14-35051

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ALASKA,
Department of Natural Resources and
Department of Transportation and Public Facilities,
Plaintiffs – Appellants

v.

UNITED STATES OF AMERICA;
et al.,
Defendants – Appellees

On appeal from the United States District Court
for the District of Alaska, Fairbanks
No. 4:13-cv-00008-RRB

OPENING BRIEF OF STATE OF ALASKA PLAINTIFFS – APPELLANTS

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INTRODUCTION

Four trails with a history dating back to the late 1800s cross two Alaska Native allotments. The State of Alaska owns the trails as public rights-of-way under Revised Statute 2477 (R.S. 2477),[1] a self-executing Congressional grant that allowed rights-of-way to be created automatically by public use.[2] At least one of the Native allotment owners tried to impair public access, even suing a local miner for using the trails. To confirm its ownership of the trails as public rights-of-way, the State sued the allotment owners and others for quiet title, condemnation, and declaratory judgment. The district court dismissed the State's claims against the Native allotment owners, holding it had no subject matter jurisdiction, and the State appealed.

Because there is precedent allowing quiet title actions to preexisting rights-of-way over Native allotments,[3] because there is a statute allowing condemnation on Native allotments,[4] and because there is precedent allowing declaratory

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[1] 43 U.S.C. § 932 (repealed 1976); *see also Mills v. United States*, 742 F.3d 400, 403 n.1 (9th Cir. 2014) (explaining that valid, existing rights-of-way were expressly preserved).

[2] *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996).

[3] *See Alaska v. Babbitt (Bryant)*, 182 F.3d 672, 676 (9th Cir. 1999).

[4] 25 U.S.C. § 357; *see also Jachetta v. United States*, 653 F.3d 898, 907 (9th Cir. 2011) ("§ 357 waives the government's sovereign immunity.").

judgment actions in the face of coercive law suits,[5] the State requests that this Court hold that the district court had jurisdiction over all of the State's claims and reverse the district court's dismissal.

JURISDICTIONAL STATEMENT

The district court's jurisdiction is at issue on this appeal. *See* ER 2-10.

For the State of Alaska's actions to quiet title to four rights-of-way on Alaska Native allotments, the district court had subject matter jurisdiction under the Quiet Title Act, 28 U.S.C. § 2409a. The Act's exception for Indian lands does not apply because the rights-of-way predated the allottees' use and occupancy.[6]

For the State's actions to condemn rights-of-way on the Native allotments, the district court had jurisdiction under 25 U.S.C. § 357.[7]

For the State's actions for declaratory judgment confirming that the State owns the rights-of-way, the district court had jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201. Declaratory judgment jurisdiction existed independent of, as well as in concert with, the quiet title and condemnation actions.

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[5] *See Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985).

[6] *See Bryant*, 182 F.3d at 676 (holding that when State right-of-way predated Native allottee's use and occupancy, there is no colorable claim that the right-of-way is Indian land, and therefore there is jurisdiction under the Quiet Title Act).

[7] *See Jachetta*, 653 F.3d at 907; *Yellowfish v. City of Stillwater*, 691 F.2d 926, 927 (10th Cir. 1982) ("[F]ederal courts have jurisdiction under section 357 to condemn rights-of-way over allotted Indian land . . . .").

The district court had declaratory judgment jurisdiction independent of the other claims because the Native allottees could, and one did, bring a coercive action in federal court impacting the State's rights to the rights-of-way.[8]

This Court has appellate jurisdiction under 28 U.S.C. § 1291. On December 26, 2013, the district court entered a final judgment dismissing all of the State's claims against the Native allottees, Agnes Purdy and Anne Lynn Purdy. ER 1. On January 22, 2014, the State filed a timely appeal. ER 11-13.

ISSUES PRESENTED FOR REVIEW

1. *Quiet Title:* The United States has waived its sovereign immunity and given courts jurisdiction for quiet title actions on non-Indian land. This Court has held that when a state-owned right-of-way predates an Alaska Native allottee's use and occupancy, that part of the allotment is non-Indian land and subject to quiet title jurisdiction.[9] Here the State sued to quiet title to rights-of-way that cross Native allotments and that predate the allottees' use and occupancy. Did the district court have jurisdiction to quiet title to the rights-of-way?

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[8] *See Janakes*, 768 F.2d at 1093 ("If . . . the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights, then we have jurisdiction . . . ."); *see also* Compl., *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Dec. 6, 2012), ECF No. 1.

[9] *See Bryant*, 182 F.3d at 676.

2. *Condemnation:* Under 25 U.S.C. § 357, states may condemn lands on Native allotments in the same manner as fee land. Because this statute authorizes condemnation actions on land with a federal interest, the statute necessarily waives the United States' sovereign immunity.[10] Here the State sued to condemn rights-of-way over Native allotments, seeking to confirm preexisting rights-of-way and compensate the allottees if the State's claim exceeded what it already owned. Did the district court have condemnation jurisdiction?

3. *Declaratory Judgment:* Under 28 U.S.C. § 2201, a court may enter declaratory judgment for claims that it otherwise has jurisdiction to hear. The statute also independently creates jurisdiction where the defendant could have brought a coercive action in federal court.[11] Before the State filed suit in this case, one of the Native allottees sued a member of the public for his use of the State's rights-of-way and initially challenged the State's ownership of the rights-of-way. [12] Did the district court have declaratory judgment jurisdiction independent of the State's other claims?

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[10] *Jachetta*, 653 F.3d at 907.

[11] *Janakes*, 768 F.2d at 1093.

[12] *See* Compl., *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Dec. 6, 2012), ECF No. 1.

ADDENDUM

Pertinent statutes and rules appear in the addendum at the end of this brief.

STATEMENT OF THE CASE

I. Overview

In the late 1800s, prospectors flocked to Interior Alaska. The prospectors built roads and trails to access mining claims and connect communities. Four of those historical trails are at issue here.

The State of Alaska asserts ownership over those four trails as public rights-of-way under Revised Statute 2477 (R.S. 2477).[13] Under that law, Congress granted states rights-of-way for highways over public lands.[14] The grant was self-executing. An R.S. 2477 right-of-way automatically came into existence when a highway was created under state law—which in Alaska, was done by public use.[15]

The public has used the trails at issue here since the late 1800s. ER 125. But decades after the trails were established, two parcels of public land crossed by the R.S. 2477 rights-of-way were deeded as Alaska Native allotments. To clarify the trails' continuing status as public rights-of-way, and in light of growing uncertainty

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[13] 43 U.S.C. § 932 (repealed 1976); *see also Mills v. United States*, 742 F.3d 400, 403 n.1 (9th Cir. 2014) (explaining that while statute was repealed, previous rights-of-way were expressly preserved).

[14] *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996).

[15] *Id.*

for people who use the trails, the State filed this quiet title, condemnation, and declaratory judgment suit. ER 53.

The two Native allotment holders moved to dismiss. Dkt. 91. They argued that the United States was an indispensable party to quiet title actions on Native allotments, that the allotments (including the state rights-of-way) are Indian lands, and that therefore the United States' waiver of sovereign immunity under the Quiet Title Act did not extend to these rights-of-way. Dkt. 91. Despite precedent allowing quiet title actions on Native allotments when there was a preexisting state right-of-way,[16] the district court found R.S. 2477 rights-of-way different from other rights-of-way, and held that there was no federal waiver of sovereign immunity, and thus no quiet title jurisdiction. ER 7. And despite precedent indicating a separate federal waiver for condemnation actions,[17] the district court held it had no condemnation jurisdiction. ER 8-9. And because it had concluded it was without jurisdiction to quiet title, the court also held it had no declaratory judgment jurisdiction. ER 5. The court dismissed all of the State's claims against the allottees, and the State appealed. ER 1, 9-10, 11-13.

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16 *See Alaska v. Babbitt (Bryant)*, 182 F.3d 672, 676 (9th Cir. 1999).

17 *See* 25 U.S.C. § 357; *see also Jachetta v. United States*, 653 F.3d 898, 907 (9th Cir. 2011).

II. Facts

A. In the late 1800s, people flocked to Interior Alaska and carved out public roads.

In the 1880s, major gold discoveries sparked a gold rush in Interior Alaska near the Fortymile River. ER 73. Towns popped up to support the miners, including a town called Chicken. ER 73. Chicken was home to a post office and a trading post, and about 500 miners worked nearby. ER 73-74. Miners, mail carriers, and freighters constructed trails in the area. ER 75. Over time, many trails became wagon roads and, in the winter, sled trails. ER 76-77. People could travel northeast from Chicken to the community of Franklin, and then to Eagle, home of the Fort Egbert military base. ER 73, 106, 140. A trading post operator regularly followed that route, running goods between Chicken and Eagle. ER 73, 106. Over time the mining and supply trails became accessible to trucks, tractors, heavy equipment, and tracked vehicles. ER 76-77.

The military also carved out trails in the region. In the late 1890s, the Army constructed the Valdez–Eagle trail, starting at Alaska's southern coast in Valdez and travelling north some 400 plus miles, through Chicken and Franklin, and on to Eagle. ER 74, 140.

Four sections of the historical, publicly created R.S. 2477 rights-of-way are at issue in this appeal. ER 139, 147. All four trails connect to the community of Chicken. ER 139.They generally follow part of the historical Valdez–Eagle trail as

it ran north over Chicken Ridge, dipped south into Chicken, then turned northeast to Franklin, and continued to Eagle. ER 139, 140. When the trails were built, the land was under public domain, owned and possessed by the United States. ER 86, 94, 98, 103.

Trail 1: The Chicken to Franklin Trail

The Chicken to Franklin Trail (Trail 1) roughly follows a creek northeast from Chicken to the town of Franklin. ER 77, 139. Early accounts of the trail date back to the 1890s. ER 79-80, 141. The trail was a major public corridor for miners and freighters, and was a small portion of the historical Valdez–Eagle Trail. ER 79, 81-82, 139. In the 1920s and 1930s the trail was maintained and improved by the Alaska Road Commission. ER 82. In 1926 alone, over 517 people, 29 sleds, 215 pack horses, and 75 tons of freight travelled this route. ER 82. The Alaska State Legislature identified the Chicken to Franklin Trail in statute as a public right-of-way, created by public use.[18]

Trail 2: The Chicken Ridge Trail

The Chicken Ridge Trail (Trail 2) runs from Chicken northwest and connects to trails running from the northwest[19] and from the southwest.[20] ER 87-

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[18] Alaska Stat. § 19.30.400(c), (d) (2012) (Chicken–Franklin, RST 10); s*ee also* ER 77.

[19] To the northwest, the Chicken Ridge Trail connects to at least one trail that has been legislatively confirmed as an R.S. 2477 right-of-way created by public

89, 139. Accounts of the Chicken Ridge Trail date back to as early as 1899. ER 89. The Chicken Ridge Trail is also part of the historical Valdez–Eagle Trail and was one of the primary overland routes into the Fortymile Region. ER 89, 140. The trail appears on maps as early as 1902, and can be seen entering Chicken and connecting to the Chicken–Franklin Trail (Trail 1) in a map as early as 1914. ER 89, 143, 145-46. In the 1920s the trail was maintained and improved by the Alaska Road Commission. ER 91. And in 1926 alone, 261 people, 86 packhorses, and 5 tons of freight passed over the Chicken Ridge Trail. ER 91.

Trail 3: The Chicken Ridge Alternate Trail

The Chicken Ridge Alternate Trail (Trail 3) starts at the Chicken Post Office and runs north along the west side of Myers Fork Creek, then connects to the Chicken Ridge Trail (Trail 2). ER 95, 139. The Chicken Ridge Alternate Trail originated in the 1890s, providing access to town for miners that worked on the Myers Fork drainage. ER 95-96. In the early 1950s the trail was partly developed as a section of a major highway. ER 96. Though the highway ultimately followed a

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use. Alaska Stat. § 19.30.400(c), (d) (2012) (North Fork of Fortymile–Big Delta, RST 379); *see also* ER 89.

[20] To the southwest, the Chicken Ridge Trail connects to, and is part of, the Ketchumstuk–Chicken trail. The Ketchumstuk–Chicken trail has been legislatively confirmed as an R.S. 2477 right-of-way created by public use. Alaska Stat. § 19.30.400(c), (d) (2012) (Ketchumstuk–Chicken, RST 421).

different route, the Chicken Ridge Alternate Trail continues to be accessible by highway vehicles up to a material site and to the Myers Fork Spur Trail. ER 96.

Trail 4: The Myers Fork Spur Trail

The Myers Fork Spur Trail (Trail 4) is a spur of the Chicken Ridge Trail that runs along the east side of Myers Fork Creek. ER 99, 139. The Myers Fork Spur Trail originated in the late 1800s, providing access to town for people mining the Myers Fork drainage. ER 100-01. The trail was repeatedly rerouted to accommodate mining on Myers Fork. ER 100-01.

B. Two Alaska Native allotments were established over the four R.S. 2477 trails.

Arthur Purdy started mining near Chicken on Myers Fork in the 1930s. ER 31. After about twenty years, Arthur started finding less gold; he then got injured and stopped mining. ER 31-33. In 1971, Arthur applied for a Native allotment in the area surrounding his mining activity. ER 40. Arthur claimed use and occupancy since 1931, for about 160 acres of land. ER 40. Arthur died while the application was pending. *See* ER 36 (grant to heirs, devisees, and/or assigns). By the 1970s, Agnes Purdy, Arthur's surviving spouse, had a cabin, shed, and garage on the property, but she mainly used the parcel for hunting. ER 33, 41.

In 2006, BLM approved the allotment application. ER 42. BLM found that Agnes Purdy's allotment was subject to the preexisting "Chistochina–Eagle Trail (part of the old Valdez to Ft. Egbert Trail)" and expressly reserved a 25-foot public

right-of-way on the trail. ER 37, 42. The Chistochina–Eagle Trail is a historical name for part of the Valdez–Eagle Trail. ER 74. Of the trails at issue here, at least the Chicken to Franklin Trail (Trail 1) and the Chicken Ridge Trail (Trail 2) are portions of the historical Chistochina–Eagle and Valdez–Eagle routes. ER 74, 79, 89.

In 2012 BLM approved a neighboring 40-acre Native allotment for Anne Lynn Purdy. ER 38, 45. BLM determined Anne Lynn started using and occupying the land in 1955. ER 47.

BLM made Anne Lynn's allotment subject to 25-foot public rights-of-way over several preexisting trails. Like it did on Agnes's allotment, BLM noted the Chistochina–Eagle Trail, which it also referred to as the Chicken to Fish to McKinley Creeks Trail. ER 48. The Chicken to Franklin Trail (Trail 1) and the Chicken Ridge Trail (Trail 2) in this litigation are part of the historical Chistochina–Eagle and Valdez–Eagle routes. ER 74, 79, 89. BLM also noted the 40 Mile to Lillywig Creek Trail, which it also referred to as the Chicken to Franklin Trail. ER 48. The Chicken to Franklin Trail (Trail 1) is at issue in this litigation. ER 77. BLM also noted the Ketchumstuk to Chicken Trail. ER 39, 48. The Chicken Ridge Trail (Trail 2) is part of the historical Ketchumstuk to Chicken Trail. ER 87-89.

III. PROCEEDINGS

A. After one of the allottees prevented public access, the State filed this quiet title, condemnation, and declaratory judgment action to clarify the trails' statuses as public R.S. 2477 rights-of-way.

Confrontation arose over the access rights to the four trails after Agnes Purdy and the non-profit organization Tanana Chiefs Conference, a Bureau of Indian Affairs service provider that assisted with the allotment application, began preventing public access. *See* ER 43, 50. Tanana Chiefs Conference posted no-trespassing signs where the trails crossed the allotment. *See* ER 21, 58. Knowing that the State of Alaska was contemplating bringing this action to confirm the trails as public rights-of-way by quiet title or condemnation, Tanana Chiefs Conference and Agnes sued a local miner who used the trails, asserting trespass and damages, and claiming that "[n]o person other than Agnes Purdy has any ownership interest in the allotment, and no other person has authority to grant access rights to anyone."[21] The miner responded that the allotment was subject to public rights-of-way under R.S. 2477.[22]

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[21] *See* Compl. ¶¶ 1, 15-16, 20-23, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Dec. 6, 2012), ECF No. 1.

Tanana Chiefs Conference later removed its no-trespassing signs and moved to dismiss itself as a plaintiff in the suit against the miner. Dkt. 75 at 1-2; Dkt. 76 at 2.

[22] Answer ¶ 4, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Feb. 20, 2013), ECF No. 11.

Shortly after, in an effort to clarify the status of the four trails that cross the Purdys' Native allotments and other trails in the region, the State filed its complaint in this litigation. *See* ER 53-133. The State named as defendants several individuals and mining firms with property or mining claims in the Chicken area; the United States as holder of restrictions on alienation to the Purdy Native allotments;[23] Agnes Purdy as an allotment owner; Barbara Redmon as legal guardian to allotment owner Anne Lynn Purdy; and Tanana Chiefs Conference for its actions in seeking to deny public access over the allotments. ER 57-67. The State sought quiet title against the United States under the Quiet Title Act;[24] quiet title and recovery of possession against non-federal defendants under state law;[25] a declaratory judgment against all defendants under the Declaratory Judgment Act;[26] and condemnation under 25 U.S.C. § 357 to portions of the Purdy Native allotments where the trails exist. ER 124-27, 129-32.

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[23] The United States was also named as a defendant as title holder to certain parcels not at issue in this appeal. ER 57.

[24] 28 U.S.C. § 2409a.

[25] Alaska Stat. §§ 09.45.010, 09.45.630 (2012). The complaint also sought to quiet title against the non-federal, non-allottee defendants based on public prescription. ER 128-29.

[26] 28 U.S.C. § 2201.

B. In Agnes Purdy's parallel litigation against the miner, the district court stayed consideration of the existence of State-owned R.S. 2477 rights-of-way.

In Agnes's parallel litigation against the miner, the district court was made aware of this quiet title, condemnation, and declaratory judgment action, and thus stayed any claims concerning the existence of R.S. 2477 rights-of-way.[27] The district court reasoned that "any action affecting rights under [the R.S. 2477] right-of-way necessarily implicates the State," which was not a party to Agnes's parallel litigation.[28] The existence and ownership of the historical trails as rights-of-way under R.S. 2477 was left for determination in this litigation.

But the district court allowed Agnes's parallel litigation to proceed on the question of monetary damages arising from the miner's use of the trails, including maintenance, expansion, and routing.[29] The State moved for a limited intervention, and requested a stay or dismissal because determination of the scope of the public's use of State-owned R.S. 2477 rights-of-way implicates the State and the State could not be joined because of its sovereign immunity.[30] The district court

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[27] Order Granting Mot. for Stay at Docket 18, at 5, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Aug. 12, 2013), ECF No. 57.

[28] *Id.* at 3.

[29] Order [Re: Mots. at Dockets 60, 63, 66], at 4, 7, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Sept. 13, 2013), ECF No. 73.

[30] State of Alaska's Mot. for & Mem. in Support of Ltd. Intervention 1-2, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Oct. 17, 2013), ECF No. 87.

concluded that its determination of the public's allowed scope of use on the State-owned rights-of-way did not concern the State, and the district court denied the State's motion to intervene for a stay or dismissal, allowing Agnes's parallel litigation to continue.[31]

C. In this litigation, the Purdys moved to dismiss the State's quiet title, condemnation, and declaratory judgment claims.

Meanwhile in this litigation, Agnes and Anne Lynn Purdy moved to dismiss the State's quiet title, condemnation, and declaratory judgment action, arguing that the State failed to exhaust administrative remedies by not previously challenging the reservation of rights-of-way in the Native allotment certificates. Dkt. 79. The district court rejected the exhaustion argument and denied the motion; the Purdys did not appeal. Dkt. 101; *see also* ER 148-68.

The Purdys then again moved to dismiss, this time asserting the court lacked subject matter jurisdiction. Dkt. 91. The Purdys first argued that the court lacked jurisdiction to quiet title to the rights-of-way under the Quiet Title Act, 28 U.S.C. § 2409a. Dkt. 91 at 2-4. They noted that the Quiet Title Act's grant of jurisdiction

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[31] Omnibus Order 5-6, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Oct. 25, 2013), ECF No. 101.

The parallel litigation settled during the pendency of this appeal. Order Dismissing Case, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, June, 4, 2014), ECF No. 126.

excludes claims on Indian lands.[32] And they argued that this action was not controlled by precedent holding that a quiet title action could proceed over state rights-of-way that predate a Native allottee's use and occupancy.[33] The Purdys also argued that the court lacked subject matter jurisdiction over the State's condemnation action because, they asserted, the State had not determined that condemnation would further the greatest common good and least private injury. Dkt. 91 at 7. Though the motion was styled as a motion to dismiss, the Purdys cited no rule of procedure to support the motion, and the Purdys attached several factual exhibits, many of which exceeded the facts of the complaint and included photographs, maps, and affidavits. Dkt. 91.1-91.16.

The State argued that, as it had alleged in its complaint, the Indian lands exception to the Quiet Title Act was inapplicable because the rights-of-way were granted to the State before the Purdys' use and occupancy. Dkt. 102 at 5-13; ER 56. Any factual issues that the Purdys' raised about the timing of the trails' use and construction, and the State's ownership of the trails as public rights-of-way, were genuinely disputed facts that needed to be resolved on the merits. Dkt. 102 at 5-13, 32-41. The State also argued that 25 U.S.C. § 357 gave the court jurisdiction

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[32] 28 U.S.C. § 2409a ("This section does not apply to trust or restricted Indian lands . . . .").

[33] *See Alaska v. Babbitt (Bryant)*, 182 F.3d 672, 676 (9th Cir. 1999).

over the condemnation action and that any question about the condemnation's necessity would also have to be resolved on the merits. Dkt. 102 at 18-27. The State pointed out that in the past, it had successfully brought condemnation actions under 25 U.S.C. § 357 to confirm its ownership of rights-of-way and then compensate a landowner where a road exceeded the bounds of the right-of-way. Dkt. 102 at 23-27. The State noted that there was also jurisdiction for declaratory judgment, both in concert with the other actions and independently. Dkt. 102 at 13-16.

In their reply, the Purdys attempted to distinguish R.S. 2477 rights-of-way from other preexisting rights-of-way that would allow Quiet Title Act jurisdiction on Native allotments, arguing that the R.S. 2477 rights-of-way are too "nebulous." Dkt. 115 at 12. The Purdys also argued for the first time that condemnation could not proceed under 25 U.S.C. § 357 because a different statute, 25 U.S.C. § 311, allows the Secretary of Interior to grant rights-of-way over Indian lands by consent. Dkt. 115 at 15-18. The Purdys argued that § 311 should control and require the State to seek secretarial consent for a right-of-way rather than pursue condemnation under 25 U.S.C. § 357.[34] Dkt. 115 at 15-18.

[34] The Purdys cited *United States v. Minnesota*, 95 F.2d 468, 470 (8th Cir. 1938). Dkt. 115 at 16-17. But that opinion was expressly overruled. *United States v. Minnesota*, 113 F.2d 770, 774-75 (8th Cir. 1940) ("We are clear that this court was in error in basing its conclusion in United States v. Minnesota, 8 Cir., 95 F.2d 468, upon the ground that the lower court was without jurisdiction because consent

The district court invited amicus briefing from Tanana Chiefs Conference and the United States in their capacity as *parens patriae* for the Purdys, but only on the issue of subject matter jurisdiction under the Quiet Title Act. Dkt. 116 at 2-3; *see also* Dkt. 119; Dkt. 123.

D. The district court dismissed the State's claims against the Purdys, and the State appealed.

The district court held that on the Native allotments, the Quiet Title Act is the exclusive means to determine the existence of a right of way. ER 5. Thus the court reasoned that if the claims against the Purdys could not proceed without the United States, and if the Quiet Title Act conferred no jurisdiction over the United States, then "the entire matter must be dismissed as against the Purdys." ER 5-6. The court held that the United States was an indispensable party to claims involving Native allotments. ER 7-10. Because it concluded the United States was indispensable, it reasoned that quiet title jurisdiction must be found under the Quiet Title Act's waiver of federal sovereign immunity. ER 7-9. Because the Quiet Title Act does not provide jurisdiction over the United States to claims involving Indian lands, the court then turned to the impact of preexisting R.S. 2477 rights-of-way.

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of the Secretary of the Interior for the maintenance of the procedure had not been obtained . . . . Our decision in United States v. Minnesota, . . . is therefore overruled . . . ."); *see also Minnesota v. United States*, 305 U.S. 382, 391 (1939) (reviewing the Eighth Circuit's 1938 opinion and expressly declining to consider "whether, as a matter of substantive law, the lack of assent by the Secretary of the Interior precluded maintenance of the condemnation proceeding").

ER 6-7. Although the court recognized that preexisting rights-of-way under the Federal Highway Act[35] have prevented land from being available for allotment and thus have allowed the court to exercise quiet title jurisdiction over the rights-of-way, the court held that preexisting rights-of-way under R.S. 2477 were different. ER 7. The court stated that it could find no authority indicating that a preexisting R.S. 2477 right-of-way rendered the land it encompasses as occupied, appropriated, or reserved, and thus could provide quiet title jurisdiction despite the Quiet Title Act's Indian lands exception. ER 7. Therefore the court held that there was no waiver of federal sovereign immunity for the quiet title claim. ER 7. Then, despite caselaw indicating that 25 U.S.C. § 357 waives sovereign immunity for condemnation,[36] the court held that there was also no waiver for a condemnation action under 25 U.S.C. § 357. ER 8-9. And because it had no quiet title jurisdiction, the court held it also had no declaratory judgment jurisdiction. ER 5. The court dismissed all of the State's claims against the Purdys and invited an "immediate appeal" to "resolve this issue once and for all." ER 9-10.

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[35] 23 U.S.C. § 317.

[36] *Jachetta v. United States*, 653 F.3d 898, 907 (9th Cir. 2011) ("Because § 357 permits condemnation actions that cannot effectively proceed absent the United States, § 357 waives the government's sovereign immunity.").

On December 26, 2013, the district court entered a judgment dismissing the complaint as against the Purdys. ER 1. On January 22, 2014, the State filed its notice of appeal. ER 11-13.

SUMMARY OF THE ARGUMENT

The district court erred in dismissing the State's claims against the Purdys. First, because the State's R.S. 2477 rights-of-way predated the Purdys' use and occupancy, the rights-of-way fall outside of the Indian lands exception to the Quiet Title Act, creating quiet title jurisdiction.[37] To the extent there are factual disputes over whether the R.S. 2477 rights-of-way came into existence before the Purdys' use and occupancy, those go to the merits of the quiet title claim and must be addressed in further proceedings.[38] Moreover, because Agnes Purdy brought an action against a member of the public for his use of the same State rights-of-way, the State's quiet title action is properly construed as defensive, and thus can proceed without the United States and is, therefore, also not barred by the Indian lands exception.[39]

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[37] *See Alaska v. Babbitt (Bryant)*, 182 F.3d 672, 676 (9th Cir. 1999).

[38] *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039-40 (9th Cir. 2004).

[39] *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1069-71 (9th Cir. 2010) (holding that a claim against Indian land could proceed without the United States where the tribe stood in the shoes of a plaintiff).

Second, the State's condemnation counts created a separate basis for jurisdiction. Even though the United States may be an indispensable party for a condemnation action on a Native allotment, the United States has expressly waived its sovereign immunity for those actions.[40]

Third, the State's declaratory judgment claim not only survives in connection with the quiet title and condemnation counts, but also creates an independent basis for jurisdiction because the Purdys can (and one did) bring a coercive action in federal court impacting the State's authority over its rights-of-way.[41]

ARGUMENT

I. Standard of Review

"Subject matter jurisdiction determinations are subject to de novo review."[42] The district court may determine jurisdiction on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and hear evidence and resolve factual disputes regarding jurisdiction.[43] Those findings of fact are reviewed for clear error.[44] But it

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40 *See* 25 U.S.C. § 357; *Jachetta v. United States*, 653 F.3d 898, 907 (9th Cir. 2011).

41 *See Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985).

42 *Alaska v. Babbitt (Albert)*, 38 F.3d 1068, 1072 (9th Cir. 1994).

43 *Kingman Reef Atoll Invs., LLC v. United States*, 541 F.3d 1189, 1195 (9th Cir. 2008).

is error to dismiss under Rule 12(b)(1) when "the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action."[45]

This court reviews a decision regarding joinder for abuse of discretion, but reviews the underlying legal conclusions de novo.[46]

II. Legal Background: The State owns public rights-of-way over historical trails under Revised Statute 2477.

Revised Statute 2477, section 8 of the Mining Act of 1866, provided for a simple grant of rights-of-way: "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[47] The grant, available between 1866 and 1976, came when new states were being carved out of federal public domain.[48] The highway grant was essential for allowing states to plan for future rights-of-way and retain preexisting thoroughfares as land passed

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44 *Id.*

45 *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039-40 (9th Cir. 2004) (quoting *Sun Valley Gasoline, Inc. v. Ernst Enters.*, 711 F.2d 138, 139 (9th Cir. 1983)) (internal quotation marks omitted).

46 *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1067 (9th Cir. 2010).

47 The Mining Act of 1866 § 8, 14 Stat. 251, 253 (codified at 43 U.S.C. § 932 (repealed 1976)). Although repealed in 1976, valid, existing rights-of-way were preserved. *Mills v. United States*, 742 F.3d 400, 403 n.1 (9th Cir. 2014).

48 Thomas E. Meacham, *Public Roads over Public Lands: The Unresolved Legacy of R.S. 2477*, 40 RMMLF-INST 2 § 2.04[4][a] (1994).

into private ownership.[49] The grant was self-executing—R.S. 2477 rights-of-way came into existence automatically if a public highway was established across public land in accordance with state law.[50] In Alaska, the federal grant could be accepted either by a positive state act *or* by public use.[51] The necessary extent of public use "depends on the character of the land and the nature of the use."[52] But the public use does not need to have been continuous.[53] And the route does not need a precise path. [54] It is enough "to show that there was a generally-followed route."[55] And the highway does not need to be significantly developed.[56] "[E]ven a rudimentary trail can qualify" as an R.S. 2477 highway.[57] By statute, the State claims, occupies, and possesses each right-of-way granted under R.S. 2477.[58]

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49 *Id.*

50 *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996).

51 *Id.*

52 *Id.* at 1020.

53 *Id.*

54 *Id.* at 1021-22.

55 *Id.*

56 *Id.* at 1020.

57 *Id.*

58 Alaska Stat. § 19.30.400(a) (2012).

The four trails that cross the Purdy Native allotments have been accepted by public use that long-predated the Purdys' claimed use and occupancy.[59] ER 40, 47. Early accounts of all the trails date back to the late 1800s. ER 79-80, 89, 95-96, 100, 139, 141. The Alaska Legislature has, by statute, specifically identified the Chicken to Franklin Trail (Trail 1) as an R.S. 2477 right-of-way created by public use.[60] And although the BLM does not adjudicate R.S. 2477 rights-of-way when it adjudicates Native allotment applications,[61] BLM at least noted that the allotments were subject to historical rights-of-way. ER 42, 48. Agnes's allotment was subject to the Chistochina–Eagle Trail and Anne Lynn's allotment was subject to the Chistochina–Eagle or Chicken to Fish to McKinley Creeks Trail; the 40 Mile to Lillywig Creek or Chicken to Franklin Trail; and to the Ketchumstuk to Chicken Trail. ER 42, 48. The trails at issue here are also known by those names or are subparts of those named trails.[62]

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[59] The State disputes the actual use and occupancy dates, which are later than Agnes's and Anne Lynn's claimed original use and occupancy. *See* Dkt. 102 at 27-33.

[60] Alaska Stat. § 19.30.400(c), (d) (2012) (Chicken–Franklin, RST 10).

[61] *See Leo Titus, Sr.*, 89 IBLA 323, 337-40 (1985) (explaining that the Department of Interior refuses to adjudicate claimed R.S. 2477 rights-of-way because allotments are subject to public highway rights-of-way regardless of language in allotment grant, and the existence of a public highway is properly determined in court).

[62] *See* ER 74, 79, 89 (Valdez–Eagle Trail); ER 77 (Chicken–Franklin Trail); ER 87-89 (Ketchumstuk–Chicken Trail).

III. The district court had quiet title jurisdiction.

A. Because the State's rights-of-way predated the Native allotments, there is jurisdiction under the Quiet Title Act despite the Indian lands exception.

The district court had jurisdiction to confirm the State's ownership of the trails under the Quiet Title Act because the trails predated the Native allottees' use and occupancy.

Generally the United States is an indispensable party to litigation involving an Alaska Native allotment.[63] The Quiet Title Act allows the United States to be named as a defendant to adjudicate disputed title to real property, but it expressly "does not apply to trust or other restricted Indian lands."[64] But that Indian lands exception does not apply—and therefore does not prohibit a quiet title action—where the claim to Indian land is not "colorable."[65] And, under this Court's

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Although the allotment certificates purported to reserve only 25-foot rights-of-way, under Alaska law, the rights-of-way are 100 feet. *See* Alaska Stat. § 19.10.015(a) (2012).

[63] *See Minnesota v. United States*, 305 U.S. 382, 386 (1939) ("A proceeding against property in which the United States has an interest is a suit against the United States."). The United States retains a restriction on alienation, not fee in trust, over Alaska Native allotments. *See State of Alaska*, 45 IBLA 318, 321-22 (1980).

[64] 28 U.S.C. § 2409a; *Alaska v. Babbitt (Bryant)*, 182 F.3d 672, 674 (9th Cir. 1999).

[65] *Bryant*, 182 F.3d at 675-76 (citing *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987)).

precedent, there is no colorable claim that it is Indian land when the allottee's use and occupancy started *after* the land had already been appropriated.[66] Alaska Native allotments are limited to "vacant, unappropriated and unreserved nonmineral land in Alaska."[67] "[O]ccupied, appropriated, or reserved land is not available for allotment."[68]

In *State of Alaska v. Babbitt (Bryant)*, this Court explained that a state right-of-way makes the land under the right-of-way no longer vacant, unappropriated, or unreserved, which prevents an allotment applicant from using and occupying under color of law, which affords the allottee no right to that land, and thus allows the courts to exercise Quiet Title Act jurisdiction over the preexisting right-of-way.[69] In *Bryant*, the federal government granted the State a 500-acre Federal Highway Act material-site right-of-way in 1961.[70] Three years later, in 1964, Bryant began using a portion of the land subject to the right-of-way for hunting, picking berries, and trapping.[71] In 1969, the State's right-of-way was amended and significantly

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66 *Id.* at 677.

67 *See* 43 U.S.C. § 270-1 (repealed Dec. 18, 1971, with savings clause for pending allotment applications).

68 *Alaska v. Norton (Bryant II)*, 168 F. Supp. 2d 1102, 1106 (D. Alaska 2001).

69 *Bryant*, 182 F.3d at 674, 676-77.

70 *Id.* at 673, 677 n.32 (citing 23 U.S.C. § 317(b)).

71 *Id.* at 673.

reduced in size.[72] The next year Bryant filed an application for a 120-acre Native allotment.[73] Reviewing the allotment application, the Interior Board of Land Appeals (IBLA), held that the 1961 right-of-way had no effect on the availability of the land for allotment, reasoning that it was only a right-of-way, and not the fee.[74] The State appealed the IBLA ruling to the district court, which held that the Quiet Title Act's Indian lands exception prevented it from exercising subject matter jurisdiction over the State's challenges.[75]

But while appeal of that district court ruling was pending, IBLA changed its course. In *Goodlataw*, IBLA held that preceding rights-of-way, even if later reduced in size, bar use and occupancy under color of law and thus bar a claim to a Native allotment over those rights-of-way.[76] In light of IBLA's new position in *Goodlataw*, this Court reversed the district court's holding that the Indian lands exception to the Quiet Title Act prevented it from hearing the challenges to Bryant's allotment.[77] This Court explained that because Bryant began using and

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72 *Id.*

73 *Id.*

74 *Id.* at 674.

75 *Id.* at 674-75.

76 *Id.* at 676 (citing *State of Alaska (Goodlataw)*, 140 IBLA 205, 215 (1997)).

77 *Id.*

occupying the land after the State received the 1961 material site right-of-way, Bryant's use and occupancy was not under color of law and therefore could afford him no rights over the right-of-way. [78] Thus any claim Bryant had to an allotment over the right-of-way was not colorable.[79] And the Quiet Title Act's Indian lands exception therefore did not apply.

On remand the district court concluded that the allotment was void as to all land within the boundaries of the original right-of-way.[80] The court reasoned that "the preceding right-of-way has the legal effect of excluding the right-of-way lands from allotment."[81] The allotment was void as to all land within the boundaries of the State's original right-of-way.[82]

The same is true here. The State's rights-of-way predated the potential allottees' claimed use and occupancy. Early accounts of the Chicken to Franklin, Chicken Ridge, Chicken Ridge Alternate, and Myers Fork Trails, and the larger trails of which they are parts, date back to the late 1800s. ER 79-80, 89, 95-96, 100, 139, 141. These all predate Agnes's predecessor in interest's claimed 1931

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78 *Id.* at 676-77.

79 *Id.*

80 *Alaska v. Norton (Bryant II)*, 168 F. Supp. 2d 1102, 1108-09 (D. Alaska 2001).

81 *Id.*

82 *Id.* at 1109.

use and occupancy and Anne Lynn's claimed 1955 use and occupancy. ER 40, 47. And like the right-of-way in *Bryant*, the R.S. 2477s were a federal grant of public land to the State.[83]

The district court attempted to distinguish the R.S. 2477 rights-of-way here from the Federal Highway Act grant in *Bryant*, stating that "no authority has been cited that a R.S. 2477 renders the land it encompasses as occupied, appropriated, or reserved." ER 7. But the differences between a Federal Highway Act right-of-way and an R.S. 2477 right-of-way are superficial: a the Federal Highway Act right-of-way is made by a specific Secretarial finding and filing[84] and an R.S. 2477 right-of-way is a Congressional grant accepted by positive state action or by public use.[85]

Despite the R.S. 2477 grant being self-executing (that is, the Secretary of Interior is not required to separately act to create each R.S. 2477 right-of-way, as the Secretary must for a Federal Highway Act right-of-way), the R.S. 2477 rights-of-way are still valid and still made with the consent of Congress. The United States Supreme Court has recognized that highways created across public lands,

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83 *See Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996) (explaining that acceptance of the federal grant could occur either by a positive state act or by public use).

84 23 U.S.C. § 317.

85 *Fitzgerald*, 918 P.2d at 1019.

even before R.S. 2477's 1866 enactment, were "established and used with the full knowledge and acquiescence of the national government."[86] The Supreme Court explained that the "[g]overnmental concurrence in and assent to the establishment of these roads [was] so apparent, and their maintenance so clearly in furtherance of the general policies of the United States," that the federal government has a "moral obligation to protect them against destruction or impairment as a result of subsequent grants."[87] R.S. 2477 was Congress actualizing that moral obligation.[88] R.S. 2477 protected not only pre-1866 highways, it protected the entire method of creating roads over public land by local customs—roads that "in the fullest sense of the words, were necessary aids to the development and disposition of the public lands."[89]

In addition, the fact that the precise route of these historical, publicly created highways may have been subject to some variation does not undermine their validity: The Supreme Court has recognized that roads formed by "the passage of wagons, etc., over the natural soil" are "as a matter of ordinary observation, . . .

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86 *Cent. Pac. Ry. Co. v. Alameda Cnty.*, 284 U.S. 463, 472-73 (1932).

87 *Id.* at 473.

88 *See id.*

89 *See id.* at 473.

subject to occasional deviations."[90] R.S. 2477 rights-of-way do not need to have always followed a precise path or be significantly developed.[91] This distinctive nature of R.S. 2477 rights-of-way does not make them any less valid or convey any less protected of an interest than a Secretarial grant.

Moreover, when compared to the actual right-of-way in *Bryant*, the R.S. 2477 rights-of-way in this case even more persuasively indicate that the land underlying the rights-of-way was "occupied, appropriated, or reserved."[92] In *Bryant*, the State did not even use its 1961 material site until 1970.[93] So, when Bryant began using and occupying the land in 1964 he had no knowledge that there was a preexisting state right.[94] And before Bryant even applied for his allotment, the State's right-of-way was reduced from 500 acres to about 4 acres.[95] Those facts did not prevent the State's 500 acre right-of-way from preventing Bryant's claim to the land.[96]

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90 *Id.* at 466.

91 *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1020, 1021 (Alaska 1996).

92 *Alaska v. Norton (Bryant II)*, 168 F. Supp. 2d 1102, 1106 (D. Alaska 2001).

93 *Id.*

94 *Id.*

95 *Id.* at 1106.

96 *See id.* at 1109.

Unlike the unused 500 acres in *Bryant*, the rights-of-way here would have at least been physically apparent when the Purdys entered the land. And the rights-of-way were, and continue to be, used by the public. Also two of the rights-of-way are specifically identified in statute,[97] and several of the rights-of-way or larger trails of which they are a subpart are even mentioned in the Purdys' allotment certificates.[98] If an unused right-of-way was enough to prevent application of the Indian lands exception in *Bryant*, then the continuously used, readily apparent rights-of-way here all the more prevent the exception from applying.

If the Purdys have factual disputes with the formation, scope, width, and location of the rights-of-way, they go to the merits of the quiet title action and must be resolved by the district court in further proceedings. The Purdys may argue that these factual disputes on formation, scope, width, and location would have to be resolved to determine whether *Bryant* applies, and that doing so would improperly require the United States to litigate the merits.[99] But that would conflate the quiet title merits with the jurisdictional analysis. The United States can only prevent litigation of the quiet title merits if it has a colorable claim that the land is Indian

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[97] Alaska Stat. § 19.30.400(c), (d) (2012) (Chicken–Franklin, RST 10; Ketchumstuk–Chicken, RST 421, of which the Chicken Ridge Trail is a segment).

[98] *See* ER 37, 39, 42, 48; ER 74, 79, 89 (Valdez–Eagle Trail); ER 77 (Chicken–Franklin Trail); ER 87-89 (Ketchumstuk–Chicken Trail).

[99] *See Alaska v. Babbitt (Bryant)*, 182 F.3d 672, 675 (9th Cir. 1999) (citing *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987)).

land. That implies a threshold legal, but not necessarily factual, determination; here that is, as a matter of law, can the United States have a colorable claim that a Native allotment can be created over land where there was a preexisting right-of-way? Because under *Bryant* it cannot, the Indian lands exception to the Quiet Title Act does not apply, and the court can review the quiet title action on the merits. To hold otherwise—that is, to require there be no factual dispute over the formation, scope, width, or location of the R.S. 2477 rights-of-way—would wholly undermine *Bryant*'s carveout from the Indian lands exception. As a practical matter, the purpose of a quiet title action is to resolve disputes over title. As a legal matter, an element of a claim under the Quiet Title Act is that the United States contests title.[100] *Bryant* would be meaningless if it only allowed actions where there were no factual disputes over title.

And even if the factual disputes must be resolved to determine jurisdiction, those disputes are not grounds for dismissal. This Court has held it is error to dismiss for lack of jurisdiction when "the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action."[101] The formation, scope, width, and

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[100] *See Mills v. United States*, 742 F.3d 400, 405-06 (9th Cir. 2014).

[101] *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039-40 (9th Cir. 2004) (quoting *Sun Valley Gasoline, Inc. v. Ernst Enters.*, 711 F.2d 138, 139 (9th Cir. 1983)) (internal quotation marks omitted).

location of the R.S. 2477 rights-of-way are the substantive heart of the quiet title action, and, if they are jurisdictional, are so inextricably intertwined with the substance that it would be inappropriate for the court to dismiss for lack of jurisdiction.

B. Alternatively, the United States is not an indispensable party, and thus presents no barrier to a quiet title action, because the allottees stand in the shoes of plaintiffs.

As outlined above, the preexisting nature of the rights-of-way preclude the Indian lands exception, triggering the United States' waiver of sovereign immunity under the Quiet Title Act and allowing the quiet title actions to proceed against the allottees and the United States. But this Court can also allow the quiet title action to proceed without the United States.

This Court has held that actions concerning Indian lands may proceed without the United States when the Indian "stands in the shoes of a plaintiff."[102] Because Agnes Purdy and Tanana Chiefs Conference first sued a member of the public for his use of portions of the same rights-of-way at issue here,[103] and

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[102] *See Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1069-71 (9th Cir. 2010).

[103] *See* Compl., *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Dec. 6, 2012), ECF No. 1.

because Anne Lynn Purdy could have sued, the United States is no longer an indispensable party.[104]

In *Lyon v. Gila River Indian Community*, this Court allowed a suit concerning tribal land to proceed without the United States.[105] Non-Indian landowners owned a parcel that was surrounded by a tribe's reservation, and accessed only by crossing the reservation.[106] When the landowners declared bankruptcy, the tribe filed a proof of claim in the bankruptcy proceedings asserting that it had "exclusive right to use and occupy" the non-Indian land and a right to "relief for trespass" on reservation and aboriginal lands.[107] In response, the landowners' trustee in bankruptcy filed for declaratory judgment against the tribe in district court and asserted that the landowners' estate had legal title and access.[108] The tribe argued that because any access dispute involved reservation land, which the United States held in trust for the tribe, the case could not proceed

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104 *Cf. Lyon*, 626 F.3d at 1069-71 (allowing dispute over right-of-way on Indian land to proceed without United States because tribe first asserted exclusive claim to the right-of-way).

105 *Id.*

106 *Id.* at 1066.

107 *Id.* at 1066.

108 *Id.* at 1066-67.

without the United States.[109] This Court explained that while the United States is generally an indispensable party to claims involving Indian lands, "that rule does not apply where the *tribe* has filed the claim to protect its own interest."[110] That was true even though the tribe did not initiate the adversary proceeding in the district court.[111] The tribe's proof of claim in the bankruptcy proceeding was enough for this Court to hold that the tribe stood "in the shoes of a plaintiff" in the later district court proceeding.[112] This Court noted that the tribe had asserted that the bankruptcy estate had no right to occupy or access its most significant asset.[113] The case was "more similar to 'a tribe seeking to protect Indian land from alienation,' . . . than to a case of 'litigation . . . instituted by non-Indians for the purpose of effecting the alienation of tribal or restricted lands.' "[114] And the

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109 *Id.* at 1069.

110 *Id.* (citing *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983)).

111 *Id.* at 1070.

112 *Id.* at 1070-71.

113 *Id.* at 1070.

114 *Id.* at 1071 (quoting *Puyallup*, 717 F.2d at 1255 n.1) (second omission in original).

government's interests were "shared and adequately represented by the [tribe]."[115] Therefore this Court held the United States was not an indispensable party.[116]

Lyon applies here. Before the State initiated this quiet title action, Tanana Chiefs Conference and Agnes Purdy sued a miner for trespass and damages for his use of the same State-owned public rights-of-way at issue here.[117] They asserted that the Chistochina–Eagle Trail—one of the historical trails mentioned in the allotment certificates and of which the trails at issue here are subsections or spurs, ER 79, 87, 89, 95, 100, 139, 140—"was not accepted and not asserted as a valid R.S. 2477 right-of-way"; that "no person other than Agnes Purdy has any ownership interest in the allotment, and no other person has authority to grant access rights to anyone"; and that any argument from the miner "claiming a right-of-way is not valid."[118] They also sought declaratory relief that "the Myers Fork Spur Road and Chicken Creek Alternate Roads #1 and #2 are not public rights-of-way."[119]

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115 *Id.* at 1071.

116 *Id.*

117 *See* Compl. ¶¶ 1, 15-16, 20-23, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Dec. 6, 2012), ECF No. 1.

118 *Id.* ¶¶ 12, 16, 28.

119 *Id.* at 10 ¶ 5.

Like the tribe in *Lyon*, Tanana Chiefs Conference and Agnes had asserted that the public had "no right to occupy or access" the rights-of-way.[120] And in light of the State's interest in those rights-of-way and its 11th Amendment immunity from suit, Tanana Chiefs Conference and Agnes "had to know that there would be an objection which could be litigated only as an adversary proceeding" with them named as defendants.[121] In fact, after the State filed this quiet title, condemnation, and declaratory judgment action, the district court in Tanana Chiefs Conference and Agnes's suit purported to stay any claims concerning the existence of R.S. 2477 rights-of-way, noting that "any action affecting rights under [the R.S. 2477] right-of-way necessarily implicates the State."[122] And Tanana Chiefs Conference and Agnes appeared to acquiesce to the right-of-way issue being removed from their suit and litigated in the State's action—they moved to amend their complaint to remove their claim for a declaratory judgment that there was no public road over the Purdy allotment, explaining, "[t]hat issue can be litigated in the other case."[123]

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120 *See Lyon*, 626 F.3d at 1070; Compl. ¶¶ 12, 16, 28, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Dec. 6, 2012), ECF No. 1.

121 *See Lyon*, 626 F.3d at 1070.

122 Order Granting Mot. for Stay at Docket 18, at 3, 5, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Aug. 12, 2013), ECF No. 57.

123 Mem. of Points & Authorities in Support of Mot. for Leave to Amend Compl. 4, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Apr. 25, 2013), ECF No. 22.

Because Agnes and Tanana Chiefs Conference brought the first suit challenging the historical trails' status as public rights-of-way, they stand in the shoes of the plaintiffs and, under *Lyon*, this case can proceed without the United States. Federal Rule of Civil Procedure 19(b) supports this outcome.[124] That rule provides that if a person who is required to be joined cannot, "the court must determine whether, in equity and good conscience, the action should proceed."[125] At the district court's request, the United States filed an amicus brief clearly supporting the Purdys' argument against quiet title jurisdiction, and in its answer the United States asserted that the complaint failed to state a claim and that any R.S. 2477s had been abandoned. Dkt. 63 ¶¶ 1, 6; Dkt. 123. The United States' interest in Agnes's allotment is therefore "shared and adequately represented by" Agnes.[126] And for same reason, even though Anne Lynn Purdy was not a party to the parallel litigation against the miner, her joint briefing with Agnes adequately represents the government's interest in the allotments. The State's claims against Agnes's and Anne Lynn's allotments can, therefore, proceed "in equity and good conscience" without the United States. And without the United States, there is no

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[124] The United States is a "person who is required to be joined if feasible" under Rule 19(a) because, while the allottees hold the fee, the United States holds a restriction on alienation.

[125] Fed. R. Civ. P. 19(b). Aside from questions of law, the district court's joinder decision is reviewed for abuse of discretion. *Lyon*, 626 F.3d at 1067.

[126] *See Lyon*, 626 F.3d at 1071.

jurisdictional hurdle from the Quiet Title Act's Indian lands exception, and the district court had jurisdiction over the quiet title actions.

IV. The district court had jurisdiction over the State's condemnation actions because a federal statute expressly authorizes condemnation on allotments.

25 U.S.C. § 357 authorizes State condemnation actions on Native allotments: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."[127]

An Alaska Native allotment condemnation implicates the United States' restriction on alienation that it holds in the Native allotment, thereby making the United States a necessary party to the condemnation action.[128] By authorizing condemnation on allotments in which the United States holds an interest, Congress necessarily waived the United States' sovereign immunity.[129]

In dismissing the State's condemnation actions against the Purdys, the district court apparently concluded that because it found no waiver for the quiet

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127 25 U.S.C. § 357.

128 *See Jachetta v. United States*, 653 F.3d 898, 907 (9th Cir. 2011); *see also Minnesota v. United States*, 305 U.S. 382, 386, 388 (1939).

129 *Minnesota*, 305 U.S. at 388 ("It is true that authorization to condemn confers by implication permission to sue the United States.").

title action, the United States had also not waived its sovereign immunity for condemnation. ER 8-9. The court explained that "irrespective of whether the State seeks to establish a right-of-way under R.S. 2477 or to condemn under § 357, the failure of the United States to have waived its sovereign immunity bars this action as against the Purdy Native allotments." ER 8-9.

The district court erred. The United States has waived its sovereign immunity for the condemnation action against portions of the Purdy allotments. As this Court has explained: "Because § 357 permits condemnation actions that cannot effectively proceed absent the United States, § 357 waives the government's sovereign immunity."[130] 25 U.S.C. § 357 is an independent waiver of the government's sovereign immunity and allows the State's condemnation actions to proceed against the Purdys.[131]

This jurisdiction to condemn under 25 U.S.C. § 357 will not be impaired even if this Court rules against quiet title jurisdiction. While it has been said that through the Quiet Title Act, Congress intended to "provide the exclusive means by which adverse claimants could challenge the United States' title to real

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130 *Jachetta*, 653 F.3d at 907 (citing *Minnesota*, 305 U.S. at 388).

131 *See Yellowfish v. City of Stillwater*, 691 F.2d 926, 927 (10th Cir. 1982) ("[F]ederal courts have jurisdiction under section 357 to condemn rights-of-way over allotted Indian land without secretarial or Indian consent.").

property,"[132] Congress also intended to allow condemnation actions on Native allotments—which by their nature challenge and, even more, remove the United States' title to real property.[133]

While the Quiet Title Act and 25 U.S.C. § 357 may overlap because both involve adjudication of the United States' title to real property, "it is the duty of the courts absent a clearly expressed congressional intention to the contrary, to regard each as effective."[134] This Court has held that 25 U.S.C. § 357 is "clear, plain, unambiguous, and there is no difficulty in determining the Congressional intent."[135] That intent was, for the purpose of condemnation, to remove any special Indian lands protections for allottees.[136] "Congress explicitly afforded no special protection to allotted lands beyond that which land owned in fee already received under the state laws of eminent domain."[137] "Congress placed Indian allottees in the same position as any other private landowner vis-à-vis condemnation actions,

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132 *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 (1983).

133 *See* 25 U.S.C. § 357.

134 *See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001) (explaining the court gives effect to overlapping statutes that reach distinct cases).

135 *Nicodemus v. Wash. Water Power Co.*, 264 F.2d 614, 617 (9th Cir. 1959).

136 *Id.*

137 *S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir. 1982).

with the interest of the United States implicated only to the extent of assuring a fair payment for the property taken and a responsible disposition of the proceeds."[138] While in 1901, when Congress enacted 25 U.S.C. § 357, Congress may have been generally less protective of Indian land than it was when it enacted the Quiet Title Act in 1972,[139] there is no indication that Congress intended to overrule or even limit 25 U.S.C. § 357. As this Court has explained, "the fact that Congress has not amended or repealed section 357 shows that the position of Indian allottees with respect to condemnation actions under state law has not changed."[140] Thus, while the Quiet Title Act may generally provide the means to challenge government title, it does not control condemnations on allotments. The Quiet Title Act has no impact on the State's condemnation actions.

Nor does it matter that the State has claimed, under R.S. 2477, preexisting rights-of-way to the trails it seeks to condemn.[141] If, through quiet title, the district court confirms the State's rights-of-way as they have been pleaded, then there will

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138 *Id.* (citing *Minnesota v. United States*, 305 U.S. 382, 388 (1939)).

139 *See* H.R. Rep. No. 1559 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4547, 4557 (mentioning President Nixon's policy against abridging historical trust relationship between Indians and federal government).

140 *Rice*, 685 F.2d at 356.

141 *See* 26 Am. Jur. 2d *Eminent Domain* § 101 ("[T]he mere fact that one already owns some right or interest in property is not a bar to acquisition by the exercise of eminent domain of the fee title to the same property or of some other increased interest therein.").

be no need for the State to condemn them. But if the court does not confirm the trails, or if parts of the State's claimed trails exceed what the court confirms as preexisting rights-of-way, then condemnation allows the State to secure title to the remainder of the trails; that is, to expand the rights-of-way and compensate the allottees. And even if this Court concludes the district court cannot hear the quiet title claims, then the State's preexisting rights-of-way can be properly confirmed as part of the valuation analysis of the condemnation. That would be no different than a typical condemnation action in which the State seeks to increase the property it owns or to relieve a burden on it.[142] Before determining how much to compensate the servient landowners, the court must determine the precise contours of the State's preexisting right-of-way.[143] When Congress granted the states public rights-of-way under R.S. 2477, it did not force the states to surrender their power of eminent domain.[144] And when Congress authorized condemnation under 25 U.S.C.

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142 *See id.* ("Except where restricted by statute, a right or interest already owned in property may be increased or a burden in respect thereof may be relieved upon good cause shown by the exercise of eminent domain . . . .").

143 *See* 26 Am. Jur. 2d *Eminent Domain* § 259 ("Where land taken by eminent domain is already subject to a servitude, such as an easement held by the public . . . the servitude must, if its existence decreases the market value of the fee, be taken into consideration in determining the amount of the award to be made to the property owner.").

144 *See* The Mining Act of 1866 § 8, 14 Stat. 251, 253 (codified at 43 U.S.C. § 932 (repealed 1976)); *see also City of Milwaukee v. Schomberg*, 52 N.W.2d 151, 169 (Wis. 1952) ("By no form of contract or legislative grant can the state

§ 357, it placed no limits on the type of interests the states could condemn.[145] The State's preexisting R.S. 2477 rights-of-way have no bearing on whether the district court had authority to hear the condemnation actions.

Also, in order to condemn, the State does not need prior consent from the Secretary of the Interior or the allottees.[146] In a reply brief before the district court, the Purdys argued for the first time that the State's condemnation action could not proceed under 25 U.S.C. § 357, but instead should proceed under 25 U.S.C. § 311, which allows states to acquire rights-of-way over allotments by consent from the Secretary of Interior.[147] Dkt. 115 at 15-18. The district court did not address that argument. ER 2-10.

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surrender its right to take any property within the limits of the state when it may be required for the public use.").

[145] 25 U.S.C. § 357. Perhaps the only limit, which is not at issue here, is that condemnation must be "for any public purpose under the laws of the State." *See id.*

[146] *See S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir. 1982) (rejecting argument that to condemn right-of-way, condemning authority should pursue approval from the Secretary of the Interior); *Nicodemus v. Wash. Water Power Co.*, 264 F.2d 614, 617 (9th Cir. 1959) (holding argument that condemning authority must first obtain Secretarial permission was "without merit").

[147] Because the argument was first raised in a reply brief and not mentioned in the Purdys' answer, it was waived and not preserved for appeal. *See* Dkt. 77 at 45-47; Dkt. 87; Dkt. 115 at 15-18; Fed. R. Civ. P. 71.1(e)(3) (explaining that a condemnation defendant waives all objections and defenses not stated in the defendant's answer); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084,1100 n.14 (9th Cir. 2012) ("[A]rguments raised for the first time in a reply brief are waived."); *see also In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir.

Consent is not required for condemnation under 25 U.S.C. § 357. This Court first addressed that issue in *Nicodemus v. Washington Water Power Co.*[148] There a power company successfully condemned an easement over an Indian allotment under 25 U.S.C. § 357.[149] On appeal the allottee pointed out that even though 25 U.S.C. § 357 has no explicit consent requirement, several statutes allowing rights-of-way over Indian lands require approval of the Secretary of the Interior.[150] The allottee argued that the condemnation was void "because the [condemning authority] failed to obtain approval or permission of the Secretary of the Interior before proceeding with the condemnation action."[151] This Court held that argument was "without merit"; it is possible to acquire a right-of-way by either the secretarial consent statutes or by condemning without consent under 25 U.S.C. § 357.[152] This Court again rejected a consent argument in *Southern California*

1989) (explaining that in this circuit, the Court will not consider arguments not properly raised below).

148 *Nicodemus*, 264 F.2d at 617-18.

149 *Id.* at 615.

150 *Id.* at 617-18 (citing 25 U.S.C. §§ 311 (opening highways), 312 (railway, telegraph, telephone lines, townsite stations), 313 (width of right-of-way), 320 (reservoirs or materials), 321 (pipelines), 323 (all purposes)).

151 *Id.* at 617.

152 *Id.* at 617-18 (citing *United States v. Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940)).

Edison Co. v. Rice.[153] This Court explained that in 25 U.S.C. § 357 condemnation actions, Indian allottees are treated just like any other property owner, and the United States' only interest in protecting the allotment is in "assuring a fair payment for the property taken and a responsible disposition of the proceeds."[154] At least two other circuits agree that no consent is required prior to bringing a condemnation action—both of which have been affirmatively cited by this Court.[155]

United States v. Pend Oreille County Public Utility District No. 1 (Kalispel III) appeared to impose a consent requirement,[156] but it did not change the law that no consent is required. In *Kalispel III* a public utility flooded both tribal land and allotted Indian land.[157] In response to an action for trespass and injunction, the public utility sought to enable continued flooding by condemning

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153 *S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir. 1982).

154 *Id.* at 356 (citing *Minnesota v. United States*, 305 U.S. 382, 388 (1939)).

155 *See Minnesota*, 113 F.2d at 774; *Yellowfish v. City of Stillwater*, 691 F.2d 926, 927 (10th Cir. 1982); *see also Rice*, 685 F.2d at 357 (citing *Yellowfish*, 691 F.2d 926; *Minnesota*, 113 F.2d at 773); *Nicodemus.*, 264 F.2d at 618 (citing *Minnesota*, 113 F.2d at 773)).

156 *United States v. Pend Oreille Cnty. Pub. Util. Dist. No. 1 (Kalispel III)*, 135 F.3d 602, 613-14 (9th Cir. 1998).

157 *Id.* at 606-07.

the allotted lands under 25 U.S.C. § 357.[158] But any permanent flooding of the allotted lands would also flood the neighboring tribal non-allotted lands, which could not be condemned.[159] The public utility urged the court to assume that federal authorities would grant it permission to authorize flooding on the tribal lands, and that the court should therefore allow the condemnation of the neighboring allotted lands.[160] *Kalispel III* rejected the condemnation action in part because the utility had no federal license allowing condemnation under a federal power act, but also reasoned that "[t]he consent of the United States is required before the lands can be condemned."[161] *Kalispel III* cited *Rice* for that proposition.[162] But in *Rice*, this Court held the exact opposite: that consent was not

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158 *Id.* at 607.

159 *Id.* ("[A]ny rise in water level would flood both Tribal and allotted land, [so] in any event the rights of the Tribe would be violated.").

160 Fourth Brief on Cross-Appeals for Pub. Util. Dist. No. 1 at 55-56, *United States v. Pend Oreille Cnty. Pub. Util. Dist. No. 1 (Kalispel III)*, 135 F.3d 602 (9th Cir. 1998) (Nos. 95-36289, 96-35022, 96-35045), *available at* 1997 WL 33772529; *see also* Third Brief on Cross-Appeals for Kalispel Indian Tribe at 44-45, *United States v. Pend Oreille Cnty. Pub. Util. Dist. No. 1 (Kalispel III)*, 135 F.3d 602 (9th Cir. 1998) (Nos. 95-36289, 96-35022, 96-35045), *available at* 1997 WL 34651375 ("Any rise in the water level along the reservation would necessarily flood tribal trust lands. . . . Thus, whatever authority there is to condemn the allotted lands would be insufficient to accomplish a lawful occupancy of this Reservation area.").

161 *See Kalispel III*, 135 F.3d at 614.

162 *Id.* (citing *S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir. 1982)).

required.[163] And this Court held consent was not required in *Nicodemus*.[164] The statement in *Kalispel III* must be limited to its unique facts—an attempt to use condemnation to simultaneously occupy condemnable allotment land and non-condemnable tribal land.[165] Moreover, because *Kalispel III* was not decided en banc, it cannot be construed to overrule the holdings in *Nicodemus* and *Rice*.[166] No consent is required for the State's condemnation actions against the Purdys.

Because under 25 U.S.C. § 357, Congress expressly allowed the State to condemn Native allotment land and thus expressly waived the United States' sovereign immunity for condemnation, the district court has jurisdiction to hear the State's condemnation actions against the Purdys.

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163 *Rice*, 685 F.2d at 356-57.

164 *Nicodemus v. Wash. Water Power Co.*, 264 F.2d 614, 617 (9th Cir. 1959) ("Appellant's argument that the order of the district court is void because the appellee failed to obtain approval or permission of the Secretary of the Interior before proceeding with the condemnation action is without merit.").

165 *See, e.g.*, Peter J. Hack & Constance J. Rogers, *Accessing Indian Lands for Oil and Gas Development*, 2008 No. 1 RMMLF-INST Paper No. 6 § III(A)(6) & n.72 (2008) (citing *Kalispel III* as "dicta indicating that consent of the Secretary is needed for *inverse* condemnation actions," and explaining that "[e]xcept perhaps for some instances of inverse condemnation, Secretarial consent is not necessary for a condemnation action").

166 *See Rice*, 685 F.2d at 357 n.6 (explaining *Nicodemus* controls "until such time as an en banc panel of this Court overrules it").

V. The district court has declaratory judgment jurisdiction independent of the other claims because the allotment owners could, and one did, bring a coercive action impacting the State's rights.

The district court dismissed the State's claims for declaratory judgment and held that the Declaratory Judgment Act[167] did not give it subject matter jurisdiction because, it reasoned, the Quiet Title Act "is the exclusive remedy available for determining the existence of a right of way." ER 5. This was error for two reasons. First, the declaratory judgment claims here are appropriately attached to claims that are within the court's jurisdiction.[168] Second, because the defendants could bring a coercive action in federal court, the Declaratory Judgment Act provides an independent source of jurisdiction.[169]

The Declaratory Judgment Act provides that "any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought," where the court is presented with a "case of actual controversy within its jurisdiction."[170] Because, as outlined above, the district court had jurisdiction over the State's quiet title and condemnation claims, it also had jurisdiction to declare the parties' rights

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167 28 U.S.C. § 2201.

168 *See* 28 U.S.C. § 2201(a).

169 *See Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985).

170 28 U.S.C. § 2201(a).

and legal relations under the Declaratory Judgment Act. Because it was error to dismiss the quiet title and condemnation claims, it was also error to dismiss the declaratory judgment claim.

The Declaratory Judgment Act can also provide an independent basis for jurisdiction. This Court has explained that while declaratory judgment generally "does not confer jurisdiction by itself if jurisdiction would not exist on the face of a well-pleaded complaint brought without the use of 28 U.S.C. § 2201," declaratory judgment can stand alone if "the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights."[171] That coercive action must arise under federal law.[172] Here, Tanana Chiefs Conference and Agnes Purdy actually brought a coercive action in federal court to enforce Agnes's rights to her allotment.[173] She sued a miner for using some of the State-owned rights-of-way at issue here and asserted that one of the historical trails mentioned in her allotment certificate was not accepted as a valid R.S. 2477 right-of-way; that she was the only person with an ownership interest in the allotment and the only person with authority to grant access rights; and that the miner had no ability to use

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171 *Janakes*, 768 F.2d at 1093.

172 *Id.* at 1093.

173 *See* Compl. ¶¶ 1, 15-16, 20-23, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Dec. 6, 2012), ECF No. 1.

the right-of-way.[174] Agnes even sought declaratory relief that several of the trails are not public rights-of-way.[175] Anne Lynn Purdy could have brought the same type of suit. The district court concluded that the claims in that private litigation affected the State's rights under R.S. 2477, and stayed those parallel claims concerning the existence of R.S. 2477 rights-of-way pending resolution of this case.[176] Because Agnes brought, and Anne Lynn could have brought, a coercive action in federal court to enforce their rights to the allotments and impact the State's interests in the rights-of-way, the district court had independent declaratory judgment jurisdiction.[177]

While it is said that the Quiet Title Act "provide[s] the exclusive means by which adverse claimants could challenge the United States' title to real

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174 *Id.* ¶¶ 12, 16, 28.

175 *Id.* at 10 ¶ 5. The fact that Purdy attempted to abandon the right-of-way ownership issue in her private suit once this litigation began, does not impact the analysis; the standard is whether she *could* have brought a coercive action. *See* Mem. of Points & Authorities in Support of Mot. for Leave to Amend Compl. 4, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Apr. 25, 2013), ECF No. 22 (moving to amend complaint to remove claim for declaratory judgment that right-of-way was not a public road); *Janakes*, 768 F.2d at 1093 (explaining declaratory judgment can proceed if "defendant could have brought a coercive action").

176 Order Granting Mot. for Stay at Docket 18, at 3, 5, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Aug. 12, 2013), ECF No. 57.

177 *See Janakes*, 768 F.2d at 1093.

property,"[178] that should not bar the independent declaratory judgment jurisdiction. The declaratory judgment actions on the allotments can proceed without the United States. As outlined above, this Court held in *Lyon* that actions to establish interests in Indian lands may proceed without the United States where the Indian "really stands in the shoes of a plaintiff," and should have known that a claim would bring an objection "which could be litigated only as an adversary proceeding with [the Indian] named as the defendant," and where the United States' interests are "shared and adequately represented by" the Indian.[179] Because Agnes's coercive action places her in the shoes of the plaintiff, and because both Purdys adequately represent the United States' interests, the claims against the allotments can proceed without the United States. Therefore the Quiet Title Act does not prevent independent declaratory judgment jurisdiction. The State's declaratory judgment claims can proceed regardless of this Court's rulings on the quiet title and condemnation claims.

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178 *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 (1983).

179 *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1070, 1071 (9th Cir. 2010).

CONCLUSION

For the reasons above, the State respectfully requests that this Court reverse the district court order dismissing the State's claims against Agnes Purdy and Anne Lynn Purdy.

STATEMENT OF RELATED CASES

The State is not aware of any related cases pending before this Court.

There was a related case in the District Court, *Purdy v. Busby*, No. 4:12-cv-00031-RRB, but it is now closed and there is no notice of appeal.[180]

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[180] The parallel litigation settled during the pendency of this appeal. Order Dismissing Case, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, June, 4, 2014), ECF No. 126.

CERTIFICATE OF COMPLIANCE TO FED. R. APP. P. 32(a)(7)(C)

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Dated August 29, 2014.

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ADDENDUM

ADDENDUM CONTENTS

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23 U.S.C. § 317

Appropriation for highway purposes of lands or interests in lands owned by the United States

(a) If the Secretary determines that any part of the lands or interests in lands owned by the United States is reasonably necessary for the right-of-way of any highway, or as a source of materials for the construction or maintenance of any such highway adjacent to such lands or interests in lands, the Secretary shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands which it is desired to appropriate.

(b) If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary that the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State transportation department, or its nominee, for such purposes and subject to the conditions so specified.

(c) If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State transportation department to the Secretary and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated.

(d) The provisions of this section shall apply only to projects constructed on a Federal-aid highway or under the provisions of chapter 2 of this title.

25 U.S.C. § 311

Opening highways

The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.

25 U.S.C. § 357

Condemnation of lands under laws of States

Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

28 U.S.C. § 1291

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 2201

Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, 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, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

28 U.S.C. § 2409a

Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(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.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be--

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term “tide or submerged lands” means “lands beneath navigable waters” as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

43 U.S.C. § 270-1

Original language at 34 Stat. 197

An Act Authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

43 U.S.C. § 932

Original language at 14 Stat. 251, 253

And be it further enacted, that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Alaska Stat. § 09.45.010 (2012)

Action to quiet title

A person in possession of real property, or a tenant of that person, may bring an action against another who claims an adverse estate or interest in the property for the purpose of determining the claim.

Alaska Stat. § 09.45.630 (2012)

Actions for recovery of real property

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 the possession of the property with damages for withholding it; however, recovery of possession from a tenant shall be made under AS 09.45.060 - 09.45.160.

Alaska Stat. § 19.10.015 (2012)

Establishment of highway widths

(a) It is declared that all officially proposed and existing highways on public land not reserved for public uses are 100 feet wide. This section does not apply to highways that are specifically designated to be wider than 100 feet.

(b) Notwithstanding (a) of this section, a municipality may designate the width of a road that is not a part of the state highway system if the municipality maintains the road.

Alaska Stat. § 19.30.400 (2012)

Identification and acceptance of rights-of-way

(a) The state claims, occupies, and possesses each right-of-way granted under former 43 U.S.C. 932 that was accepted either by the state or the territory of Alaska or by public users. A right-of-way acquired under former 43 U.S.C. 932 is available for use by the public under regulations adopted by the Department of Natural Resources unless the right-of-way has been transferred by the Department of Natural Resources to the Department of Transportation and Public Facilities in which case the right-of-way is available for use by the public under regulations adopted by the Department of Transportation and Public Facilities.

(b) The Department of Natural Resources shall conduct the necessary research to identify rights-of-way that have been accepted by public users under former 43 U.S.C. 932 and that have not been previously identified and shall annually report to the legislature by the first day of each regular session of the legislature on rights-of-way that have been identified and that are not listed in this section.

(c) The rights-of-way listed in (d) of this section have been accepted by public users and have been identified to provide effective notice to the public of these rights-of-way. The failure to include or identify a right-of-way under (d) of this section does not relinquish any right, title, or interest the public has in a right-of-way.

(d) The following rights-of-way are identified by the name of the right-of-way and the identification number the right-of-way has been assigned by the Department of Natural Resources in the Historic Trails Database, known as the "RST" number, which contains a complete description of the right-of-way:

RIGHT-OF-WAY NAME	**RST NUMBER**
Chicken—Franklin	0010
North Fork of Fortymile--Big Delta	0379
Ketchumstuk—Chicken	0421

The Mining Act of 1866 § 8
14 Stat. 251, 253 (codified at 43 U.S.C. § 932 (repealed 1976))

And be it further enacted, that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Fed. R. Civ. P. 12(b)

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

Fed. R. Civ. P. 19

Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) *Joinder by Court Order.* If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) *Venue.* If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

Fed. R. Civ. P. 71.1(e)(3)

Condemning Real or Personal Property

(e) Appearance or Answer.

(3) Waiver of Other Objections and Defenses; Evidence on Compensation. A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant--whether or not it has previously appeared or answered--may present evidence on the amount of compensation to be paid and may share in the award.