grievance."[37] Defendants contend that Plaintiff has no more particularized interest than any member of the public. To the contrary, Plaintiff has alleged more than a general declaration against the United States regarding whether or not the Forty Mile Trail is a R.S. 2477 road. With respect to the Non-federal Defendants, Plaintiff has alleged that he has been denied access to his claims and threatened with civil and or criminal prosecution for trespass. While this is sufficient to establish constitutional standing,[38] as discussed further below in subpart IV.A, it is not sufficient to establish prudential standing.

C. Scope of R.S. 2477

From 1866 until its repeal in 1976, R.S. 2477 granted a "right of way for the construction of highways over public lands, not reserved for public uses."[39] All rights of way existing on the date of repeal were expressly preserved.[40] While the grant is "self-executing,"[41] "Federal Revised Statute 2477 did not itself

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[37] *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 848 (9th Cir. 2007) (citing *Lujan*, 504 U.S. at 560-61.

[38] *See Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1076-77 (9th Cir. 2010).

[39] 43 U.S.C. § 932 *repealed by* Federal Land Policy Management Act of 1976, § 706(a), Pub. L. No. 94-579, 90 Stat. 2793.

[40] 43 U.S.C. § 1769.

[41] *Standage Ventures*, 499 F.2d at 250; *see Sierra Club v. Hodel*, 848 F.2d 1068, 1083-84 (10th Cir. 1988).

create R.S. 2477 roads; rather it *authorized* the states to construct highways over state land."[42] In order for the Forty Mile Trail to be a R.S. 2477 road, Alaska had to have established it as such over public lands in accordance with Alaska law.[43]

> R.S. 2477 acts "as a present grant which takes effect as soon as it is accepted by the State," and acceptance requires merely "some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept." *Wilderness Soc'y v. Morton*, 479 F.2d 842, 882 (D.C.Cir.1973) (internal quotation marks omitted). Thus, the first question is whether [Alaska] at some point established these roads as public highways under [Alaska] law and if so, whether these roads crossed lands that were "public lands" at that time.[44]

It is clear that Alaska accepted the grant of the Forty Mile Trail R.S. 2477 right-of-way when it enacted Alaska Statute § 19.30.400(c), effective August 3, 1998. Thus, as relevant to this case, the critical issue is whether a right-of-way along the Forty Mile Trail across the Non-Federal Defendants' property existed on that date.

Whether a right of way has been established is a question of state law.[45] The scope of an R.S. 2477 right-of-way is also

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[42] *Lyon*, 626 F.3d at 1077 (emphasis in the original).

[43] *Id.* ("right of way under R.S. 2477 comes into existence 'automatically *when a public highway [is] established across public lands in accordance with the law of the state*.'") (quoting *Standage Ventures*, 499 F.2d at 250) (alteration and emphasis added in *Lyon*).

[44] *Id.*

[45] *Standage Ventures*, 499 F.2d at 250; *Fisher v. Golden Valley Elec. Ass'n, Inc.*, 658 P.2d 127, 130 (Alaska 1983) (citing (continued...)

subject to state law.[46] The resolution of any particular claim turns upon a highly factual inquiry.[47] "Any doubt as to the extent of the grant must be resolved in the government's favor."[48] Under Alaska law, two methods of establishing an R.S. 2477 right of way have been recognized:

> [B]efore a highway may be created, there must either be [1] some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intent to accept the grant, or [2] there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.[49]

To prove R.S. 2477 rights by the second of these methods, a claimant must show "(1) that the alleged highway was located 'over public lands,' and (2) that the character of its use was such as to constitute acceptance by the public of the statutory grant."[50]

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[45] (...continued)
United States v. Oklahoma Gas & Elec. Co., 318 U.S. 206, 209-10 (1943)).

[46] *Sierra Club*, 848 F.2d at 1079-83.

[47] *Standage Ventures*, 499 F.2d at 250.

[48] *Adams v. United States*, 3 F.3d 1254, 1258 (9th Cir. 1993); *Humboldt County v. United States*, 684 F.2d 1276, 1280-81 (9th Cir. 1982) (citing *Andrus v. Charlestone Prod., Inc.*, 436 U.S. 604, 617 (1978)).

[49] *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961); *see Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410, 413-14 (Alaska 1985); *Alaska v. Alaska Land Title Ass'n*, 667 P.2d 714, 722 (Alaska 1983); *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221, 1226 (Alaska 1975), *overruled on other grounds*, 618 P.2d 567, 569 n.4 (Alaska 1980).

[50] *Hamerly*, 359 P.2d at 123.

Alaska law, consistent with Alaska's circumstances, does not place a burdensome requirement on R.S. 2477 claimants regarding the nature of the "highway," whether established by dedication or public use. It broadly defines "highway" to include a "road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof."[51] It is necessary to establish that the road traverses public land because an R.S. 2477 right of way may be created only while the "surrounding land [retains] its public character."[52]

> If the conditions were such that the lands were not public lands—having been taken up under homestead applications—then the congressional grant was not in effect. Public use of the road would be of no avail since there would be at that time no offer which the public could accept. The fact that the entries were later relinquished or cancelled would not change the condition[s].[53]

Valid pre-existing claims upon the land traversed by an alleged right of way trump any R.S. 2477 claim. As the *Dillingham* Court put it, "[i]t is clear that the public may not, pursuant to § 932 acquire a right of way over lands that have been validly entered."[54] Territory validly withdrawn from the public domain

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[51] Alaska Stat. § 19.45.001; *cf.* 48 U.S.C. § 321d (similar definition).

[52] *Adams v. United States*, 3 F.3d 1254, 1258 n.1 (9th Cir. 1993); *see Humboldt County*, 684 F.2d at 1281.

[53] *Hamerly*, 359 P.2d at 124; *see also Dillingham*, 705 P.2d at 414.

[54] *Dillingham*, 705 P.2d at 414.

falls within the *Dillingham* rule and is clearly superior to later established R.S. 2477 claims.

IV. DISCUSSION

A. Prudential Standing

In this case, the interest that Plaintiff seeks to enforce is the interest, if any, held by the State of Alaska in the Forty Mile Trail. As the Court held in its prior Order, Plaintiff lacks prudential standing to assert the rights of the State of Alaska.[55] That constitutes the law of the case, which this court is generally precluded from reconsidering.[56] However, the law of the case doctrine is not a shackle without a key. As long as a district court retains jurisdiction over a case, it has inherent power to reconsider and modify an interlocutory order for sufficient cause.[57] That inherent power is not unfettered: a court may depart from the law of the case doctrine where: "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial."[58] Plaintiff attempts

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[55] Docket 126 at 36–37.

[56] *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993).

[57] *City of Los Angeles, Harbor Div. v. Santa Monica*, 254 F.3d 882, 885 (9th Cir. 2001).

[58] *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc) (footnote and internal quotes omitted); *see Leslie Salt Co.* (continued...)