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

REPLY BRIEF OF STATE OF ALASKA PLAINTIFFS – APPELLANTS

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INTRODUCTION

The district court erred in dismissing the State's claims against the Purdys. Because the State's R.S. 2477 rights-of-way predate the Purdys' use and occupancy—making the rights-of-way fall outside of the Quiet Title Act's Indian lands exception—the court had quiet title jurisdiction.[1] And because Congress has expressly authorized condemnation on allotments, the court had condemnation jurisdiction.[2] The appellees' arguments to the contrary are unpersuasive.

ARGUMENT

I. The district court had quiet title jurisdiction because the R.S. 2477 rights-of-way predate the Purdys' use and occupancy.

In *Bryant* this Court confirmed that when a right-of-way predates an Alaska Native allottee's use and occupancy, the land within the right-of-way is not Indian land.[3] That principle controls here. Because, as pleaded, the State's R.S. 2477 rights-of-way predate the Purdys' use and occupancy, the rights-of-way fall outside

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

2 *See* 25 U.S.C. § 357.

3 *See Bryant*, 182 F.3d at 676.

of the Indian lands exception to the Quiet Title Act[4] and the district court had quiet title jurisdiction over the rights-of-way.

The principle underlying *Bryant* is simple: Use and occupancy by a would-be allottee is without color of law where the State already has a right-of-way.[5] In granting the allotment, the federal government cannot divest the State of its previously granted right-of-way; that is, the government cannot convey a property interest that it no longer possesses.[6] The preexisting right-of-way "necessarily means that the claim that the land at issue is Indian land is not 'colorable,' . . . and there is jurisdiction under the Quiet Title Act."[7]

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[4] 28 U.S.C. § 2409a (allowing the United States to be named in quiet title actions, except regarding "trust or restricted Indian lands").

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

[6] *See id.* ("*Goodlataw* holds that allotments are granted subject to valid existing rights, and a state right of way is such a valid and existing right. It holds further that if the Native use and occupancy commences subsequent to a right of way grant to the state, then relation back cannot save it regardless of the state of affairs at the time of the native allotment application, because 'the qualifying Native use and occupancy must be under color of law.' " (quoting *State of Alaska (Goodlataw)*, 140 IBLA 205, 214 (1997))); *cf.* 23 Am. Jur. 2d *Deeds* § 7 ("One cannot convey an interest greater than one possesses in property, and a conveyance of property is invalid to the extent the seller tries to convey an interest greater than he or she has."); *Allen v. Schultheiss*, 981 A.2d 610, 616 (D.C. 2009) (applying maxim *nemo dat quod non habet*, a person cannot give what the person does not have).

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

A. The fact that an allotment was adjudicated and issued does not convert the State's rights-of-way into Indian land.

The appellees argue that the United States' restrictions on alienation on the Purdy allotments mean that all real property interests within the allotment borders are Indian land. Purdy Br. 26-30; Tanana Chiefs Conference (TCC) Br. 10-12, 16; USA Br. 27-29. They would have this Court hold, as the district court did, that an allotment certificate alone gives the United States a colorable claim that all interests inside the allotment are Indian land. *See* ER 6-7 ("[T]he Purdys clearly have more than a 'colorable' claim to their allotments, in fact they have been issued allotments.") But that misses the distinction in *Bryant*.[8] The question is not whether a Native allotment has been issued, but whether it takes priority over an earlier grant; *Bryant* confirmed that Native allotments do not.[9]

The United States points out that BLM found that the Purdy applications met the requirements for allotments (it found the lands vacant, unappropriated, unreserved, and nonmineral[10]) and that BLM noted that the allotments were subject

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8 *See id.*

9 *Id.* at 673, 676 (citing *Goodlataw*, 140 IBLA at 214).

10 43 U.S.C. §§ 270-1 to 270-3 (repealed Dec. 18, 1971, with savings clause); Act of Aug. 2, 1956, Pub. L. No. 931, 70 Stat. 954 (adding "vacant, unappropriated, and unreserved").

to historical rights-of-way, which it reserved as 25-foot-wide trails.[11] USA Br. 27-28. That, the United States argues, gives it colorable claim that the rights-of-way in the allotments are Indian land. USA Br. 28-29. But in *Bryant* BLM also had approved the allotment and had determined the land was unappropriated despite the preexisting right-of-way.[12] Those findings were not enough to give the United States a colorable basis to assert that the preexisting right-of-way was Indian land.[13] Likewise the Purdy allotment certificates do not provide a colorable basis that the State's preexisting R.S. 2477 rights-of-way are Indian land. *See* ER 42, 48.

The Purdys also suggest that because the State was a party to the allotment adjudication, that adjudication should be "a conclusive and binding determination regarding competing claims to the allotted lands." Purdy Br. 28; *see also* TCC Br. 16. The Purdys made the same argument before the district court in an earlier motion to dismiss (not at issue in this appeal), and the district court correctly rejected it. Dkt. 79; Dkt. 89; Dkt. 101. There, the Purdys argued that the State had

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[11] The Purdys incorrectly assert that the State's position is that the allotments "were subject to the wrong public trails." Purdy Br. 26. Although known by slightly different names, the trails at issue in this litigation are the same as the trails in the certificates or are spurs or alternate routes of those trails. Op. Br. 24 & n.62; ER 74, 77, 79, 87-89. However, as R.S. 2477 rights-of-way, the State has more extensive rights to the trails, including management as 100-foot-wide public highway easements. *See* Order 2665: Rights-of-Way for Highways in Alaska, 16 Fed. Reg. 10,752, 10,752 (Oct. 16, 1951); Alaska Stat. § 19.10.015(a) (2014).

[12] *Bryant*, 182 F.3d at 673-74.

[13] *Id.* at 677.

the opportunity to object during the allotment adjudications, but did not raise the R.S. 2477 rights-of-way, and thus, the Purdys argued, failed to exhaust administrative remedies. Dkt. 79, at 2. The district court rejected that argument because this litigation is not based on reforming the allotment certificates, but on demonstrating that the allotments "are subject to previously established rights-of-way as a matter of law notwithstanding the silence of the document of conveyance." Dkt. 101, at 6.

This Court can also reject the Purdys' argument. Under *Goodlataw*, "allotments are granted subject to valid existing rights, and a state right-of-way is such a valid and existing right."[14] That is true even if the certificate does not mention the right-of-way: "disposal of the underlying fee is subject to the R.S. 2477 easement *regardless of whether or not a reservation is expressed in the conveyance document*."[15] Moreover, BLM expressly refuses to adjudicate R.S. 2477 rights-of-way when it adjudicates allotments.[16] The State therefore had no obligation to assert its rights-of-way when the Purdy allotments were

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[14] *Id.* at 676 (citing *Goodlataw*, 140 IBLA at 214).

[15] *Leo Titus, Sr.*, 89 IBLA 323, 337 (1985). The Purdys are therefore incorrect to argue that rights-of-way must be stated in the allotment certificate. *See* Purdy Br. 27-28.

[16] *Id.* at 337-39 (noting exceptions for administrative necessity and for identifying R.S. 2477 rights-of-way underlying easements reserved under Alaska Native Claims Settlement Act section 17(b); neither exception applied here).

adjudicated. It should have no bearing on this Court's quiet title analysis that R.S. 2477 rights-of-way were not adjudicated in the allotment proceedings.

TCC and the Purdys also conflate the State's land selection during the allotment adjudications with assertions of rights-of-way. TCC Br. 14-16; Purdy Br. 25. In 1982 the State filed a "general purposes grant selection application" under the Alaska Statehood Act,[17] which overlapped with the Purdy allotments. ER 42, 49. The Statehood Act allowed the State to select over 100 million acres of federal public land.[18] Because the Purdy allotment applications were pending in 1982, the selection was denied where it conflicted with the allotments. ER 42, 49. That land selection had nothing to do with the R.S. 2477 rights-of-way.

Moreover, the Purdys argue that all property rights within the allotment boundaries are Indian land because, they assert, Alaska Native allotments are "Indian country." Purdy Br. 28-30. That is a red herring. Indian country is a land status used to determine the applicability of federal, tribal, and state laws.[19] This is

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[17] Alaska Statehood Act of July 7, 1958, § 6(b), Pub. L. 85-508, 72 Stat. 339 (allowing the State of Alaska to select vacant, unappropriated, and unreserved public lands in Alaska).

[18] *Id.*

[19] *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) (explaining that in Indian country, primary jurisdiction "rests with the Federal Government and the Indian tribe inhabiting it"); *see also* Cohen's Handbook of Federal Indian Law § 3.04[1] (2012) (term Indian country "is most usefully

not a dispute over territorial jurisdiction. The Quiet Title Act refers to "trust or restricted Indian lands," not Indian country.[20] The State does not dispute that the United States holds restrictions on alienation on the allotments and that—outside the State's preexisting rights-of-way—the allotments generally are "restricted Indian lands." ER 57 ¶ 15. And even if these areas are Indian country, it does not resolve the core dispute in this case. The Purdys argument that Indian country status converted the State's preexisting rights-of-way into Indian lands would unravel this Court's holding in *Bryant*.[21] Further, it is an open question whether Alaska Native allotments are even Indian country.[22] The criminal statute defining Indian country mentions "Indian allotments," not Alaska Native allotments.[23] The two forms of allotments arose from different statutes in different historical periods and had different effects.[24] The Purdys cite an Interior solicitor's view that the

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defined as country within which Indian laws and customs and federal laws relating to Indians are generally applicable").

[20] 28 U.S.C. § 2409a(a); *see also* Cohen's Handbook of Federal Indian Law § 3.04[1] (2012) (explaining that Congress often uses geographic descriptions other than Indian country).

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

[22] *See Jones v. State*, 936 P.2d 1263, 1265 (Alaska Ct. App. 1997).

[23] 18 U.S.C. § 1151(c).

[24] *Compare* General Allotment Act of Feb. 8, 1887, 24 Stat. 388 (codified at 25 U.S.C. §§ 348-49), *with* Alaska Native Allotment Act of May 17, 1906, 34 Stat. 197 (codified at 43 U.S.C. §§ 270-1 to 270-3) (authorizing the Secretary of the

federal government should manage Native allotments as Indian country, but the solicitor also explained Native allotments' unique status, which militates against them being Indian country: They are homesteads held in restricted fee title, they are not carved out of reservations, and there is "little or no basis" for Alaska tribes to claim territorial jurisdiction over them. Purdy SER 28-34; Purdy Br. 29. In short, "it is far from clear whether Congress meant for Alaska Native allotments to be considered 'Indian Country.' "[25] This Court does not need to, and on this record should not, analyze the allotments' Indian country status.

B. The R.S. 2477 rights-of-way are not materially different from the *Bryant* and *Goodlataw* rights-of-way.

Because allotment does not convert earlier grants to Indian land, the core dispute is whether the State's R.S. 2477 rights-of-way are preexisting grants. The appellees fail to demonstrate that the rights-of-way are not. *See* Purdy Br. 35-38; TCC Br. 12-22; USA Br. 30-36. Just like the Federal Highway Act in *Bryant* and *Goodlataw*, R.S. 2477 granted a property interest to the State.[26] And just like in

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Interior to allot homesteads to Alaska Natives); *see also* David S. Case & David A. Voluck, *Alaska Natives and American Laws* § 4(II)(A)(2) at 115 (3d ed. 2012) ("The General Allotment Act is usually credited with the terrible erosion of the Native American land base, whereas the Alaska Native allotment Act promised a significant increase in Alaska Native land ownership.").

[25] *Jones*, 936 P.2d at 1265.

[26] *See Bryant*, 182 F.3d at 673; *State of Alaska (Goodlataw)*, 140 IBLA 205, 206 (1997); *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 413 (Alaska 1985).

Bryant and *Goodlataw*, those existing rights did not become Indian land with allotment.[27]

1. R.S. 2477 rights-of-way are valid grants.

R.S. 2477 was an offer from the federal government to grant public rights-of-way over public lands.[28] The grant took effect either when there was a positive act by the appropriate public authority or when public use demonstrated acceptance.[29] R.S. 2477 appropriated and conveyed valid property interests; indeed "without that law, the West would never have been settled. Without that law, we would not have the Interstate Highway System. Without that law, we would not really have the unity we have as a nation."[30]

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[27] *Bryant*, 182 F.3d at 676-77; *Goodlataw*, 140 IBLA at 214-15 ("Goodlataw's occupancy did not constitute a 'valid existing right' in 1966 when the right-of-way issued, and the right-of-way was, accordingly, not subject thereto.").

[28] *Dillingham Commercial Co.*, 705 P.2d at 413 ("[R.S. 2477] is one-half of a grant—an offer to dedicate.").

[29] *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996); *Dillingham Commercial Co.*, 705 P.2d at 413; *see also Leo Titus, Sr.*, 89 IBLA 323, 336 (1985). While the United States characterizes the existence of an R.S. 2477 right-of-way as a purely legal question, the analysis involves both factual findings about the property's use and legal conclusions about whether that use demonstrated acceptance. USA Br. 21-22. *Price v. Eastham*, 75 P.3d 1051, 1055 (Alaska 2003). But the district court neither discussed the facts in the State's complaint nor analyzed whether the facts demonstrated acceptance under R.S. 2477. ER 7.

[30] 141 Cong. Rec. S8875-04, 1995 WL 370509 (statement of Sen. Stevens).

The United States attempts to distinguish the rights-of-way in *Bryant* and *Goodlataw* by arguing that those rights-of-way withdrew the land entirely and so prevented allotment, whereas an R.S. 2477 right-of-way would allow the remaining land to be allotted subject to it.[31] USA Br. 35-36. But the *Goodlataw* right-of-way did not prevent allotment—the allotment conveyed subject to it, just like an R.S. 2477 right-of-way.[32] *Goodlataw* involved a state claim to a Federal Highway Act channel change right-of-way.[33] The right-of-way was granted while the land was subject to a power project withdrawal.[34] Although the allottee entered the land before the State received the channel change right-of-way, the allottee's entry was legally barred by the power withdrawal until Congress declared otherwise.[35] Thus, the State's channel change right-of-way predated the allottee's

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[31] *See Titus*, 89 IBLA at 337 (explaining allotments convey subject to R.S. 2477).

[32] *Goodlataw*, 140 IBLA at 215. Although IBLA uses the phrase "subject to" in both *Goodlataw* (discussing a Federal Highway Act right-of-way) and *Titus* (discussing R.S. 2477), the allottee has no legal claim to the fee underlying the right-of-way and acquires no interest in the right-of-way. *See Goodlataw*, 140 IBLA at 214 (explaining state right-of-way not subject to allottee's occupancy); *see also Alaska v. Norton (Bryant II)*, 168 F. Supp. 2d 1102, 1108-09 (D. Alaska 2001) (explaining allotment is void within right-of-way, so allottee has no claim to underlying fee).

[33] *Goodlataw*, 140 IBLA at 206.

[34] *Id.*

[35] *Id.* at 215.

lawful entry.[36] IBLA held that the allotment ultimately "could only properly be approved *subject to* [the] right-of-way."[37] Analyzing *Goodlataw*, this Court recognized that existing state rights-of-way prevent Native use and occupancy on the right-of-way, and that therefore allotments are granted subject to those existing state rights-of-way.[38] Whether a right-of-way entirely prevents allotment depends on its size and scope.[39] Like the right-of-way in *Goodlataw*, the R.S. 2477 rights-of-way here would not invalidate the Purdy allotments in the entirety—only the portion within the State's preexisting rights-of-way.

The appellees also argue that *Bryant* was "statute-specific" because the Federal Highway Act allows land or materials to be "appropriated."[40] USA Br. 32-33; Purdy Br. 37. *Bryant* noted the term *appropriated*, but its reasoning was not statute-specific.[41] The heart of its reasoning was IBLA's holding in *Goodlataw*.[42]

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36 *Id.*

37 *Id.* (emphasis added).

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

39 *See Alaska v. Norton (Bryant II)*, 168 F. Supp. 2d 1102, 1108-09 (D. Alaska 2001) (holding "allotment is void as to all land within the original boundaries of [the state right-of-way]," leaving allottee with possible claim to only 8 acres of 120-acre allotment).

40 23 U.S.C. § 317(b), *cited in Bryant*, 182 F.3d at 677 n.32.

41 *See Bryant*, 182 F.3d at 677 n.32.

It does not matter that R.S. 2477 does not use the word *appropriate*. Nor does it matter that the R.S. 2477 rights-of-way are not surveyed or "memorialized by tangible written documents." *See* Purdy Br. 36. Under R.S. 2477, "rights of way may be procured by individuals or the public without any public record being made thereof."[43] The absence of a conveying document does not invalidate public acceptance of the trails and does not materially distinguish the right-of-way in *Bryant*.

2. The R.S. 2477 rights-of-way predate the Purdys' use and occupancy.

The State has pleaded and is prepared to prove facts showing public acceptance of the four historical trails before the Purdys' use and occupancy. *See* ER 14-19, 77-103; *see also* Op. Br. 7-11. At earliest, Agnes Purdy's allotment interest may relate back to the 1960s[44] and Anne Lynn's may relate back to 1955.

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[42] *Id.* at 677 ("IBLA's decision in *Goodlataw* appears to be on all fours with the case at bar.").

[43] *United States v. Rogge*, 10 Alaska 130, 151 (D. Alaska 1941).

[44] Although Agnes's predecessor in interest, Arthur Purdy, claimed use and occupancy since 1931, the land was actively mined, mineral in character, and unavailable for allotment until sometime in the 1960s. ER 40; *see* Dkt. 103-7, at 12, BLM Administrative Decision, *United States v. Heir of Arthur Purdy, Sr.*, F-13543, at 12 (Sept. 7, 2006) (concluding that as of Arthur's 1971 application the land was nonmineral, but noting mining until the 1960s); *State of Alaska (Mary Sanford)*, 131 IBLA 121,127-28 (1994) (explaining mineral land not available for allotment, and the allottee's preference right cannot relate back to use and occupancy on mineral land). *But see* TCC Br. 14.

ER 40, 47. But the four trails have been in public use since the late 1800s, two of the trails were maintained and improved by the Alaska Road Commission in the 1920s and 1930s,[45] and one of the trails was partly developed during highway construction in the 1950s.[46] ER 79-80, 82, 89, 91, 95-96, 100-01, 141. The State has pleaded that the Chicken to Franklin Trail was accepted by public use in 1896 and by public authorities in 1922; the Chicken Ridge Trail by public use in 1899 and by public authorities in 1923; the Chicken Ridge Alternate Trail by public use in 1886; and the Myers Fork Spur Trail by public use in 1886. ER 125.

The Purdys argue, and TCC suggests, that the rights-of-way could not have been granted to the State because public acceptance predates statehood. Purdy Br. 10 n.33, 36; TCC Br. 18. That argument lacks merit. In 1884 and 1900, Congress made federal mining laws applicable in the Territory of Alaska.[47] Those mining

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[45] The Alaska Road Commission established roads and trails that were necessary to the Territory, were of permanent value, and would not merely reach transitory or insubstantial camps. *See Clark v. Taylor*, 9 Alaska 298, 303 (D. Alaska 1938).

[46] TCC argues that the fact that the major public highway was ultimately constructed on a different route undermines the State's right-of-way claim. TCC Br. 5-6. Alternate routes do not undermine R.S. 2477 rights-of-way; as public rights-of-way they "may be used for any purpose consistent with public travel." *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 415 (Alaska 1985).

[47] District Organic Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24; Act of Congress of June 6, 1900, § 26, 31 Stat. 321, 329.

laws included R.S. 2477, section 8 of the Mining Act of 1866.[48] And the federal court in the Territory recognized that R.S. 2477 rights-of-way could be accepted by public use.[49] Ultimately the Alaska Statehood Act transferred the Territory's public rights-of-way to the State.[50] The fact that the R.S. 2477 rights-of-way predate statehood does not undermine the State's claim.

TCC also argues that the R.S. 2477 rights-of-way were "not perfected before R.S. 2477's repeal." TCC Br. 18, 21; *see also* Purdy Br. 37. But the State has pleaded facts demonstrating acceptance before R.S. 2477's 1976 repeal.[51] ER 125. Litigation or legislation is not needed to perfect R.S. 2477 rights-of-way: The grant is completed by a positive act by public authorities or by public use.[52]

In sum, R.S. 2477 conveyed to the State valid rights-of-way. The State has pleaded facts demonstrating the rights-of-way were accepted by public authorities or public use before the Purdys' use and occupancy. The Purdys therefore have no

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[48] The Mining Act of 1866, § 8, 14 Stat. 251, 253 (codified at 43 U.S.C. § 932 (repealed 1976)); *see Clark*, 9 Alaska at 303.

[49] *Clark*, 9 Alaska at 308 ("The public may, by user, accept the dedication contained in section 2477, R.S.U.S.").

[50] Alaska Statehood Act of July 7, 1958, § 5 (title to property), § 6(k) (grants), Pub. L. 85-508, 72 Stat. 339, 340; *see also Dillingham Commercial Co.*, 705 P.2d at 414-15 (recognizing a pre-statehood R.S. 2477 right-of-way).

[51] *See* 43 U.S.C. § 932 (R.S. 2477) (repealed 1976).

[52] *Dillingham Commercial Co.*, 705 P.2d at 413-14.

claim to the rights-of-way; they are not Indian lands. The district court thus had jurisdiction to quiet title to the preexisting rights-of-way.

II. The district court had condemnation jurisdiction.

In 25 U.S.C. § 357, Congress authorized condemnation on Alaska Native allotments. That authorization waives the United States' immunity from suit.[53] The district court erred in holding it had no condemnation jurisdiction, and the appellees have not persuasively demonstrated otherwise. ER 9; TCC Br. 23-27; Purdy Br. 38-46; USA Br. 50-56.

A. The United States was a named defendant.

The United States acknowledges that 25 U.S.C. § 357 implies permission to sue the United States but asserts that the State failed to name it as a defendant in the complaint. USA Br. 9, 50. That assertion is incorrect.

The record demonstrates that the United States is a condemnation defendant. Count VI is an action seeking condemnation against the "Agnes M. Purdy & Anne L. Purdy Native *Allotments*," and specifically states that entities listed in complaint paragraph 15–21 "have, claim, or . . . may claim an interest in the property." ER 131-32. In paragraph 15, the State asserted that the United States holds restrictions

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[53] *Minnesota v. United States*, 305 U.S. 382, 388 (1939) ("It is true that authorization to condemn confers by implication permission to sue the United States."); *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 alienation on the Native Allotments and listed the United States as a defendant in the litigation generally. ER 57 ¶ 15; *see also* ER 53 (caption). The State served the United States with a notice of condemnation titled, "Notice of Condemnation (*Defendant* United States of America)." Dkt. 5. Moreover, the United States' answer indicates it understood it was a condemnation defendant. *See* US SER 57-62. For each count that the United States believed it was not a defendant it responded in the form: "The allegations contained in paragraph [ ] plead claims against non-federal defendants, and therefore no answer is required." US SER 58 ¶ 315, 59 ¶ 327, 60 ¶ 336. But it did not use that form in responding to condemnation. US SER 61-62. In fact, in response to condemnation the United States "admit[ed] that it has a reserved interest" in both of the allotments. US SER 62 ¶ 352. The United States is a condemnation defendant.

The United States also asserts that the district court dismissed the condemnation action for failing to name the United States as a defendant. USA Br. 19, 50-51. The district court order suggests otherwise. ER 9. Though the court stated that the condemnation count "appears to be directed against the Purdys alone," it did not mention any failure to name the government in its reasoning. ER 9. The court stated only that it lacked jurisdiction because the United States had not waived its sovereign immunity. ER 9. Because the record shows the United States was a named defendant, if the district court held otherwise then it erred.

But even if this Court concludes that the United States was not a named defendant, the proper remedy is not to affirm the dismissal, but to remand with instructions to allow the State leave to amend its complaint.[54]

B. A claim to preexisting rights-of-way does not bar condemnation.

The Quiet Title Act does not bar condemnation under 25 U.S.C. § 357. Through 25 U.S.C. § 357, Congress has authorized states to condemn interests in allotments and has thus authorized a form of litigation that, by its nature, implicates the United States' real property. *See* Op. Br. 41-43. While the Quiet Title Act precludes actions under generally applicable statutes when they implicate the United States' interest in real property, such as the Administrative Procedures Act,[55] the Quiet Title Act should not be read to bar actions implicating federal property that are specifically authorized by Congress.

Pleading a preexisting property interest does not bar condemnation. Condemnation can occur only when the court first determines the interests the State already possesses (a party's right to compensation for a property interest depends on which party owns the interest).[56] The State has not pleaded, as the

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[54] *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires.").

[55] *See Alaska v. Babbit (Bryant)*, 182 F.3d 672, 674-75 (9th. Cir. 1999) (explaining that Quiet Title Act precluded using Administrative Procedures Act claims or officers' suits to challenge federal title).

[56] *See State v. Teller Native Corp.*, 904 P.2d 847, 852 (Alaska 1995).

appellees' assert, that it will not compensate the allottees if it takes more than the rights-of-way it is ultimately determined to own. *See* TCC Br. 23, 25; USA Br. 55; Purdy Br. 46. The State pleaded it owed no compensation based on its claim to the entirety of the asserted R.S. 2477 rights-of-way, but it also pleaded to "take" and "condemn" if less is confirmed. *See* ER 131 ¶¶ 348, 349, 350. The State did not intend to take without compensation. Indeed, at least once before, the State has brought a § 357 condemnation action on a Native allotment to confirm and take a preexisting State easement under a road and pleaded that the easement made no compensation necessary.[57] When the court confirmed the easement but found the road diverged from part of it, the State condemned the divergent portion and paid the allottee.[58] *See* Op. Br. 17. The State pleaded the same here.

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[57] *See* Dkt. 103-4, at 7, 9-11, Amended Compl. ¶¶ 20, 34, 37, 38, *Alaska v. Harrison*, No. A 94-0464-cv (HRH) (D. Alaska, June 23, 1995) (pleading condemnation to "take and confirm" right-of-way and no compensation owed because of preexisting right-of-way and explaining that United States suggested the State plead jurisdiction under § 357).

[58] *See* Dkt. 103-6, at 2, Order on Mot. for Summary J./Valuation 2, *Alaska v. Harrison*, No. A94-0464-cv (HRH) (D. Alaska, June 23, 1995) (explaining State held right-of-way but owed $3000 to acquire road where it diverged from right-of-way); *see also Alaska v. Harrison*, 10 Fed. Appx. 527 (9th Cir. 2001) (affirming same). The *Harrison* orders are unpublished but are referenced here only for factual purposes, to demonstrate the State's intent to plead a taking with compensation if the entirety of the rights-of-way is not confirmed. *See* Circuit R. 36-3(c)(ii).

While the United States argues that *Jachetta* "makes clear [that] § 357 does *not* authorize" proceedings to confirm property interests, *Jachetta* did not address that issue.[59] USA Br. 55. *Jachetta* analyzed an allottee's attempt to use § 357 as a jurisdictional basis to recover damages from the government for allowing gravel extraction on the allotment.[60] Rejecting the allottee's attempted inverse condemnation action, *Jachetta* explained that § 357 authorizes "formal condemnation proceedings in which *a state* seeks to acquire Indian allotments for a public purpose in exchange for monetary compensation."[61] That does not foreclose determining ownership as a predicate to compensation.[62] In fact, this Court has upheld a district court's determination of ownership during a Native allotment condemnation.[63] In *Etalook*, a pipeline company sued to condemn an easement on a Native allotment under § 357; the easement contained an existing pipeline and road.[64] The allottee brought a separate action claiming title to the pipeline and

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59 *See Jachetta*, 653 F.3d at 902, 907.

60 *Id.*

61 *Id.* at 907 (emphasis in original).

62 *See Teller Native Corp.*, 904 P.2d at 852 (analyzing, in condemnation proceeding, which party owned airport improvements because the "right to compensation for the improvements . . . depends on which party owned the improvements").

63 *Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440, 1443, 1444-45 (9th Cir. 1987).

road, and that action was consolidated with the condemnation.[65] The district court condemned the easement and determined that the pipeline and road belonged to the pipeline company.[66] This Court affirmed that in condemning the easement, the company owed the allottee no compensation for the pipeline and road.[67] Determining ownership is a permissible aspect of condemnation proceedings on Native allotments.

Moreover, as a policy matter it would make little sense to limit 25 U.S.C. § 357 to condemnation actions for wholly new rights-of-way, but to not allow condemnation of lands subject to preexisting rights-of-way. Under the appellees' reasoning, the State could condemn and construct a highway across a previously untouched portion of the allotments, but could not condemn a road over pre-existing trails by confirming and (if necessary) expanding or improving its rights-of-way. In allowing states to condemn allotted lands, Congress could not have intended to bar the less intrusive option of condemning lands burdened by preexisting rights-of-way.

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64 *Id.* at 1442.

65 *Id.* at 1443.

66 *Id.*

67 *Id.* at 1444-45.

Finally, the Purdys argue the preexisting rights-of-way make this condemnation a "de facto inverse condemnation," impermissible under *United States v. Clarke*.[68] Purdy Br. 43-46. That argument fails for three reasons. First, inverse condemnation is an action by a landowner to recover compensation for a taking, not an action by a condemning authority.[69] This is not a suit by a landowner for takings damages, and any allegations of takings raised in the Purdys' answering brief were not pleaded and are not the subject of this litigation. *See* Purdy Br. 44-45; ER 2-10; Dkt. 77. Second, the State does not claim title to the rights-of-way by way of post-allotment entry. The State asserts that (per R.S. 2477) its interests predate the allotments, and to the extent the existing interests are inadequate, it seeks to gain title through formal condemnation. Third, this Court rejected an argument identical to the Purdys' in *Etalook*, and explained that physical presence on an allotment does not convert condemnation proceedings into an action for inverse condemnation.[70] The State has pleaded a valid formal condemnation.

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68 *United States v. Clarke*, 445 U.S. 253, 258-59 (1980).

69 *Id.* at 257; *see also* 4 Tiffany Real Prop. § 1254 (3d ed.) ("Eminent domain refers to a legal proceeding in which the government asserts its authority to condemn property, whereas inverse condemnation is a shorthand description of the manner in which a landowner recovers just compensation for taking of his or her property when condemnation proceedings have not been instituted.").

70 *Etalook*, 831 F.2d at 1443-44.

C. The United States' consent is not needed to condemn.

The State does not need to secure the United States' consent to condemn. The weight of authority supports that.[71] In arguing consent is needed, the Purdys and TCC raise no argument not addressed in the State's opening brief—they rely on language in *Kalispel III* that should be limited to its unique facts: an attempt to use condemnation to simultaneously occupy condemnable allotment land and non-condemnable tribal land.[72] Purdy Br. 38-41; TCC Br. 24-25; *see* Op. Br. 45-49.

Tellingly, the United States (the party whose consent is allegedly needed) chose not to argue that consent is required. USA Br. 50-56. Congress has authorized condemnation on allotments; no other federal consent is needed.

Because 25 U.S.C. § 357 authorizes condemnation on allotments, the district court had condemnation jurisdiction.

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[71] *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"); *United States v. Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940); *Yellowfish v. City of Stillwater*, 691 F.2d 926, 927 (10th Cir. 1982); *see also Transok Pipeline Co. v. Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977) ("Undoubtedly Congress considered the safeguards available in federal judicial proceedings to be sufficient so that the permission of the Secretary was not required.").

[72] *See United States v. Pend Oreille Cnty. Pub. Util. Dist. No. 1 (Kalispel III)*, 135 F.3d 602, 606-07 (9th Cir. 1998).

III. Coercive action by TCC and Agnes Purdy also allows this case to proceed.

A. The court can quiet title without the United States.

Because Agnes Purdy and TCC first sued a member of the public for using portions of the rights-of-way and asserted that the trails are not public rights-of-way,[73] and because Anne Lynn Purdy could have brought the same litigation and is aligned with Agnes and TCC, the Court can analogize this case to *Lyon*, where a suit over a right-of-way on Indian land proceeded without the United States because the defendant tribe first asserted exclusive use of the right-of-way.[74] Op. Br. 34-40.

The United States asserts this argument is waived because it was not raised in the district court. USA Br. 37. The United States is correct that the State did not cite *Lyon* before the district court. *See* Dkt. 102. But this Court may still address the argument. While this Court does not generally review arguments raised for the first time on appeal, it will review purely legal issues where the opposing party will suffer no prejudice.[75] Although the Court reviews joinder decisions for abuse of

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[73] *See* Compl. ¶¶ 1, 12, 15-16, 20-23, 28, & 10 ¶ 5, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Dec. 6, 2012), ECF No. 1. That parallel suit 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.

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

[75] *Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir. 2007).

discretion, the joinder decision involves underlying legal conclusions.[76] The construction and applicability *Lyon* to this case are legal issues. And reviewing the *Lyon* argument does not prejudice the opposing parties. The parties have had an opportunity to respond to *Lyon* in their appellate briefing. And the facts relevant to the *Lyon* argument—the suit by Agnes Purdy and TCC—were raised below in the context of declaratory judgment, and the district court took judicial notice of the parallel suit. Dkt. 102, at 13-16; Dkt. 107, at 2 n.3. Moreover, the district court cited and rejected *Lyon* in the order under appeal.[77] ER 8 n.21. This Court can review the *Lyon* argument.

On the merits, the United States argues that proceeding without it is undercut because the Quiet Title Act claim (Count I) is brought solely against the United States. USA Br. 44; ER 124-26. But in bringing the parallel litigation TCC was appearing under contract with the Bureau of Indian Affairs to act in *parens patriae* on behalf of Agnes Purdy.[78] Thus TCC adequately represents the United States' interests.[79] Moreover, the district court did not solely dismiss Count I; it dismissed

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[76] *Lyon*, 626 F.3d at 1067.

[77] *See Raich*, 500 F.3d at 868 n.18 (explaining benefit of district court's analysis).

[78] *See* Dkt. 107, at 2 n.3; Compl. ¶ 14, *Purdy v. Busby*, No. 4:12-cv-00031-RRB (D. Alaska, Dec. 6, 2012), ECF No. 1.

[79] *See Lyon*, 626 F.3d at 1071 (noting government's interests were shared and represented by tribe).

the complaint in its entirety against the Purdys, including the quiet title under state law, recovery of possession, declaratory judgment, and condemnation counts.[80] ER 9; *see* ER 124-32. Even if *Lyon* would not allow the federal Quiet Title Act claim to proceed without the United States, the other counts could proceed.

B. The district court had independent declaratory judgment jurisdiction.

The district court had declaratory judgment jurisdiction in tandem with the quiet title and condemnation counts.[81] And the court had independent declaratory judgment jurisdiction because the defendants could bring (and Agnes Purdy and TCC did bring) a coercive action in federal court.[82] Op. Br. 50-53.

The Purdys suggest that the State raised this argument for the first time on appeal. Purdy Br. 47. That is incorrect. The State raised the argument in briefing on the Purdys' motion to dismiss. Dkt. 102, at 13-16.

TCC argues that the coercive action reasoning in *Janakes* has been abandoned in *Flamingo Industries*.[83] TCC Br. 29. But *Flamingo Industries*

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80 Alaska Stat. § 09.45.010 (2014) (quiet title); Alaska Stat. § 09.45.630 (2014) (recovery of possession); 28 U.S.C. § 2201 (declaratory judgment); 25 U.S.C. § 357 (condemnation).

81 *See* 28 U.S.C. § 2201(a).

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

83 *Flamingo Indus. v. U.S. Postal Serv.*, 302 F.3d 985 (9th Cir. 2002), *rev'd on other grounds*, 540 U.S. 736 (2004).

analyzed a statute allowing suits against the Postal Service—it did not discuss the Declaratory Judgment Act and did not discuss *Janakes*'s declaratory judgment reasoning.[84] *Flamingo Industries* has no bearing on the district court's declaratory judgment jurisdiction.

CONCLUSION

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

Dated February 4, 2015.

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[84] *Id.* at 995-96 (discussing 39 U.S.C. § 409 and *Janakes*'s holding that § 409 gave no substantive right to sue, but not discussing 28 U.S.C. § 2201(a)).

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

I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 6,352 words.

Dated February 4, 2015.

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ADDENDUM

ADDENDUM CONTENTS

Statutes

Court Rules

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. § 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. § 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.

Amended by Act of Aug. 2, 1956 § (b) Pub. L. No. 931, 70 Stat. 954

That the Act of May 17, 1906 (34 Stat. 197; 48 U.S.C. 357), is hereby amended—
. . .
(b) by inserting before the word “nonmineral” in the first sentence thereof the following: “vacant, unappropriated, and unreserved” . . . .

43 U.S.C. § 932

Original language at 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.

Act of Congress of June 6, 1900, § 26
31 Stat. 321, 329

The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the District of Alaska . . . .

Alaska Stat. § 09.45.010 (2014)

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 (2014)

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 (2014)

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 Statehood Act of July 7, 1958, §§ 5, 6(b), (k)
Pub. L. 85-508, 72 Stat. 339

Sec. 5.
The State of Alaska and its political subdivisions, respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.

Sec.6
(b) The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: *Provided*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the lands so occupied . . . .

(k) Grants previously made to the Territory of Alaska are hereby confirmed and transferred to the State of Alaska upon its admission.

District Organic Act of May 17, 1884, ch. 53, § 8
23 Stat. 24

Sec. 8.
That the said district of Alaska is hereby created a land district . . . . [A]nd the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President . . . .

Fed. R. Civ. P. 15

Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence

and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the United States. When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original

pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.