

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

CAREY MILLS

Plaintiff,

vs.

UNITED STATES OF AMERICA; KEN SALAZAR, in his capacity as Secretary of the Department of the Interior; JULIA DOUGAN, in her capacity as Acting State Director, Alaska State Office; MARK FULLMER, in his capacity as Supervisor Land Transfer Specialist, Division of Land, Alaska State Office, ROBERT W. SCHNEIDER, in his capacity as District Manager, Fairbanks District Office; LENORE HEPLER, in her capacity as Field Manager, Eastern Interior Field Office; SCOTT WOOD; DOYON LIMITED; and HUNGWITCHIN CORPORATION,

Defendants.

Case No. 4:10-cv-00033-RRB

**ORDER REGARDING MOTIONS AT
DOCKETS 155, 156, and 160**

I. BACKGROUND

A. Nature of Action

Plaintiff Carey Mills has brought an action seeking declaratory relief and to quiet title in property commonly referred to as the "Forty Mile Station-Eagle Trail" (a/k/a "RST 1594" in the

ORDER RE: MOTION AT DOCKETS 155, 156, and 160 - 1
4:10-cv-00033-RRB

Alaska State file system) (hereinafter referred to as the "Forty Mile Trail") against the United States; Ken Salazar, Secretary of the Department of the Interior ("DOI"); Julia Dougan, State Director, Alaska State Office, Bureau of Land Management ("BLM"); Robert W. Schneider, District Manager, Fairbanks District Office, BLM; and Leonore Heppler, Field Manager, Eastern Interior Field Office, BLM (collectively "Federal Defendants"), and Scott Wood, Doyon Ltd., and Hungwitchin Corp. (Village of Eagle) (collectively "Non-federal Defendants").^{1/}

The facts underlying Plaintiff's claims and the interests of the parties in the property that is the subject of this action is set forth in the Court's prior Tentative Order Regarding Pending Motions^{2/} and are not repeated here.

B. Prior Order

In the Amended Complaint that immediately preceded the Third Amended Complaint Plaintiffs alleged three counts.

Count I. In their first count, Plaintiffs sought declaratory or monetary relief against all Defendants under six separate claims.

^{1/} This action was originally initiated by Carey Mills and Diversified Mining Ventures, LLC. Diversified Mining is not a party to the Third Amended Complaint.

^{2/} Docket 126 at 3-6 (addressing the Motions at Dockets 19, 71, 73, 74, 77, 79, 104, 121, and 125).

In the First Claim for Relief, ostensibly brought solely against the Federal Defendants, Plaintiffs appeared to seek to quiet title to the Forty Mile Trail.

The Second Claim for Relief sought a declaration that the property interests of the Non-federal Defendants were subject to the Forty Mile Trail right-of-way.

The Third Claim for Relief sought a declaration that the property interests of the Non-Federal Defendants conflicted with the State-owned Forty Mile Trail right-of-way.

The Fourth Claim for relief claimed a right of access via the Forty Mile Trail in themselves and the general public across the land owned by the Non-Federal Defendants.

The Fifth Claim for Relief claimed that the Defendants conspired to deny them access to their mining claims via the Forty Mile Trail in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Articles 1, 7, and 16 of the Alaska Constitution, thereby causing them damages in excess of \$100,000.

The Sixth Claim for Relief claimed a right-of-way over Wood's unpatented federal mining claim under the 1872 Mining Act, 30 U.S.C. § 41.

Count II. In their second count, Plaintiffs sought declaratory relief to compel the Federal Defendants to amend the conveyances to

Doyon, Ltd. and Hungwitchin Corp. to include the reservation of a right-of-way for the Forty Mile Trail.

Count III. In their third count, Plaintiffs sought declaratory and injunctive relief against Scott Wood to compel Wood to recognize Plaintiffs' right-of-way via the Forty Mile Trail across Wood's unpatented mining claim under 30 U.S.C. § 41.

The prior Orders addressed eight motions attacking the Amended Complaint.^{3/} Two Motions to Dismiss by Defendant Scott Wood; three Motions for Summary Judgment by Plaintiffs (one each as against the Bureau of Land Management, Doyon/Hungwitchin, and Wood); a Motion to Dismiss by the Federal Defendants; a Motion to Dismiss by Defendant Doyon, joined by Hungwitchin; and a Motion by Plaintiffs to add the State of Alaska as an involuntary plaintiff.

The Court denied Plaintiffs' Motions for Summary Judgment and to add the State of Alaska as an involuntary plaintiff. The Court granted the Motions of Doyon/Hungwitchin and the Federal Defendants. All other Motions were denied as moot.

The Court dismissed without leave to amend Plaintiffs' Fifth Claim in its First Count as against the Federal Defendants in its entirety and their Second Count in its entirety. All other claims were dismissed with leave to amend consistent with the Court's Order.

^{3/} Dockets 126, 141.

Although it granted leave to amend, the Court also held that: (1) Plaintiffs lacked prudential standing to assert an R.S. 2477 right-of-way; (2) 30 U.S.C. § 41 does not apply under the facts of this case; and (3) the conspiracy claim failed to state facts sufficient to warrant the granting of relief.

C. Third Amended Complaint

In his Third Amended Complaint Plaintiff asserts three counts containing ten claims for relief. Count One asserts six claims for relief; Count Two three claims for relief; and Count Three a single claim for relief.

Count One. In his First Claim for Relief as against the Federal Defendants, Plaintiff seeks a declaration that he is entitled to a right-of-way via the Forty Mile Trail across federal lands.

The Second Claim for Relief, also against the Federal Defendants, seeks to quiet title in the State in the Forty Mile Trail.

The Third Claim for Relief, also against the Federal Defendants, seeks to establish an easement by necessity over the Forty Mile Trail.

In his Fourth Claim for Relief as against the Non-Federal Defendants, Plaintiff seeks to enforce the rights of the State of Alaska in and to the Forty Mile Trail.

The Fifth Claim for Relief, also against the Non-Federal Defendants, seeks to quiet the State's title in the Forty Mile Trail, i.e., that the property interests of the Non-Federal defendants are subject to the Forty Mile Trail right-of-way.

The Sixth Claim for Relief, also against the Non-Federal Defendants, seeks as an alternative to establish a right in the general public to traverse the Forty Mile Trail right-of-way.

In addition to the declarations of the rights in the Forty Mile Trail, Plaintiff seeks damages for the loss of rent and profits not to exceed \$10,000 from each of the Defendants.

Count Two. In his First Claim for Relief, Plaintiff seeks the right to traverse the Forty Mile Trail right-of-way over Wood's mining claim.

The Second Claim for Relief seeks to void Wood's mining claim.

The Third Claim for Relief seeks to recover monetary damages from Wood for interference with Plaintiff's right of access across Wood's invalid mining claim in the amount of more than \$100,000 in actual damages for lost rent and profits and more than \$100,000 in punitive damages.

Count Three. In his First Claim for Relief, Plaintiff claims that the Defendants conspired to deny him access to his mining claims via the Forty Mile Trail in violation of the Fifth and Fourteenth Amendments to the United States Constitution and

Articles 1, 7, and 16 of the Alaska Constitution, thereby causing Plaintiff damages. In addition to seeking a declaration that the right-of-way over the Thirty Mile Trail be recognized, Plaintiff seeks \$1.00 in compensatory damages and punitive damages in the amount of \$1,000,000.

The central gravamen of the Third Amended Complaint, upon which all of Plaintiff's claims depend, is the existence of a R.S. 2477 right-of-way over the Forty Mile Trail. In the absence of a valid right-of-way over the Forty Mile Trail, Plaintiff's entire action fails. Thus, unless Plaintiff can establish that the State of Alaska holds title to the Forty Mile Trail, he cannot prevail.

II. PENDING MOTIONS

Pending before this Court are three motions. At Docket 155 the Federal Defendants filed a Motion to Strike the Third Amended Complaint or, in the Alternative, Dismiss; at Docket 156 Defendant Doyon Ltd. filed a Motion to Dismiss, which Defendant Hungwitchin Corp. (Village of Eagle) joined at Docket 158; and at Docket 160 Defendant Scott Wood filed a Motion to Dismiss the Third Amended Complaint. Plaintiff has opposed the motions. The Federal Defendants and Doyon have replied and Wood's time to reply has lapsed. The motions are now ripe for decision.

Plaintiff has requested oral argument. The Court has determined that oral argument would not materially assist in the determination of the pending motions. Accordingly, the request for oral argument is denied and the motions are submitted on the moving and opposing papers.

III. APPLICABLE STANDARD

A. Rule 12 Motions

Rule 12 provides in relevant part:

(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;

* * * *

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

* * * *

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.

* * * *

(f) MOTION TO STRIKE. The Court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own motion; or

(2) on motion made by a party either before responding to a pleading or, if a response is not allowed, within 21 days of being served with the pleading.

In general, on a motion to dismiss under Rule 12(b), all well pleaded factual allegations are taken as true and construed in the light most favorable to the non-moving party.^{4/} A motion to dismiss for lack of subject matter jurisdiction is not, however, restricted to the face of the pleadings.^{5/} Because jurisdictional attacks may be either facial or factual, a federal court may consider declarations or other admissible evidence bearing on subject-matter jurisdiction without converting the case to one under summary judgment.^{6/} This Court must also consider the complaint in its entirety, as well as documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.^{7/}

Whether an action should be dismissed with or without prejudice is within the discretion of the court.^{8/} The discretion, however, is not absolute and leave to amend should be granted unless the court "determines that the pleading could not possibly be cured by the allegation of other facts."^{9/}

^{4/} *ASW v. Oregon*, 424 F.3d 970, 974 (9th Cir. 2005).

^{5/} *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

^{6/} *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

^{7/} *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

^{8/} *United States ex rel. Lee v. SmithKiline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001).

^{9/} *Id.* at 1052 (internal quotation marks and citation (continued...))

B. Subject Matter Jurisdiction

1. In General

Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which may not be expanded by judicial decree. It is presumed that a cause lies outside this limited jurisdiction, and the burden of establishing jurisdiction rests upon the party asserting jurisdiction.^{10/} The lack of subject-matter jurisdiction is brought by motion.^{11/} A motion under 12(b)(1) may be brought at anytime,^{12/} and cannot be waived or conferred by consent.^{13/} Because a court always has a duty to examine its own subject-matter jurisdiction,^{14/} it may determine the question *sua sponte*.^{15/} However, subject-

^{9/} (...continued)
omitted); see Fed. R. Civ. P. 15(a) (providing that leave to amend should be freely granted "when justice so requires"); *Foman v. Davis*, 371 U.S. 178, 182 (1962) (Rule 15(a)'s mandate "is to be heeded.").

^{10/} *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

^{11/} Fed. R. Civ. P. 12(b)(1).

^{12/} Fed. R. Civ. P. 12(h)(3); see *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 (9th Cir. 1988).

^{13/} *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 26 (1989), overruled on other grounds by *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. Luong*, 627 F.3d 1306, 1310 (9th Cir. 2010).

^{14/} *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990).

^{15/} See *Sissoko v. Rocha*, 440 F.3d 1145, 1154-55 (9th Cir. 2006).

matter jurisdiction is ordinarily determined on the facts that exist at the time the complaint is filed; subsequent changes can neither confer nor defeat subject-matter jurisdiction.^{16/}

2. Diversity Jurisdiction

In this case, Plaintiff, an Alaska domiciliary, has brought an action against Scott Wood, a Washington domiciliary, for compensatory damages of \$100,000. Thus, this Court has diversity jurisdiction.^{17/}

3. Federal Question/Supplemental Jurisdiction

This Court also has original jurisdiction over Plaintiff's federal law claims,^{18/} and supplemental jurisdiction over Plaintiff's related state law claims and the joinder of non-diverse defendants.^{19/} To the extent that Plaintiff's claims are based upon on R.S. 2477 does not, however, confer federal subject matter jurisdiction.^{20/}

4. Sovereign Immunity/Exhaustion of Remedies

Sovereign immunity is an important limitation on the subject matter jurisdiction of federal courts. The United States may only

^{16/} *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.4 (1992); *Dunmore v. United States*, 358 F.3d 1107, 1113 (9th Cir. 2004).

^{17/} 28 U.S.C. § 1332(a).

^{18/} 28 U.S.C. § 1331.

^{19/} 28 U.S.C. § 1367.

^{20/} See *Standage Ventures, Inc. v. Arizona*, 499 F.2d 248, 250 (9th Cir. 1974).

be sued to the extent that it has waived its sovereign immunity.^{21/} A waiver of sovereign immunity is strictly construed, in terms of its scope, in favor of the sovereign.^{22/} Exhaustion of remedies, part of sovereign immunity, is also jurisdictional.^{23/} Exhaustion may also be addressed by the court *sua sponte*.^{24/} Plaintiff sues the Federal Defendants solely in their official capacity. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."^{25/} "If the statute of limitations has run on a waiver of sovereign immunity, federal courts lack jurisdiction."^{26/}

5. Validity of Mining Claims

The Department of the Interior has plenary authority over the administration of public lands, including minerals on those lands.^{27/} Consequently, "the Department of the Interior has primary jurisdiction to determine the validity of mining claims on public

^{21/} *Vacek v. United States Postal Service*, 447 F.3d 1248, 1250 (9th Cir. 2006).

^{22/} *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999).

^{23/} *Vacek*, 447 F.3d at 1250.

^{24/} *See Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 673 (9th Cir. 1993).

^{25/} *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994).

^{26/} *Shranak v. Castenada*, 425 F.3d 1213, 1216 (citing *Block v. North Dakota*, 461 U.S. 273, 292 (1983)).

^{27/} *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963).

lands."^{28/} The Department of the Interior is entrusted with the function of making the initial determination, subject to judicial review, as to the validity of claims against mineral lands.^{29/} The Department is fully empowered to determine whether a claim, such as the one before this Court, is valid and, if it finds the claim invalid, the Department may declare the claim null and void.^{30/}

6. Standing

Standing to bring an action is an important predicate in many law suits brought against governmental agencies. Standing has two components—constitutional and prudential—both of which must be present.

In order to have constitutional standing to bring an action a person must show: (1) it has suffered an injury in fact that is concrete and particularized and is actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by

^{28/} *United States v. Bagwell*, 961 F.2d 1450, 1453-54 (9th Cir. 1992) (citing *Foremost Int'l Tours v. Qantas Airways*, 525 F.2d 281, 286-87 (9th Cir. 1975)); *United States v. Haskins*, 505 F.2d 246, 253 (9th Cir. 1974); *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 834 (9th Cir. 1963) ("administrative determination should precede adjudication in the courts").

^{29/} *Bagwell*, 961 F.2d at 1454 (quoting *Adams v. United States*, 318 F.2d 861, 866 (9th Cir. 1963)).

^{30/} See *Best*, 371 U.S. at 337 (quoting *Cameron v. United States*, 252 U.S. 450, 459-60 (1920)).

a favorable decision.^{31/} This not a mere pleading requirement. The party seeking to invoke federal jurisdiction has the burden of proving each element by competent evidence.^{32/} Normally, a person does not have standing to assert the legal rights of another.^{33/} A plaintiff must also demonstrate standing for each form of relief requested. That is, a plaintiff may have standing to obtain damages but not equitable relief or vice versa.^{34/}

Prudential standing goes to the question of whether the right invaded is a legal right—one of property, arising out of a contract, protected against tortious invasion, or founded on a statute that confers a privilege.^{35/} With regards to prudential standing, it is sufficient if the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected.^{36/}

To have standing, Plaintiff must have a “concrete and particularized” injury that is more than a “mere general

^{31/} *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992).

^{32/} *Id.* at 561.

^{33/} *Pony v. County of Los Angeles*, 433 F.3d 1138, 1146–47 (9th Cir. 2006)

^{34/} *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)

^{35/} *Ass’n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

^{36/} *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 492 (1998).

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

C. Scope of R.S. 2477

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

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

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

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

^{40/} 43 U.S.C. § 1769.

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

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

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

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

Whether a right of way has been established is a question of state law.^{45/} The scope of an R.S. 2477 right-of-way is also

^{42/} *Lyon*, 626 F.3d at 1077 (emphasis in the original).

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

^{44/} *Id.*

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

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

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

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

^{45/} (...continued)
United States v. Oklahoma Gas & Elec. Co., 318 U.S. 206, 209-10 (1943)).

^{46/} *Sierra Club*, 848 F.2d at 1079-83.

^{47/} *Standage Ventures*, 499 F.2d at 250.

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

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

^{50/} *Hamerly*, 359 P.2d at 123.

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

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

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

^{51/} Alaska Stat. § 19.45.001; *cf.* 48 U.S.C. § 321d (similar definition).

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

^{53/} *Hamerly*, 359 P.2d at 124; *see also Dillingham*, 705 P.2d at 414.

^{54/} *Dillingham*, 705 P.2d at 414.

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

IV. DISCUSSION

A. Prudential Standing

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

^{55/} Docket 126 at 36-37.

^{56/} *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993).

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

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

to circumvent the prior holding by asserting that he is bringing this action as a "private attorney general." The Court disagrees.

In order to proceed as a "private attorney general" to enforce the rights of the State, Plaintiff must establish that he is authorized by the statutory provision to bring a private cause of action to enforce its provisions.^{54/} It does not appear that R.S. 2477 confers any right to bring a private cause of action. But perhaps more importantly, Plaintiff in this case is not an attorney but, rather an individual layperson appearing *pro se*. No court has ever permitted a layperson appearing *pro se* to act as a "private attorney general" in vindicating a right held by a state as a governmental entity, as opposed to a right held by the public in general, and this Court declines to extend that concept to a layperson appearing *pro se*.^{55/}

^{58/} (...continued)
v. United States, 55 F.3d 1388, 1393 (9th Cir. 1995); see also *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

^{54/} See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 285-93 (2001); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assn'n*, 453 U.S. 1, 13-14 (1981); *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1061 (9th Cir. 2011).

^{55/} For an exhaustive discussion of the concept of private attorneys serving as private attorneys general see, e.g., William B. Rubenstein, *On What a "Private Attorney General" is—And Why it Matters*, 57. Vand. L. Rev. 2129 (2004). The Court also notes that the concept of a private attorney general generally arises in the context of the award of attorney's fees to a party who vindicates a right that: (1) benefits a large number of people; (2) requires
(continued...)

This Court's position is further supported by the position of the State of Alaska as stated by its Attorney General in opposing the joinder of the State in this action.

The state's notice to the Department of Interior expresses the state's belief that the RS 2477s included within that notice, including the trail that is the subject of this case, are in fact valid existing rights-of-way that were accepted and used under the terms of the federal grant. The state is going forward with researching the historical establishment and use of those and other trails within the entire Fortymile District. The Alaska Department of Natural Resources has been aggressively gathering information and documentation that is necessary to firmly establish the state's title to those rights-of-way, and has spent many weeks and man-hours on the ground in the Fortymile area this past summer. However, it is up to the state, after an evaluation of all the factors, including cost and benefits to the state and its citizens, to determine when it is ready to file a quiet title action and on which trail or trails.

More importantly, when the state files an action to quiet title to an RS 2477 right-of-way, such an action must be against the United States in order to fully establish the state's rights to such trail. The Tentative Order reflects that the quiet title action against the United States will be dismissed because the United States has not yet disputed title to the trail and, therefore, there is no actual case or controversy of which the court can take jurisdiction. Simply joining the state will not change this ruling. The current status of this case would prevent a full adjudication of the state's interests in the trail because the United

^{55/} (...continued)

private enforcement; and (3) is of societal importance. See Ann K. Wooster, *Private Attorney General Doctrine—State Cases*, 106 A.L.R. 5th 523 (2003); *State v. Native Village of Nunapitchuk*, 156 P.3d 389 (Alaska 2007) (addressing public interest litigant attorney's fees under Alaska R. Civ. P. 82); *Akiak Native Community v. United States Env'tl. Prot. Agency*, 625 F.3d 1162, 1168-71 (9th Cir. 2010) (same).

States is dismissed and the only remaining claims are against the non-federal defendants for access. Forcing the state to join as an involuntary plaintiff at this point will not prevent the United States from subsequently denying access on the trail, thus forcing additional, duplicative, and wasteful litigation in the future. The state cannot and should not be an involuntary plaintiff in this case.^{56/}

In addition, any decision this Court might render, to the extent it is adverse to the state's ultimate position, would not be binding on the State. Thus, in a very real sense, in this case the Court would be doing nothing more than rendering an advisory opinion on the validity of the Forty Mile Trail. This, the Court may not do.^{57/} This Court is not inclined to adjudicate the rights of the State or the general public under circumstances where the Attorney General has expressly indicated the State declines to do so.^{56/}

That being said, Plaintiff is not barred from asserting his right to use the route traversed by the Forty Mile Trail as a member of the public without establishing the existence of a state-owned R.S. 2477 right-of-way.

^{56/} Docket 134 at 2-3.

^{57/} See *Camreta v. Greene*, 131 S. Ct. 2020, 2037-38 (2011).

^{56/} As noted in the Court's earlier order, this action raises a serious question concerning the merits of the R.S. 2477 claim—whether the patents issued to Doyon and Hungwitchin extinguished the right of the State to accept the R.S. 2477 grant. Docket 126 at 38. Plaintiff to date has not shown that he has sufficient legal acumen to adequately address this complex question.

B. Federal Defendants' Motion to Strike/Dismiss - Docket 155

The Federal Defendants have moved to strike the Third Amended Complaint as against them on two bases: (1) that the Third Amended Complaint exceeds the bounds set by the Court in its prior Orders; or (2) alternatively, the claims still fail to overcome the legal barriers recognized by the Court in its prior Orders. For the reasons that follow, the Court agrees.

In his First Claim for Relief Plaintiff contends that he is entitled to a declaration that the property interests of the Federal Defendants are subject to the State of Alaska's right-of-way created by R.S. 2477 over the Forty Mile Trail under 28 U.S.C. § 2201 (Declaratory Relief). Plaintiff's Second Claim for Relief also claims he is entitled to a declaration that the property interests claimed by the Federal Defendants are subject to the State of Alaska's right-of-way created by R.S. 2477 over the Forty Mile Trail under 28 U.S.C. §§ 2409a (Quiet Title), and 2201. Plaintiff's Third Claim for Relief also claims he is entitled to a declaration that the property interests claimed by the Federal Defendants are subject to the State of Alaska's right-of-way created by R.S. 2477 over the Forty Mile Trail under 28 U.S.C. § 1367 (Supplemental Jurisdiction). All three claims are based upon a single premise: that the State of Alaska holds a R.S. 2477 right-of-way over the Forty Mile Trail that Plaintiff can enforce

for his own benefit. In addition, in all three claims Plaintiff apparently seeks damages of \$10,000.00 for loss of rents and profits from the Federal Defendants under an unspecified legal theory.^{57/}

Plaintiff's Third Count is nothing more than the Fifth Claim for Relief in the Amended Complaint that was dismissed, without leave to amend, as against the Federal Defendants for lack of subject matter jurisdiction.^{58/}

1. Count One - First Claim For Relief [Declaratory Relief]

Not only does Plaintiff lack prudential standing to bring this claim, the claim is internally contradictory, both factually and legally. Plaintiff claims that an actual controversy exists between Plaintiff and the Federal Defendants, yet the facts as pleaded conclusively establish the lack of any controversy. As the Court noted in its prior Order:

There is no indication in the Amended Complaint itself, or any document attached and incorporated therein, that the United States actually disputes the title of the State in the 40 Mile Trail or the right, if any, of Plaintiffs to the use of the trail. Nor, contrary to the conclusory allegations in the Amended Complaint, does it appear that United States denies the existence of a RS

^{57/} Plaintiff has not pled a cause of action under the Federal Torts Claim Act, 28 U.S.C. § 2671, *et seq.*, or for breach of contract, 28 U.S.C. § 1346(a)(2). Furthermore, it does not appear that Plaintiff may truthfully plead either a tort or contract action.

^{58/} Docket 126 at 28-29; Docket 141 at 8.

2477 right-of-way across the surface estates held by Wood and Hungwitchin. In denying Plaintiffs' FLPMA permit to construct an access road across Wood's mining claim, the DOI did so on the basis that it lacked authority to approve a right-of-way. Indeed, the DOI specifically declined to address the question of whether a R.S. 2477 right-of-way existed.^{59/}

Plaintiff's Third Amended Complaint suffers from the same infirmity.^{60/}

Because it does not appear that Plaintiff can truthfully allege facts that would entitle him to declaratory relief, Plaintiff's First Claim for Relief will be dismissed without leave to amend.

2. Count One - Second Claim for Relief [Quiet Title]

As with his First Claim for relief, Plaintiff lacks prudential standing to bring this claim. The Court held in its prior decision that jurisdiction does not lie in this Court under § 2409a.^{61/} The Court, however, granted leave to amend to state a claim under the Administrative Procedures Act ("APA"),^{62/} which Plaintiff has declined to do. Plaintiff, having eschewed the Court's grant of

^{59/} Docket 126 at 25-26 (footnotes omitted).

^{60/} Plaintiff attempts to establish the existence of a controversy through a copy of an e-mail from a geologist in the Alaska Department of Natural Resources in which it was stated "[i]t appears that BLM does not recognize the RS 2477." Docket 149-19.

^{61/} Docket 126 at 24-25.

^{62/} Docket 126 at 26.

leave to amend his complaint to state a cause of action under the APA, the Court declines to grant further leave to amend.

3. Count One - Third Claim for Relief [Supplemental Jurisdiction]

Plaintiff's reliance on § 1367 is misplaced. All § 1367 does is give this Court supplemental jurisdiction over claims not based upon federal law. It is not, in itself a basis for relief. Because no claim as against the Federal Defendants is based, nor could it be, upon non-federal law, this claim must also be dismissed without leave to amend.

4. Count Three [Conspiracy].

In his third count, Plaintiff alleges that the Defendants have intentionally or unintentionally conspired to deprive him of his rights under the Federal and Alaska Constitutions, and federal and state laws.

As the Federal Defendants correctly note, Plaintiff's Count Three essentially states the same allegations as did the Fifth Claim for Relief in the Amended Complaint that this Court dismissed as against the Federal Defendants without leave to amend. Plaintiff attempts to circumvent the Court's ruling by asserting that he has pleaded a violation of the Civil Rights Statute, 42 U.S.C. § 1983, and as a Conspiracy against rights, 18 U.S.C. § 241. Plaintiff's arguments fall wide of the mark.

First, 42 U.S.C. § 1983, which addresses actions taken “under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia” does not apply to the Federal Defendants acting in their official capacities under color of *federal law*. Second, 18 U.S.C. § 241, a criminal statute, does not provide a basis for civil liability.^{63/} Because Plaintiff fails to state a cause of action against the Federal Defendants, Count Three must be dismissed without leave to amend.

C. Doyon/Hungwitchin Motion to Dismiss - Docket 156

Doyon has moved to dismiss all of Plaintiff’s claims for lack of subject matter jurisdiction and for failure to state a cause of action under Rule 12(b)(1), (6). Hungwitchin has joined in this motion.^{64/}

1. Count One - Fourth Claim for Relief [Declaratory Relief]

As he did in his First Claim for relief, Plaintiff seeks a declaration that a valid R.S. 2477 right-of-way exists over the Forty Mile Trail. For the reasons stated above in subpart IV.A,

^{63/} *Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006) (citing *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980)).

^{64/} Although Wood has not joined in Doyon’s motion, because the Third Amended Complaint suffers the same infirmities as against Wood as it does Doyon and Hungwitchin, in the interest of the parties and judicial efficiency, the Court will apply *sua sponte* the same rulings it makes with respect to Doyon and Hungwitchin to Wood as well.

Plaintiff lacks prudential standing to assert this claim. It must, therefore be dismissed without leave to amend.

2. Count One - Fifth Claim for Relief [Quiet Title]

Plaintiff seeks to quiet title to the R.S. 2477 right-of-way in the Forty Mile Trail under A.S. §§ 19.30.400 and 09.45.010. Section 19.30.400 is the Alaska Statute through which the State accepted the R.S. 2477 rights-of-way (former 43 U.S.C. § 932), including the Fortymile - Eagle Trail (RST 1594). Section 09.45.010 permits a person in possession of real property to bring an action against another who claims an adverse estate or interest in the property. This claim too must fail.

First, in order to adjudicate the § 19.30.400 claim, it is necessary to determine that the State has acquired ownership of the Forty Mile Trail, an issue that Plaintiff lacks prudential standing to assert. Second, with respect to § 09.45.010, because Plaintiff is not in possession of the R.S. 2477 right-of-way over the property of the Defendants, he may not bring that action in his own right.^{65/} To the extent that Plaintiff attempts to assert the rights of the State, he lacks prudential standing. Because Plaintiff cannot plead facts sufficient to warrant the granting of relief, this claim will also be dismissed without leave to amend.

^{65/} See *Miscovich v. Tryck*, 875 P.2d 1293, 1297 (Alaska 1994).

3. Count One - Sixth Claim for Relief [Recovery of Real Property]

Plaintiff seeks to recover real property under AS §§ 09.30.400 and 09.45.010, a slight variation of his Fifth Claim for Relief. This claim fails for the same reasons as did his Fifth Claim for Relief. This claim too must be dismissed without leave to amend.

4. Count Three [Conspiracy]

In his third count, Plaintiff alleges that the Defendants have intentionally or unintentionally conspired to deprive him of his rights under the Federal and Alaska Constitutions, and federal and state laws.

To the extent that Plaintiff continues to allege a conspiracy to violate his Federal and State Constitutional rights as against the Non-Federal Defendants, as explained in the earlier Order, they are private actors, not governmental agencies, and cannot be acting in violation of either the Federal or State Constitutions.^{66/}

As a conspiracy allegation, it is still inadequately pleaded. The common law tort of civil conspiracy has four elements: (1) an object to be accomplished; (2) a meeting of the minds or agreement on the object or course of action; (3) one or more overt acts; and (4) damages as a proximate result thereof.^{67/} "[C]ivil conspiracy is an intentional tort, requiring a specific intent to accomplish

^{66/} Docket 126 at 39.

^{67/} See generally 16 Am. Jur. 2d *Conspiracy* § 51.

the contemplated wrong"^{68/} Nothing in the facts alleged in the Third Amended Complaint give rise to an inference that the Non-Federal Defendants were somehow acting in concert or by agreement with an intent to somehow harm Plaintiff. Each of the Non-Federal Defendants was acting independently of any other Defendant and in that Defendant's own best interests—not with an intent to deprive Plaintiff of any right. Thus, Count Three must also be dismissed without leave to amend.

D. Wood's Motion to Dismiss - Docket 160

At Docket 160 seeks to dismiss the complaint on the grounds that Plaintiff does not have standing. Plaintiff has submitted evidence that establishes he is a joint owner with Diversified Mining Ventures LLC of the mining claims.^{69/} Consequently, to the extent that the pleading filed at Docket 160 constitutes a motion to dismiss, it is **DENIED**.

^{68/} *Id.*

^{69/} Dockets 49-1 thru 49-7.

E. Sua Sponte Rulings^{70/}

1. Count Two - First Claim for Relief [Declaratory Relief/Damages]

In this claim, Plaintiff seeks a right-of-way across Wood's claims under 30 U.S.C. § 41. This is the exact claim that was asserted as Count III in the Amended Complaint. In its prior Order, the Court determined that § 41 was inapplicable to this case and dismissed that claim with prejudice.^{71/} Thus, including this claim was not only not authorized, but in direct violation of the Court's prior Order.

2. Count Two - Second Claim for Relief

In Plaintiff's Second Claim for Relief in his Second Count, Plaintiff challenges the validity of Wood's claim, contending that, because they are located on federal lands reserved for the United States Army, his claims do not meet the requirements of 30 U.S.C. § 26. Plaintiff requested that the BLM investigate the validity of Wood's claim.^{72/} The BLM declined to initiate a mining contest

^{70/} Although Wood has not challenged the Third Amended Complaint beyond his rejected motion to dismiss for lack of standing, the Court will, in the interests of the parties and judicial efficiency, *sua sponte* address the remaining claims applying the same principles as applied to the other Defendants.

^{71/} Docket 126 at 41-43.

^{72/} Third Amended Complaint, Exh. 43, Docket 149-43.

(validity examination).^{73/} The proper remedy for this is to seek judicial review under the Administrative Procedures Act, not a direct action in a federal district court.^{74/} Thus, Plaintiff's Second Claim for Relief in his Second Count must be dismissed. Although it is highly unlikely that Plaintiff would succeed, dismissal is without prejudice to initiating a proceeding under the Administrative Procedures Act.^{66/}

3. Count Two - Third Claim for Relief [Compensatory and Punitive damages/Declaratory Relief]

This claim, alleging that Wood's claims are devoid of any valuable mineral deposits and in the absence of any mining production are void, in effect challenges the validity of Wood's claims. This claim, therefore, fails for the same reason as his Second Claim for Relief in Count Two, and is dismissed without prejudice to initiating a proceeding under the Administrative Procedures Act.^{67/}

^{73/} Third Amended Complaint, Exh. 44, Docket 149-44.

^{74/} See *Hoefler v. Babbitt*, 139 F.3d 726, 728-29 (1998)

^{66/} Plaintiff is cautioned that it does not appear that he has exhausted his administrative appeals within the Department of the Interior, therefore such an action may be premature. See 43 C.F.R. §§ 4.410, *et seq.* In addition, it does not appear that Plaintiff has properly initiated a private contest or protest under applicable DOI Regulations. See 43 C.F.R. §§ 4.450-1, *et seq.*

^{67/} The Court notes that the interference alleged is simply that Wood denied him "mechanical access," but did not deny him access *in toto*. Third Amended Complaint, ¶¶ 204-06, Docket 149 at (continued...)

V. ORDER

For the foregoing reasons, **IT IS HEREBY ORDERED THAT:**

1. The Motion to Strike/Dismiss by the Federal Defendants at **Docket 155** is **GRANTED**.

2. The Motion to Dismiss by Doyon/Hungwitchin at **Docket 156** is **GRANTED**.

3. The Motion to Dismiss by Wood at **Docket 160** is **DENIED**.

IT IS FURTHER ORDERED THAT the First, Second, Third, Fourth, Fifth, and Sixth Claims for Relief in Count One are **DISMISSED** in their entirety as to all Defendants **without leave to amend**.

IT IS FURTHER ORDERED THAT the First, Second, and Third Claims in Count Two are dismissed **without leave to amend**, but without prejudice to seeking appropriate relief under the Administrative Procedures Act once Plaintiff has exhausted his applicable administrative remedies. This should be the focus of Plaintiff's energies for the remainder of his claims are legally without merit under the current facts.

IT IS FURTHER ORDERED THAT Count Three is dismissed as against all Defendants **without leave to amend**.

^{67/} (...continued)

29. What Plaintiff has failed to allege is that *mechanized access* is consistent with "traditional uses" of the Forty Mile Trail. See *Price v. Eastham*, 254 P.3d 1121, 1125-29 (Alaska 2011); *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt*, 425 F.3d 735, 745-46 (10th Cir. 2005).

The bottom line is that this case is **DISMISSED IN ITS ENTIRETY**. While the Court is sympathetic with Plaintiff's plight, there appears to be no remedy available for him at this time other than to possibly pursue the validity of Wood's claim through the Administrative Procedure Act.

The Clerk of the Court shall enter Judgment accordingly.

ORDERED this 8th day of June, 2012.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE