the LUPC, the Department maintained that while subsection (b)(1) established criteria to be used by the LUPC, which was to act in an advisory capacity, the Secretary operated independently under subsection (b)(3) and was not restricted to choose only the easements identified by the LUPC or the criteria in subsection (b)(1). *See* Sol. Op., "Easement Reservations in Conveyances to Alaska Native Corporations Under ANCSA," M-36880, 82 I.D. 325 (1975). The court rejected the argument by the Native Corporations that the Secretary was limited to choosing from the easements recommended by the LUPC, but the court held that in exercising his authority under (b)(3), the Secretary was bound by the criteria in subsection (b)(1). 435 F. Supp. at 674-75. Although the court held that the Secretary could not reserve "floating" easements and that easements had to be "specifically located," 435 F. Supp. at 679-80, it also recognized that the Secretary was not limited to reserving easements to ensure access only for present use of the public lands but should consider their future use as well. *Id.* at 678.

After the court ruled that the Secretary was bound to apply the criteria in subsection 17(b)(1), the Department issued new regulations applicable to easements. In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), which included a provision that made clear that the Secretary was required to reserve only those easements described in subsection 17(b)(1) of ANCSA and be guided by the following principles: (1) all easements should be designed so as to minimize their impact on Native life styles, and on subsistence uses; and (2) each easement should be specifically located and described and should include only such areas as are necessary for the purpose or purposes for which the easement is reserved. *See State of Alaska*, 153 IBLA 303, 306 (2000); *State of Alaska*, 137 IBLA at 291. Congress, however, did not amend section 17(b)(1) to narrow the scope or purposes for which an easement is to be reserved.

Doyon points to several regulatory provisions that implement these constraints on easement reservation. SOR at 8-22. Easements must be subject to "present existing use," *i.e.*, the use as of December 18, 1976, or the date of selection, whichever is later, unless there is no alternative route available or the easement is necessary to access an isolated tract of public lands. 43 C.F.R. § 2650.4-7(a)(3). Easements are not to be reserved for public recreation on land conveyed under ANCSA. 43 C.F.R. § 2650.4-7(a)(7). Under 43 C.F.R. § 2650.4-7(b)(1)(i), transportation easements may be reserved "if there is no reasonable alternative route across publicly owned lands." Under subsection (b)(1)(ii), easements may not be "duplicative." Site easements must be related to transportation to publicly owned lands, not for recreational use of ANCSA lands, and BLM must make a reasonable effort to locate sites for camping on publicly owned lands. 43 C.F.R. § 2650.4-7(b)(3).

THE SETTING

One cannot properly evaluate the reasonable necessity of reserving easements when large blocks of land will be passed from Federal to private ownership without some understanding of the broad geographic setting in which those conveyances will occur. As stated above, the lands to be conveyed are in eastern Alaska in the vicinity of the towns of Chicken and Eagle in the watershed of the Fortymile Wild and Scenic River to the west of the Taylor Highway. The Fortymile River flows northeasterly into Canada where it joins the Yukon River. *See* River Management Plan, Fortymile River (1983), Ex. A (River Plan) at 3. The Fortymile River and its tributaries are part of the wild and scenic river system. 16 U.S.C. § 1274(a)(48) (2006).[5] The Wild and Scenic Rivers Act establishes a policy to protect and preserve rivers and their immediate environments that "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values . . . for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271 (2006). Thus, before conveying land to Doyon, it is BLM's duty to reserve easements that are reasonably necessary to guarantee a full right of public use and access for these purposes. Because the land remaining in Federal ownership is part of the wild and scenic river system, it will be used for recreation by hikers, rafters, hunters, trappers, snowmobilers, and off-highway vehicle (OHV) enthusiasts.

Motorists have access to the area from the Taylor Highway which links the Alaska Highway to the towns of Chicken and Eagle. River Plan at 3. The land in the conveyance separates the Taylor Highway from the North Fork of the Fortymile River and Champion Creek. The River Plan provides the following description of the Champion Creek area:

> Champion Creek flows from the alpine tundra of the Glacier Mountain area through the subalpine zone to its confluence with Little Champion Creek. From this point, it meanders through the gravelly bottom of a

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[5] That provision of the Wild and Scenic Rivers Act describes the designated river as including:

> The main stem within the State of Alaska; O'Brien Creek; South Fork; Napoleon Creek, Franklin Creek, Uhler Creek, Walker Fork downstream from the confluence of Liberty Creek; Wade Creek; Mosquito Fork downstream from the vicinity of Kechumstuk; West Fork Dennison Fork downstream from the confluence of Logging Cabin Creek; Dennison Fork downstream from the confluence of West Fork Dennison Fork; Logging Cabin Creek; North Fork; Hutchison Creek; Champion Creek; the Middle Fork downstream from the confluence of Joseph Creek; and Joseph Creek; to be administered by the Secretary of the Interior.

16 U.S.C. § 1274(a)(48) (2006).

> "U" shaped drainage to the spruce forested banks of the North Fork. It is very difficult to gain access to the upper area of the Champion Creek drainage in summer, and summer use at this time is limited to a few walk-in hunters and geologic exploration personnel. During the winter the area is used by trappers who travel primarily by snowmobile. Although the creek is at times floatable below Little Champion Creek, recreational use is probably limited to hikers starting from the North Fork or the Glacier Mountain trail.

River Plan at 8.

EXISTING TRAILS

The identification of existing trails is important because the primary standard for determining whether an easement is necessary is "present existing use." 43 C.F.R. § 2650.4-7(a)(3). Although BLM may designate a new route as an easement, it can only do so "if there is no reasonable alternative route or site available." *Id.*

Maps in the record show that the land to be conveyed and surrounding land is crossed by existing trails that the State of Alaska considers to be public highways established under R.S. 2477.[6] *See* SOR Exs. 3, 4. Portions of those trails overlap the easements reserved by BLM. Doyon argues that there are R.S. 2477 trails on public land that provide reasonable alternatives that make the reservation of some easements unnecessary. SOR at 39, 44-47; Reply at 14-15. Proper consideration of this argument requires an understanding of the State's R.S. 2477 assertions and their relationship to the easements reserved by BLM.

R.S. 2477 simply provided: "[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." The Tenth Circuit Court of Appeals recently noted: "[T]he establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested."

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[6] R.S. 2477 is formally known as the Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253; was codified as section 2477 of the 1875 *Revised Statutes*; and subsequently became 43 U.S.C. § 932 (1970). The statute was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, Pub.L. No. 94-579, 90 Stat. 2743, 2793, effective Oct. 21, 1976, but valid existing rights were preserved. 90 Stat. at 2786; see 43 U.S.C. § 1701 note (a) (2006).

The Alaska Department of Natural Resources, Division of Mining, Land and Water, maintains a website providing information on the State's R.S. 2477 assertions: http://dnr.alaska.gov/mlw/trails/rs2477/.

see Fitzgerald v. Puddicombe, 918 P.2d 1017, 1019 (Alaska 1996); *State of Alaska v. Alaska Land Title Ass'n.*, 667 P.2d 714, 726-27 (Alaska 1983).

When BLM began to reserve easements in ANCSA conveyances that overlapped what the State of Alaska believed to be ROWs established under R.S. 2477, the State argued that there was no ROW interest remaining for BLM to reserve. However, in *State of Alaska*, 5 ANCAB 307, 88 I.D. 629 (1981), the Alaska Native Claims Appeal Board (ANCAB)[9] held that the existence of an R.S. 2477 ROW precluded neither the reservation of an overlapping section 17(b) public easement nor the conveyance of the underlying fee. Such reservation or conveyance does not affect the previously existing ROW which exists independently of a section 17(b) easement. 5 ANCAB at 322, 88 I.D. at 635. The Board referred to 43 U.S.C. § 1613(g) which calls for identification of valid existing rights to which ANCSA conveyances are subject, and held that where BLM reserves a section 17(b) public easement over an existing road or trail claimed by the State of Alaska as an R.S. 2477 right-of-way, the conveyance documents should contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 ROW, if valid. *Id.* This Board has followed that precedent. *See, e.g., City of Tanana*, 98 IBLA 378, 383-84 (1987); *Alaska Department of Transportation*, 88 IBLA 106, 109 (1985). Because a previously existing R.S. 2477 ROW exists independently of an over-lapping section 17(b) easement, neither easement will enlarge or diminish the other. *See State of Alaska v. Alaska Land Title Ass'n*, 667 P.2d at 726-27. Thus, the existence of an overlapping R.S. 2477 ROW does not control the propriety of BLM's issuance of a section 17(b) easement. *See id.*

We begin with the Mini-cup Trail, also known as the American Summit-Glacier Mountain Trail, because this appeal involves reserved easements for a site along that trail and for other trails that branch from it. The Mini-cup Trail starts from the Taylor Highway at the southern boundary of sec. 32, T. 3 S., R. 32 E., Fairbanks Meridian. Although an existing trail, it does not appear to be among the State's R.S. 2477 assertions. It proceeds southwesterly, then west and northwest along ridges across land to be conveyed to Doyon, to Glacier Mountain through the northern tier of sections in T. 4 S., R. 32 E., and then northwesterly to public lands to the central area of T. 3 S., R. 30 E. *See* SOR, Ex. 3; Answer, Ex. D at 9. The trail has been in use since the mid-1960s by caribou hunters to access the Fortymile Caribou herd, and by moose and bear hunters to access local populations of those animals. Answer, Ex. D at 9. Sheep hunters also use the trail to access the sheep population on Glacier Mountain, as do local trappers. *Id.* Recreational backpackers

[9] ANCAB was abolished in 1982 by Secretarial Order, and the authority of the Board was transferred to the Interior Board of Land Appeals. *See* 47 Fed. Reg. 26392 (June 18, 1982).

use the trail throughout the summer to reach State and Federal lands to the west of the highway. BLM reserved the 25-foot-wide easement for the Mini-cup Trail identified as EIN 58 C5, D9, L[10] in the subject conveyance. Decision at 9. Other portions of that trail have been reserved in other conveyances. Doyon does not appeal the reservation of this easement.

The Fortymile Station-Eagle Trail is part of the old Washington-Alaska Military Cable and Telegraph System (WAMCATS). Pursuant to an R.S. 2477 project initiated in 1993, the State has designated the WAMCATS trail as RST 1594.[11] It intersects the Taylor Highway in T. 3 S., R. 32 E., and heads southerwesterly, meeting the Mini-cup Trail on land to be conveyed to Doyon in sec. 10, T. 4 S., R. 31 E., and crossing southerly through the township, turning to the west in secs. 33, 32, and 31, where it reaches Champion Creek at its confluence with Little Champion Creek on public land and then follows along the Champion Creek through the townships to the west to the North Fork of the Fortymile River, where it runs southward along the river and terminates at the historic site of Fortymile Station. A spur of this trail heads southward in secs. 29 and 32 of T. 4 S., R. 29 E., and crosses land to be conveyed to Doyon in T. 5 S., R. 29 E., terminating at Fortymile Station. Portions of this trail are reserved in EIN 11 C5, L and EIN 75 C5.

The Fortymile Station-Government Supply Route (GSR) intersects the Taylor Highway in T. 3 S., R. 32 E., and heads southerwesterly, crossing the Mini-cup Trail on land to be conveyed to Doyon in sec. 1, T. 4 S., R. 31 E, and continues southerwesterly through that township, meeting the WAMCATS trail in the southwestern part of that township before entering sec. 4, T. 5 S., R. 31 E. It then continues along ridgetops through the northwestern portion of that township and then through the townships to the west, crossing land to be conveyed to Doyon in T. 5 S., R. 30 E. and T. 5 S., R. 29 E. The State has designated the GSR as RST 1892. Portions of this trail are reserved in EIN 58b C5, D9, L and EIN 75 C5.

Although Doyon does not appeal the reservation of easement EIN 58 C5, D9, L for the Mini-cup Trail, Doyon objects to the reservation of site easement 58a L for a campsite easement along that trail. Doyon objects that two easements that branch from that trail, EIN 58b C5, D9, L, and EIN 11 C5, L, are duplicative. Doyon also

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[10] EIN is an acronym for Easement Identification Number. The letter/number combinations are sponsor codes. C5 represents the BLM District office; D9 stands for the State's Department of Fish and Game; and L represents the general public.

[11] *See* n. 6, *supra*. (The Alaska Department of Natural Resources, Division of Mining, Land and Water, maintains a website, http://dnr.alaska.gov/mlw/trails/rs2477/, providing information on the State's R.S. 2477 assertions).

objects to reservation of easement EIN 75 C5 which crosses land to be conveyed in T. 5 S., R. 29 E., to provide access to Champion Creek.

BLM'S PROPOSED TRAIL EASEMENTS

The trail easements are 25 feet wide and allow travel by foot, dogsleds, animals, snowmobiles, two- and three-wheeled vehicles, and small all-terrain vehicles (ATVs) (less than 1500 pounds). Although the trails can be accessed by individuals starting from several directions, BLM's proposal can be understood from the perspective of a person traveling from Eagle to reach public land in T. 5 S., R. 28 E., below the confluence of the Middle and North Forks of the Fortymile River. That person would take the Mini-cup Trail (EIN 58 C5, D9, L) from the Taylor Highway and then turn southwesterly in sec. 1, T. 4. S., R. 31 E., on the portion of the GSR Trail designated as EIN 58b C5, D9, L. The reserved easement joins the WAMCATS trail to public land at the confluence of Champion Creek and Little Champion Creek in section 31, the point at which Champion Creek is sometimes floatable and can be used by rafters.[12]

BLM's Easement Memo explains that the trail provides a traditional access route from the Taylor Highway along the Mini-cup Trail then southwesterly to the south side of Champion Creek into a wild segment of the Fortymile Wild and Scenic River corridor. Noting that the area to the north of Champion Creek is closed to motorized hunting from August 5 to September 20, BLM states that this trail provides access to the nearest motorized hunting from Eagle during the restricted period.

Having reached that point on EIN 58b C5, D9, L (and the GSR trail) where it meets the WAMCATS trail, the traveler could then follow the WAMCATS trail on public land along the south side of Champion Creek to its confluence with the North Fork of the Fortymile River and then southerly to the confluence of the Middle Fork and beyond. However, BLM has reserved EIN 75, C5, which takes the traveler south from Champion Creek across land to be conveyed to Doyon in T. 5 S., R. 29 E., where it meets the GSR trail and turns westward to the overland spur of the WAMCATS trail where it heads southwesterly to Fortymile River.

BLM has also sought to provide access to public land at the headwaters of Champion Creek above its confluence with Little Champion Creek. Easement EIN 11, C5, L follows the WAMCATS trail from the Mini-cup Trail, but then turns westward to reach the headwaters of Champion Creek 4 miles above its confluence

[12] BLM did not reserve the GSR trail that would take the traveler along ridge tops across land conveyed in T. 5 S., Rs. 29 and 30 E.

with Little Champion Creek.[13] This ridgeline trail provides access from the Mini-cup trail to isolated public lands on the north and west side of Champion creek. The ridgeline provides an identifiable, easy walking surface in the summer into the Champion Creek wild and scenic river corridor.[14]

Doyon considers EIN 58b C5, D9, L and EIN 75, C5 unnecessary. Arguing that EIN 58b C5, L and EIN 11 C5, L are duplicative, Doyon proposes that travelers from Eagle follow the Mini-cup trail, turn onto EIN 11 C5, L and then follow Champion Creek to other points on public land. Doyon argues that EIN 75, C5 reserves an unnecessary "shortcut" across its land because travelers could still follow the course of Champion Creek. Doyon believes that reserving only the Mini-cup trail and EIN 11 C5, L, fulfills ANILCA's requirement to design all easements so as to minimize their impact on Native life styles and avoid duplicative easements that would only encourage public recreation on land conveyed under ANCSA contrary to 43 C.F.R. § 2650.4-7(a)(7).

Trail Easements EIN 58b C5, D9, L and EIN 11 C5, L

Although trail Easements EIN 58b C5, D9, L and EIN 11 C5, L begin at different points on the Mini-cup Trail and end at different places on Champion Creek, Doyon considers them to be duplicative because both lead from the Mini-cup Trail to

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[13] BLM did not reserve the portion of the WAMCATS trail between EIN 11 C5, L and EIN 58b C5, D9, L.

[14] BLM's Final Easement Memo states that EIN 11 C5, L is reserved "instead of a longer RS 2477 trail assertion" proposed by the Alaska Department of Fish and Game (ADFG) that corresponds to a portion of the WAMCATS trail that leaves the Mini-cup trail and enters the wild and scenic river corridor in sec. 33, T. 4. S., R. 30 E. *See supra* note 12. We find this statement puzzling for several reasons. First, if the R.S. 2477 assertion is valid, EIN 11 C5, L will provide access in addition to the R.S. 2477 trail, not "instead" of it. *See Tetlin Native Corp. v. State of Alaska*, 759 P. 2d at 533; *Fitzgerald v. Puddicombe*, 918 P. 2d at 1019; *State of Alaska v. Alaska Land Title Ass'n.*, 667 P. 2d at 726-27. Moreover, EIN 11 C5, L does not go to the same place as the R.S. 2477 assertion; although EIN 11 C5, L goes to the headwaters of Champion Creek, the WAMCATS trail leads to Champion Creek near its confluence with Little Champion Creek, as does the GSR trail and EIN 58b C5, D9, L. Because ADFG's proposal would provide access to Champion Creek that is similar to EIN 58b C5, D9, L, it would be more accurate to state that BLM chose to reserve EIN 58b C5, D9, L, not EIN 11 C5, L, as an alternative to ADFG's proposed reservation of a portion of the WAMCATS trail. Unlike EIN 11 C5, L, neither EIN 58b C5, D9, L nor ADFG's proposal achieve BLM's objective of providing access to public lands at the headwaters of Champion Creek.

Champion Creek. *See* 43 C.F.R. § 2650.4-7(b)(1)(ii). Doyon refers to our decision in *City of Tanana*, 98 IBLA 378, 382 (1987), where we found that a parallel easement was duplicative. In that case, however, the parallel easements actually connected and were not miles apart as they are here.

Because easements are to be reserved if they are reasonably necessary to provide a full right of public use of the public lands to which they provide access, an easement may be considered duplicative of another and not "reasonably necessary" if its elimination would not significantly affect the full use of the public lands to which each would provide access. The question then becomes whether one easement does something that the other does not.

Although Doyon believes that all users can simply follow EIN 11 C5, L to Champion Creek and then follow the creek 4 miles to its confluence with Little Champion Creek, BLM argues that the difficulty of the terrain between those points makes reservation of both easements necessary. Answer at 12, 13. BLM's Final Easement Memo explains that EIN 58b C5, D9, L provides a traditional access route from the Taylor Highway along the Mini-cup Trail then southwesterly to the south side of Champion Creek into a wild segment of the wild and scenic river corridor. It provides access to the nearest motorized hunting from Eagle during the restricted period from August 5 to September 20. ATV users need a trail of this scope to reach public lands where use of the ATVs is allowed.[15] Answer at 10. Were we to find that the easements were actually duplicative, such a finding would not necessarily impel the reservation of the shorter trail EIN 11 C5, L instead of EIN 58b C5, D9, L. Although BLM may designate a new route as an easement, it can only do so "if there is no reasonable alternative route or site available." 43 C.F.R. § 2650.4-7(a)(3). If the trails were duplicative, the availability of existing trail EIN 58b C5, D9, L would take precedence over designating the new trail EIN 11 C5, L.

We do not find that these trails are duplicative. Even if EIN 11 C5, L alone would provide access to both sides of Champion Creek, as Doyon contends, it does not provide for the reasonable use of that Creek by rafters because of the difficulty in the terrain that separates it from the point where EIN 58b C5, D9, L reaches the creek where floating is possible. Reserving EIN 58b C5, D9, L alone, however, would discourage full use of public land at the headwaters of Champion Creek that the conveyance will further isolate. We conclude that both easements are reasonably necessary to provide for the full use of lands that remain in Federal ownership.

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[15] While motorized hunters would use EIN 58b C5, D9, L during the restricted period to reach areas south of Champion Creek where motorized hunting is allowed, nonmotorized hunters would need to use 11 C5, L to access the north and west sides of the creek during the nonmotorized hunting season there.

Trail Easement EIN 75, C5

As stated before, the EIN 75, C5 trail takes the traveler south from Champion Creek across land to be conveyed to Doyon in T. 5 S., R. 29 E., where it meets the GSR trail and turns westward to the overland spur of the WAMCATS trail where it heads southwesterly to Fortymile River. Doyon argues that this "shortcut" is not necessary because the traveler could follow the WAMCATS trail on public land along the south side of Champion Creek to its confluence with the North Fork of the Fortymile River and then southerly to the confluence of the Middle Fork and beyond.

BLM believes that people coming from Eagle along EIN 58b C5, L need a route out of the Champion Creek portion of the wild and scenic river corridor to public lands where they can hunt and fish that is not limited to the entire length of Champion Creek, especially in the winter when the travel route is subject to aufeis conditions. It provides access to the nearest motorized hunting from Eagle during the restricted access period under State hunting regulations from August 5 to September 20 each year. This trail does not only serve travelers from Eagle. ADFG called the trail "necessary to facilitate travel from the North Fork Fortymile River to the Champion Creek area" and indicated that it "is used annually by hunters and trappers to access public lands." Ex. D at p. 2.

Arguing that BLM's real purpose is to facilitate travel by hunters from Eagle to land to the south beyond the Champion Creek area, Doyon suggests that those hunters could travel further south on the Taylor highway and access public land through R.S. 2477 trails. Doyon argues that these R.S. 2477 trails provide reasonable alternatives on public lands that make the reservation of easement EIN 75, C5 unnecessary. BLM argues that Doyon in making this argument has failed to meet its burden in this appeal, stating: "It is insufficient to just look at maps and contend that old RS 2477 trails can be used without any evidence that those routes are still in useable condition." Answer at 15.

[2] It is well established that the party challenging a BLM easement decision bears the burden of proving that it is in error. *State of Alaska*, 137 IBLA at 293; *City of Tanana*, 98 IBLA at 383; *Mendas Cha-Ag Native Corp.*, 93 IBLA at 254; *Tetlin Native Corp.*, 86 IBLA 325, 335 (1985). That showing can be accomplished by demonstrating that BLM's action was not consistent with statutory and regulatory principles established for reservation of easements in conveyances to Native corporations. *State of Alaska*, 137 IBLA at 293.

Ideally, we would be deciding this question on the basis of arguments and evidence presented by both sides on the specific merits of alternative trails or sites on public land that the parties themselves have identified and considered. *E.g.*,

Tetlin Native Corp., 86 IBLA at 336-37; *Toghotthele Corp.*, 81 IBLA 317, 322 (1984). However, in this appeal, BLM and Doyon both approach the requirement to consider alternatives for trails and sites on public land in the manner of an "Alphonse and Gaston routine," with Doyon arguing that BLM must first attempt to identify reasonable alternatives on public lands before the agency decides upon an easement, while BLM argues that Doyon cannot meet its burden in this appeal unless it first identifies reasonable alternatives. In contending that Doyon has failed to meet its burden in this appeal because it has provided no evidence that those routes are still in useable condition, BLM in essence admits that it gave them no consideration as alternatives.

Nevertheless, even assuming that the routes are in useable condition so that motorized hunters could reach the hunting area, Doyon's argument completely ignores the need to provide other users access to public land in the Champion Creek area. Hunters from Eagle are not the only persons seeking to use land in the wild and scenic river areas. As we stated earlier, it is BLM's duty to reserve easements across land conveyed to Doyon that are reasonably necessary to guarantee a full right of public use and access for all of the purposes for which the public land was set aside under 16 U.S.C. § 1271 (2006).

Thus, while we agree with BLM that some access across lands to be conveyed in this area is reasonably necessary and affirm its decision to reserve with respect to the portions of EIN 75, C5 that overlie existing trails, Doyon points out that some portions of this easement are new, notwithstanding the fact that existing portions of the WAMCATS trail provide access across land to be conveyed to Doyon from Champion Creek. As noted above, BLM may designate a new route as an easement only "if there is no reasonable alternative route or site available." 43 C.F.R. § 2650.4-7(a)(3), (7). Thus, *before* BLM designates a new route, BLM is required to find that there are no reasonable alternatives on the basis of a record that supports that finding.

Instead of pointing to evidence in the record that supports a finding that there are no reasonable alternatives, BLM argues that Doyon has failed to meet its burden in this appeal because it has provided no evidence that the R.S. 2477 routes are still in useable condition. In making this argument, BLM attempts to assign its own obligation under 43 C.F.R. § 2650.4-7(a)(3) to consider the condition of those routes to Doyon.

Because the regulation requires BLM to find that there are no alternatives *before* it designates a new route on the basis of a record that supports that finding, BLM's response to Doyon's argument shows that Doyon has satisfied its burden by demonstrating that BLM's action to reserve EIN 75, C5 was not consistent with statutory and regulatory principles established for reservation of easements in

conveyances to Native corporations. *See State of Alaska*, 137 IBLA at 293; *City of Tanana*, 98 IBLA at 383; *Mendas Cha-Ag Native Corp.*, 93 IBLA at 254; *Tetlin Native Corp.*, 86 IBLA at 335. Accordingly, BLM's decision must be set aside and the case remanded for BLM to conform the easement to existing routes or justify the designation of a new route.

Site Easement EIN 58a L

Site Easement EIN 58a L is for a 1-acre existing camp site along the Mini-cup Trail in sec. 2, T. 4 S., R. 31 E. BLM's final Easement Memo states that this periodic rest area is needed by hunters using the Glacier Mountain Controlled Use area during the nonmotorized hunting period from August 5 to September 20. Doyon points out that the site is about 4 miles from the Taylor Highway, a distance that Doyon argues is only "20 minutes by four wheeler . . . two hours by foot." SOR at 25. Arguing that the record contains no evidence that BLM made "a reasonable effort . . . to locate . . . camping sites on publicly owned lands" as required by 43 C.F.R. § 2650.4-7(b)(3), Doyon points to available public land 2 or 3 miles to the west where a campsite could be placed only 6 or 7 miles from the trailhead. Doyon argues that the nonmotorized 45-day hunting period does not justify a year-round easement, and that the only purpose of the easement is to continue recreation on the lands conveyed, in contravention of 43 C.F.R. § 2650.4-7(a)(7). Doyon points out that the Board has rejected site easements in *State of Alaska*, 153 IBLA at 307, and *Chitna Native Corp.*, 85 IBLA 311, 326, 329, 330 (1985).

BLM argues that during the nonmotorized hunting season, "[h]unters on foot with heavy packs of meat and outdoor equipment need reliable places to stop and set up camp" and "should not be required to pass all the way through a 4-5 mile stretch of private land with no possibility of camping." Answer at 7. BLM states that the campsite is not only needed by hunters but by others accessing the northern and western sides of Champion Creek. *Id.* BLM points to public comments in support of its finding. BLM observes that while Doyon argues that a reasonable alternative site exists on public land, Doyon has not identified one, a fact that distinguishes the instant appeal from *State of Alaska*, 153 IBLA at 307, the case on which Doyon relies.

Although BLM states that a site is needed by other users than the hunters who need to camp during the nonmotorized hunting season, it purports to justify this particular location solely on the needs of a particular group of users for a particular short period. BLM provides no explanation why a year-round site for other users cannot be placed on public land. Instead, BLM presents us with another iteration of its above-described Alphonse and Gaston routine, arguing that Doyon has not met its burden of proof because it has failed to identify an alternative site. Because BLM is required by 43 C.F.R. § 2650.4-7(b)(3) to make "a reasonable effort . . . to locate . . . camping sites on publicly owned lands" *before* it designates a site on land to be

conveyed, we view BLM's response as an admission that it has not done so. Accordingly, BLM's decision reserving EIN 58a L must be set aside and the case remanded to consider whether reasonable alternative campsite locations exist on public land.

CONCLUSION

We find that Doyon has failed to demonstrate that any of the trail easements are not reasonably necessary; elimination of any of the proposed easements would discourage the full use of public lands that section 17(b) ANCSA intended them to enable. The record, however, does not show that BLM considered whether there were existing routes across the land to be conveyed prior to designating a new portion for route EIN 75, C5, nor does the record show that BLM considered whether there were suitable sites for campsites on public land before proposing EIN 58a L.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed in part, and set aside and remanded in part for further action consistent with this opinion.

James F. Roberts
Administrative Judge

I concur:

Christina S. Kalavritinos
Administrative Judge