REPORT OF INVESTIGATION OF THE LEGAL STATUS OF CAMPBELL LAKE AND ALLEGED ACCESS RIGHTS OVER SECTION LINE

Campbell Lake Owners, Inc. ("CLO") is a nonprofit corporation that owns Campbell Lake in Anchorage and serves as a homeowners' association for property owners at the Lake. The CLO engaged this law firm to investigate and research some questions involving the legal status of Campbell Lake and adjoining property, and to provide this report of our findings and conclusions. The questions we address in this report arose due to the issuance by the State of Alaska and the Municipality of Anchorage ("MOA") of a document entitled "Joint Statement Campbell Lake within the Municipality Ownership, Use and Access" dated December 6, 2019 (the "Joint Statement"). The legal effect of the Joint Statement is unclear, since neither the State nor the MOA have the authority to adjudicate these questions; and it includes a specific warning that it is not to be taken as legal advice. Despite that, the Joint Statement has reportedly caused confusion and conflict between property owners and members of the public seeking to access the Lake over private land, which may lead to disputes, accidents and liability for property damage and personal injury.

Based on our investigation and legal analysis, we concluded that:

(1) The bed of the Lake belongs to the CLO;

(2) Members of the general public do not have the right to be present on the Lake without the consent of the CLO or of a property owner who is authorized by the CLO to grant such consent; and

(3) Alleged R.S. 2477 section-line easements discussed in the Joint Statement do not exist.

In our investigation, we attempted to ascertain the legal and factual bases for the contentions that the State and the MOA asserted in the Joint Statement. From what we were able to learn, it appears that they relied primarily upon a legal memorandum authored in 1975 by an intern in the Law Department of the Greater Anchorage Area Borough ("GAAB") in 1975 and a letter written in 1979 by a state lawyer to a private party (Meacham to Beaux). These documents have the appearance of well-researched legal opinions; and thus it is not surprising that, more than four decades after they were written, public officials might accept them uncritically and conveniently assume that they are correct.

However, our job was to take a fresh look at the issues. When we did, we discovered that in the 1975 intern memorandum and 1979 letter important facts were overlooked or misstated and some governing legal principles were ignored. For example, without attempting to cover all questions about them here: (1) they overlooked the fact that the Lake was created before Alaska became a State; (2) as a result of that first error they overlooked the question of whether the state laws they discuss, which became effective after the Lake was created, could take away constitutionally-protected property rights of the owner of the Lake; (3) they ignored the rule that State tidelands ownership is determined based on the mean high water line; (4) they used the wrong date of reference in addressing navigability of the creek and tidelands; and (5) they

dismissed the fact that neither the Lake nor the waters of the Creek are in their "natural state," due to innumerable changes that have occurred over the last seventy-five years or more. In addition to these errors or omissions, and others, there have been important developments in the law since the 1970s that undermine legal analyses written in that time. (The question of alleged R.S. 2477 federal section-line easements is not discussed in the 1975 and 1979 legal discussions, but is addressed in the Joint Statement. The Joint Statement is incorrect concerning alleged section-line easements.)

A BRIEF HISTORY

The land underlying Campbell Lake was acquired from the U.S.A. by private individuals under the Homestead Act, well before Statehood. Patents were issued based on entries in the 1940s by which private rights had been established. The State of Alaska never held any property interest in this land. In 1958, while Alaska was still a Territory, the Lake was created by placement of a dam and spillway on the uplands at what became the west end of the lake. Some of the history concerning the creation of the lake is related by the Alaska Supreme Court in Wood v. Alm, 516 P.2d 137 (Alaska 1973). Residential subdivisions were approved by the platting authority, which at that time acted as an instrumentality of the State (the Greater Anchorage Area Borough having not yet been formed). Additional subdivisions were approved by the GAAB after it came into being and, later, by the MOA. Over the years, numerous plats and restrictive covenants confirming the status of Campbell Lake as private property were approved and recorded. Lots were sold and homes were constructed. For about seventy years, people have been buying and selling these properties, lending and borrowing money on the security of the lots, building subdivision improvements, and spending their money to maintain the Lake and facilities associated with it. Private property owners and developers, the MOA and the State have altered the natural condition of Campbell Creek and the Lake through land development, road projects and storm water drainage facilities.

In 1968 a question came up concerning the legal status if the Lake in the context of a local land use case. The GAAB Attorney (Victor Carlson, later a Superior Court Judge) issued a legal opinion on November 6, 1968, opining that "Campbell Lake is owned by the owners of the land beneath the lake," and that "Campbell Creek was never and is not now a navigable stream," and that "the owner of the land beneath Campbell Lake has the authority to prohibit or permit the persons it pleases to use the lake which is above its land." This legal opinion was widely circulated and was reasonably understood by property owners on the Lake as reliable and authoritative.

The 1975 intern's memorandum and the 1979 A.G.'s letter contradicted the 1968 Victor Carlson opinion. However, it appears that they were disregarded or overlooked by those who might have been aware of them. The MOA repeatedly recognized the lake as a "private lake" to which the public has no right of access or use. As one of many examples, the MOA Planning Director reported to the Platting Board in 2004 (Case S-11284; August 4, 2004), "Campbell Lake is a man-made lake and the owners association owns the underlying land of the lake itself, This is a private lake which has been man made with no public access." In 1990, the MOA decided that it could save millions of dollars of taxpayer's money by redirecting storm water runoff into Campbell Lake. The MOA entered into an agreement with the owner of Lake to accept a share

of the costs of maintaining the Lake and the dam facility due to the increased sediment load that would be added by the drainage from MOA storm sewers. In this Agreement the MOA acknowledged that the Lake is a private lake for private use only.

At the State level, when the Alaska Department of Natural Resources received a request from a landowner for a permit to place facilities on and adjacent to the Lake, DNR determined that "Campbell Lake is a manmade lake. Therefore the State does not hold any interest in it." For that stated reason DNR closed the file in 1992 without acting on the permit request. ADL file # 225960. These actions at the State and local level are consistent with the determination reportedly made by the U.S. Army Corps of Engineers ("USACE"), before Statehood, when the owners of the lake now underlying the Lake inquired about the need for a federal permit from USACE to build the dam. They were told that the USACE considered the Creek nonnavigible and that therefore no USACE permit was required.[1]

I.

OWNERSHIP OF THE LAND UNDERLYING THE LAKE

The land underlying Campbell Lake was in private ownership when the Lake was created. Flooding the land could not effect a transfer of the ownership of this land to the State. However, the authors of the 1975 and 1979 legal discussions asserted that two portions of the lake bed belong to the State: (1) some unspecified area at the west end of the Lake they say was, prior to creation of the Lake, "subject to tidal influence" of some kind, and (2) the bed of the Creek as it existed at some previous time.

The first step in testing a claim that the State owns any of this land is to identify the date upon which the character of that land must be determined. This question is answered based on the Alaska Statehood Act, the Submerged Lands Act of 1953, and the Equal Footing doctrine. The general rule is that the State acquired title to lands underlying waters that were navigable, and to tidelands that lay seaward of the line of mean high water, as of the date on which it became a State, which in Alaska's case was January 3, 1959.

There is an interesting wrinkle to that rule in the case of Campbell Lake, however, due to the fact that title to the homesteaded land passed into private ownership about a decade before Statehood. In fact, under the federal public land law applicable at the time, each of the homesteaders may have acquired his legal rights to the lands some years before that, in the 1940s. If at that earlier time the creek was not navigable, then title to the land under the creek would have passed to the homesteader. Likewise, title to land near the coast that was above the line of mean high water at that time would have passed to the homesteader. If, between the time the homesteader acquired his rights and January 3, 1959, the physical character of the creek or of the coastal land changed, that change could not cause the homesteader's title, by then in private ownership, to revert to federal ownership. Hence, in this case, because the homesteaders acquired their ownership from the U.S.A. before Statehood, in order to prevail on a claim of title to land under the Lake that was a creek bed, as that creek bed existed prior to the creation of the Lake, the State would have to prove that the creek was navigable before the homesteaders

[1] This USACE "jurisdictional determination" is cited in a Report entitled "Campbell Lake Dam Phase I Study Report" dated May 19889 prepared for MOA project No. 88-55, at page 7.

acquired their rights many years before Statehood. And, similarly, to prevail on a claim to land under the western part of the Lake as tidelands the State would have to prove that this land was situated seaward of the mean high water line as it existed when the homesteaders acquired their rights. We are not aware that the State has made any investigation of these issues as of those earlier dates.

Tidelands. The dam is situated on uplands, well above the apparent mean high tide line. The 1975 and 1979 legal discussions mentioned earlier include ambiguous references to "tidal influence" of some kind but do not address the location of the line of mean high tide. This omission may signify that they had no evidence to support a claim that, on whatever the relevant reference date may be, the dam and spillway lay seaward of this line. Complicating things further, the 1964 earthquake and perhaps other physical events or processes occurring during the past decades since the homestead entries and patents may cast even further doubt upon any contention that the Lake overlies any State-owned tidelands.

Creek bed. The question of whether the bed of a river, stream or creek is (or was) "navigable" for the purpose of determining whether the State acquired it under the Statehood Act and other applicable law is a question of federal law. States and local governments are free to formulate their opinions about the question and broadcast them by means of pronouncements such as the Joint Statement. But they do not have the power to adjudicate the question of navigability for title. The Joint Statement, then, is only that: a statement of contentions. Similarly, state legislatures may pass laws purporting to establish standards or criteria for determining "navigability" for one purpose or another, as the Alaska Legislature has done; but these rules do not alter or supplant the governing federal law.

A "navigability for title" adjudication requires, first, proof of facts about the waterbody's physical characteristics and use on the date or dates that are legally material. Experts like hydrologists, fluvial geomorphologists, marine archaeologists and historians provide evidence on such matters. As has been explained, the dates that matter were not today, or sometime in 1999, 1979 or 1975 or even 1959. We are not aware that the State or anyone else has collected the required evidence about the creek as of these early dates. In fact, the exact location and physical characteristics of the creek in this area on the relevant dates approximately 70 years ago may not be known or knowable. Unsubstantiated claims made by advocates of public ownership are not evidence. The only information we have from years ago, albeit not contemporaneous with the legal reference dates, is the reported negative "jurisdictional determination" made by the U.S. Army Corp of Engineers prior to Statehood, in response to the owner's inquiry as to whether a permit was required under the federal statute applicable to "navigable waters."

The "navigability for title" determination requires the application of legal principles to the facts. Advocates of state ownership and control of land underlying lakes and streams typically argue that virtually any and all water that flows is "navigable," regardless of its physical characteristics, history of use, or other relevant criteria. They will contend that the portion of Campbell Creek underlying the lake was navigable, under the specific legal test applicable in determining title, simply because they surmise that someone could have floated down it on a raft, kayak or other shallow-draft vessel back in the 1940s or 1950s. But the legal test requires more than that.

In the first place, the physical characteristics of the waterbody must be assessed in the "natural and ordinary condition" of the creek as it existed on the relevant reference date, disregarding changes occurring since then including those brought about by artificial means. PPL Montana, LLC v. Montana, 132 U.S. 1215, 1228 (2012). We do not know precisely what changes Campbell Creek may have undergone in the last 75 to 80 years. Real estate development and road construction, surface water drainage, channelization, and other activities have changed the volume and characteristics of its flow and/or the locations of the creek bed at various places along the Creek. The 1964 earthquake may also have altered the flow or the location of the water course.[2] Usage of the creek has probably also changed during the past decades, in ways it would be difficult or impossible to ascertain today.

Since the State has become progressively more aggressive in asserting its claims to title to submerged lands, it has advocated an extremely liberal view as to what sort of physical conditions in a stream are sufficient to satisfy the federal navigability test. Some cynics have jokingly referred to the most liberal view on this question as the "popsicle stick" theory – if a popsicle stick can be floated through the stream it must be navigable. This is not correct. Where a stream has occasional features that require portaging, such as shallows or rocky obstacles, this necessity of portaging, while not alone a determinative fact, is "generally sufficient to defeat a finding of navigability because [such features] require transportation over land rather than over water." North Carolina v. Alcoa Power, 853 F.3d 140, 152 (4th Cir. 2017), citing PPL Montana, LLC v. Montana, id. It seems likely that Campbell Creek in the 1940s would have failed the federal navigability test for this reason among others.

The federal law requires that the historic, current and potential use of the waterway be assessed from the standpoint of its commercial utility – that is, by reference to its actual or potential use as a transportation route that has commercial utility as an actual or potential "highway of commerce," judged on the relevant reference date. As the U.S. Supreme Court stated this standard in U. S. v. Holt State Bank, 270 U.S. 49, 56 (1926), the question is whether "the stream in its natural and ordinary condition affords a channel for useful commerce." This means that the waterway "should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient." Harrison v. Fife, 148 F. 781, 783-84 (8th Cir.1906), quoted in Utah Stream Access v. Orange Street Development, 416 P.3d 553, 560 (Utah 2017). Use by small boats like canoes and rafts, alone, does not prove navigability for title under the federal standard. While evidence of recreational use may be relevant evidence in determining utility for commercial use, recreational use in and of itself does not establish navigability for title. PPL Montana, LLC v. Montana, id., at 1233-34. "The issue is one of potential commercial use." North Dakota v. Andrus, 671 F.2d 271 (8 Cir.1982). A log drive might be evidence of a river's commercial utility as a "highway of commerce" to transport the logs to a point of sale or processing, whereas a family's use of a creek for a Sunday afternoon inner tube adventure or cross country ski outing would not be.

[2] These changes altering the physical condition of the Creek are legally material with respect to two separate legal issues discussed in this letter, (1) whether the Creek was navigable on the appropriate date of reference for determination of whether the State owns the creek bed, and (2) whether the waters of the Creek are in their "natural state" under provisions of the Alaska Constitution and statutes.

Commercial utility is not solely a function of the physical characteristics of the waterbody; it is also a function of the larger geographical context of the waterbody, which of course varies from one place to another. U.S. v. Appalachian Elec. Power, 311 U.S. 377, 405-06 (1940). To our knowledge, no "commerce" of any kind or in any sense has ever occurred, or has ever been proposed or predicted to occur, in the intertidal area seaward of the dam that might be served by a supposed, hypothetical "highway of commerce" providing access to that area. If Campbell Creek flowed into the Port of Anchorage, as Ship Creek does, that would be one thing. But it is hard to imagine what commercially useful purpose would possibly be served by trying to transport freight of some kind down this creek to the intertidal area seaward of the dam, where no meaningful commerce has or will ever occur.

In addition to the foregoing, there are "rules of thumb" that have been suggested from time to time to serve as limiting considerations in controversies about navigability for title involving streams in Alaska. For example, a "Policy on Ownership and Management of Navigable and Public Waters" published by the Alaska Department of Natural Resources includes a guideline under which a stream that is at least 70 feet wide is presumed to be navigable. (This policy statement is only a guideline, of course, rather than a rule having binding legal effect. It does not rule out the possibility that the State might assert that a stream narrower than 70 feet is or was navigable, or that a stream wider than 70 feet is not.) Guidelines from the Regional Solicitor for the U.S. Department include a rule of thumb that, in addition to satisfying other standards, the stream in question must be capable of navigation by a vessel bearing at least 1,000 pounds of cargo. We know of no evidence indicate that the portion of Campbell Creek underlying the Lake was, in the 1940s or at any other time, of a character that would satisfy either of these guidelines.

We are not aware of any court decision holding that a creek comparable to the portion of Campbell Creek at issue here was navigable for purposes of determining title to its bed. Taking into account what one can assume or surmise as to its physical condition and commercial context in the 1940s, we seriously doubt that the State could meet its required burden of proof that it owns any part of the bed of the Creek under the Lake.

II.

PUBLIC RIGHT TO USE CAMPBELL LAKE FOR RECREATIONAL ACTIVITY

The Joint Statement asserts that the general public is entitled to use the waters of the Lake and the underlying lakebed for any permissible recreational purposes; and the State evidently holds this view even if all of the land under the Lake is in private ownership. We dispute this contention.

People have described this loosely as a dispute about whether Campbell Lake is a "private lake" or a "public lake," but that is an imprecise characterization which confuses several separate but related legal questions. As was already discussed, the land underlying the lake is in private ownership. This dispute is not about ownership of the water itself (i.e,, the molecules of

H2O in water column of the Lake); they do not belong to the State of the MOA or anyone else. Nor is this a dispute about the State's authority to manage and regulate consumptive uses of the water under the Water Use Act, or the regulatory authority of the Alaska Department of Fish and Game to regulate fisheries and habitat, or the authority of state and federal environmental regulatory agencies. (Someone might wish to argue about those things, but that is not what we are addressing here.) The question is whether the Lake, as a physical space, is open to the general public for recreational use.

Explanation of the CLO's position that recreational use of the Lake by the general public is not allowed must start with some history, at risk of repetition. The State has never owned the land that is occupied by Campbell Lake. It was acquired as private property by homesteaders during Territorial days. They then created the lake on their privately-owned land in 1958, as the Alaska Supreme Court stated in 1973 in Wood v. Alm. Neither the Alaska Constitution nor the Alaska Lands Act nor the Water Use Act existed at that time.

What was the state of the law when the Lake was created, before Statehood? At that time the general common law rule of property rights was that the owner of the land underlying a lake had the exclusive right to use the surface of the lake, and this included the right to exclude the public from the surface. This rule of property law was succinctly stated by the Colorado Supreme Court as follows: "the public has no right to the use of waters overlying private lands for recreational purposes without the consent of the owner." People v. Emmert, 597 P.2d 1025, 1030 (Colorado 1978), citing Section 159 of the Restatement (Second) of Torts (1965), which states the common law rule that an unconsented entry upon or over another person's property is a trespass. Washington State courts adopted a similar rule in Snively v. Jaber, 296 P.2d 1015 (1956) (when the lake bed is in private ownership, owners of lands along the shore of a lake are entitled to use the surface of the lake as an attribute of their riparian ownership but "a stranger has no right to enter upon the lake without the permission of an abutting owner").

In the eternal conflict between property rights advocates and recreational interests, this rule has been controversial. Some states have modified the rule to allow recreational use of a lake overlying private land without obtaining the consent of the private landowner. State law rules on this general subject vary because state constitutional provisions and other relevant laws differ from state to state.[3]

One theory on which some states recognize a right in the general public to make recreational use of the surface of a waterbody overlying private land is the idea that a public trust arose when the state, having earlier owned the land under the waterbody, transferred title out of public ownership. This public trust theory was explained in a law review article published shortly after the creation of Campbell Lake: "The State by virtue of its prior ownership [of the land over which the waterbody lies] can impress a trust upon subsequent owners." "Water Recreation: Public Use of 'Private' Waters," 52 Cal. L. Rev 171, 181 (1964). The land

[3] We are aware that the State has in the past relied on cases from other states that have rejected the rule applied in the Colorado and Washington cases we cite. These cases postdate Alaska Statehood, are based on principles found in state law provisions specific to each state involved, and therefore do not represent the prevailing view of the common law as it existed in the late 1950s in the Territory of Alaska.

underlying Campbell Lake would not have been "impressed with a trust" by the State under that theory, because the State never owned it. Id., at 182.

We understand that proponents of general public access to Campbell Lake would argue that it is the State's authority to regulate the use of water, rather than land, that gives rise to a public trust in favor of the general public to use the Campbell Lake for recreational activities. This seem to confuse the regulation of consumptive uses of water (in Alaska, through the Water Use Act, AS 46.15) and regulation of the harvesting of fish and game resources with the separate matter of restricting a property owner's right to control physical activity on his property by members of the general public. As the California Law Review article noted, "it seems questionable to hold appropriation provisions applicable to the public use of the water for recreation in the absence of a clear showing that the elimination of the bed owner's common law right of exclusive use was intended." Id., at 182. That common law right is not unambiguously eliminated by Alaska laws in the case of Campbell Lake, as is discussed later in this report.[4]

The threshold question, though, is this one: Could the new State, by imposing new laws not in effect when the Lake was created, divest the landowner of its pre-existing right to exclusive control of the surface, which is a valuable property right it held before Statehood? The legal context as it existed when the homesteaders acquired the land that now underlies the Lake and when the Lake was created was different than it is today. If the laws that came into effect in Alaska after the Lake was formed are interpreting in a way that changes the rules, a constitutional question would be presented – was it constitutionally permissible to strip the landowners of a fundamental property right they possessed before the new state laws came into effect?

To avoid violating the constitutional rights of property owners, both the Alaska Constitution and the Alaska Land Act include "savings clauses" that prohibit that kind of abridgment of property rights. Section 16 of the Natural Resources Article of the Alaska Constitution (Article VIII) promises that "[n]o person shall be involuntarily divested of his right to the use of waters, his interest in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law." The "Declaration or Rights," Article I of the Alaska Constitution, promises that "[p]rivate property shall not be taken or damaged for public use without just compensation." When the Legislature enacted the statute providing for free access to and use of public water (AS 38.05.126), it included as subsection (d) the important caveat that "[t]his section may not be construed to affect or abridge any valid existing rights."

These provisions state in general terms the bedrock principle of constitutional law that was applied by the U. S. Supreme Court in Kaiser Aetna v. U.S., 444 U.S. 164, 197-80 (1979): if the owner of land underlying a waterbody has the right to exclude the public from use of the surface, which is an attribute of the title to the property, the government cannot take that right away except by condemnation, which requires legislative authority, appropriate legal process,

[4] It may be that under the federal law in effect when the Lake was created that the impoundment of the water to create a waterbody that would be used as a floatplane facility was an appropriation of the water under 43 U.S.C. 661, vesting private property rights in the landowner. See, Paug-vik, Inc. v. Wards Cove Packing Co., 633 P.2d 1015 (Alaska 1981). We have not investigated this question.

and just compensation. In other words, in the case of Campbell Lake, the new State of Alaska could not unilaterally impose a new law on January 3, 1959, that deprives the property owner of its right to exclusive control of the surface of the Lake. Stated differently, the fact that Campbell Lake existed before the Alaska Constitution and Alaska Statutes came into effect limits application of those laws, on which arguments for a public right to use the surface of the Lake are predicated.

The foregoing discussion explains the legal problem confronted when the State claims a general public right to use a waterbody for recreational uses in the unusual case presented here: a waterbody which existed prior to Statehood, overlying private land acquired directly from the federal government, in which the State never held any property right. But even if this threshold legal problem were not presented, there are other reasons to question the contention advanced by the State in the Joint Statement. These involve the proper interpretation of Article VIII of the Alaska Constitution and AS 38.05.126.[5]

Article VIII of the Alaska Constitution is the basis for the "public trust doctrine" in Alaska in the context of state natural resources. It is based on a concept of "Common Use" resources; Section 3 providing that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use" (emphasis added). It then provides in Section 13 that waters in this category ("surface and subsurface waters reserved to the people for common use") are "subject to appropriation." Then, in Section 14, it states that "[f]ree access to the navigable or public waters of the state, as defined by the Legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes" (emphasis added). The words and phrases used in these provisions invite questions, including (1) what limiting effect was intended by the phrase referring to waters "in their natural state," (2) what limiting effect was intended by the phrase referring to waters "of the state," (3) what was intended by the use of the phrase "access to" as distinguished from, say, "use of," (4) whether the phrase "as defined by the legislature" in Section 14 refers to definition of which waters are "navigable or public waters" or refers to definition of the phrase "free access."

The phrase "in its natural state" is a term of art in the federal law concerning navigable waters. PPL Montana, LLC v. Montana, id., p. 1228. .A waterbody created by damming or diverting a creek is no longer in its "natural state." Nor, for example, is water that has been collected in an artificial pond (e.g., the pond at the Alyeska Hotel in Girdwood or a decorative water feature in a private garden), or rain water diverted to flow through a channel constructed to drain surface water off a parking lot, or water generated by snowmelt from the accumulation in a snow dump. The waters in Campbell Lake are not "in their natural state" because it is a man-make lake created by the placement of the dam.

In a second sense of the term also, the water in Campbell Lake is not "in its natural state." Some of this water, but not all, originates in its natural state where the creek rises in the Chugach State Park. But by the time it reaches Campbell Lake, the water is no longer in its natural state. The progressive alteration of the natural state of the Creek is described in a report entitled "A

[5] To be clear, as explained, we contend that no matter how they are interpreted these state laws cannot be applied to Campbell Lake to support a public right of recreational use without the owner's consent because the Lake lies on private land and was created before Statehood.

Cultural and Historical Geography of Campbell Creek" (Northon), issued in August of 2007, thus: "culverts were added, reaches of streams were put into channels and straightened, dams were built, and riparian habitats were dramatically altered." Id., p. 22. The Creek has become a "receptacle for storm water" (p.52), increasing by some unknown and probably immeasurable amount the volume of water flowing through it today at various points from what flowed through at those points when the Creek was in its natural state.

In short, neither the waterbody nor the water in it can be described as being in a "natural state." Therefore, it is not a "Common Use" natural resource under Article VIII of the Alaska Constitution.

There are other questions. For example: If the drafters of the Alaska Constitution and the voters who approved it intended the Common Use provisions in Article VIII to apply to all water that exists anywhere in the State of Alaska, regardless of the ownership of the land on which it occurs, why did they refer in Section 14 to "waters of the state," thus evidently limiting the generality of the word water? A plausible answer might be that serious political and legal problems about infringing upon private property rights would be presented if the "free access" provision applied to all water rather than being limited to water on land that is owned by the State, or, at the least, land that was at some point owned by the State. Did the framers of the constitution mean to require free public access to a pond that a homesteader created on the back forty?

Question are also presented about whether the "free access" provision (Section 14) was intended to address not only "free access" but also a free right of use and whether this right, if that is what it is, is absolute and unconditional. What does "free access" mean? Since the provision expressly confirms the legislature's authority to "regulate and limit access [to the waters to which it applies] for other beneficial use or public purposes," it seems clear from the words of Section 14 that no constitutional right of unconsented recreational use was intended by this provision.

A full examination of the public trust doctrine is beyond the scope of this report, but one point bears mention here. The principle role of this doctrine, illustrated by the historic Supreme Court decision in the Illinois Central case, is to limit the power of the government in its management of public resources. It imposes on the government a fiduciary duty to avoid imprudent compromise of the public's interest in land, water, fish and game and other public resources. How this fiduciary duty plays out in limiting the government's free hand in dealing with public resources depends largely upon state laws, which vary widely, and on the specific factual context. For example, in some states it might mean that the State cannot sell or lease tidelands without making provision in some way for public access from the uplands to the ocean. But bending the public trust doctrine to imply from it the existence of personal constitutional rights is another thing altogether.

The Legislature has defined the phrase "public waters" in AS 38.05.965(18) using the limitation that the water must be "reasonably suitable for public use." A waterbody that is not reasonably suitable for public use is not subject to the free access and Common Use provisions of the Alaska Constitution as thus interpreted by the Legislature. In the case of Campbell Lake,

the MOA has determined that due to its heavy use as a FAA-certified seaplane base the waters of the Lake are not reasonably suitable for public use.

In summary, Campbell Lake existed before Statehood and overlay private land at that time, private land in which the State of Alaska has never held an interest. One attribute of its owner's title to this land is the right to exclude the public. The state constitutional provisions and state statutes upon which the State's contentions in the Joint Statement are predicated include savings clauses that preclude their application to Campbell Lake in a way that deprives the owner of that property right. In addition, even if the state constitution and state statutes applied, for numerous reasons they do not support a claim for a public right to engage in recreational use of the Lake without the owner's consent.

III.

THE ALLEGED R.S.2477 FEDERAL SECTION-LINE EASEMENT

A surveyed section line runs north-south between Sections 14 and 15 of Township 12 North, Range 4 West, Seward Meridian, crossing Campbell Lake and several residential lots adjoining the Lake. Claims have been made that there is a 66-foot-wide public easement along this section line, 33 feet in width on each side of the section line. (For ease of reference, we will refer to the claimed section-line easement as the "SLE.") The State asserts that the claimed SLE came into existence in 1923 under a law known as R.S. 2477 and a law enacted by the Territory by which the Territory allegedly "accepted" the SLE.[6]

Questions are presented about whether the claimed SLE exists and, if so, what activity if any is or may be permitted in the SLE. Based on our investigation and legal research, we conclude that as a matter of federal law the claimed SLE does not exist. In addition, even if it were to be assumed that the SLE exists, use of the SLE as a road or a pedestrian trail to gain access the Lake for recreational activities would not be permitted, because it would exceed the scope of use authorized by Congress.

"R.S. 2477" refers to Section 2477 of the Revised Statutes, a law passed by Congress as a part of the Mining Act of 1866, which was incorporated into the United States Code as 43 U.S.C. Section 932. R.S. 2477 was repealed in 1976. To understand the legal problems presented by the State's attempt to use R.S. 2477 to support a public right of access to Campbell Lake, some discussion of the legal history of this statute as applied to surveyed section lines on federal public land is necessary.

In the 110 years during which this law was in effect, and in the 44 years since its repeal, there has been almost continuous argument about what it means, how it works, and whether

[6] What this discussion of R.S. 2477 federal SLE's is not about: The State, and the Territory before it, acquired lands and, when leasing or selling them, reserved SLEs on the land. These are not federal SLEs. The landowner that reserves an SLE (here, the State) can make any rules it wants. It can define a "highway" as broadly as it chooses to and it can allow for any use it chooses in this nonfederal SLE. So, when the Alaska Legislature enacted a statute defining the word "highway" to include a "trail" or "walk," that was the Legislature's prerogative – insofar as the definition applies to a SLE created by the State. But for federal SLEs, R.S. 2477 itself serves as an outer limit on the State's power to make rules about them.

particular claims based on R.S. 2477 are valid. Some states have been aggressive in adopting very liberal interpretations of R.S. 2477, seeking to maximize the rights they hope to acquire from the federal government. Other states have been less aggressive.

The federal government, which expresses itself on this subject primarily through the Department of the Interior, the Department of Justice, and Congressional committees and agencies, has taken more conservative positions about R.S. 2477 that often directly contradict those of some states. In particular, the State of Alaska has advocated rules about the existence of SLEs under R.S. 2477, and has advanced arguments about what activity is permitted in a valid SLE, that conflict directly with the federal government's announced interpretations of the law and conflict directly with federal court decisions. The State has freely acknowledged this broad disagreement. As an example, one can cite a 99-page report entitled "Highway Rights-of-Way in Alaska," published in 2013, authored by John Bennett, Right-of-Way Chief for the Alaska Department of Transportation & Public Facilities, which contains a 25-page discussion of R.S 2477 rights of way including SLEs. This paper was prepared for use by land surveyors, government employees, title examiners and lawyers as guidance to be used in resolving questions about R.S. 2477 claims. The author stresses that "the interpretation and application of RS 2477 in Alaska is a highly debated and controversial subject [and that] opinions of the State and Federal agencies as well as those among the private sector vary considerably." In Alaska state government, Attorneys General in different administrations have disagreed with one another about fundamental R.S. 2477 issues.

The Alaska Supreme Court has issued several decisions involving R.S. 2477 right-of-way claims. These decisions do not mention the fact that many of the interpretations of R.S. 2477 advanced by the State in its statutes, regulations and administrative agency policies are directly contradicted by federal law as interpreted by the Justice Department and the Interior Department. Possibly the parties in the lawsuits leading to these decisions did not know about the state/federal disagreement and for this reason failed to apprise the Court of it. As a result, the Alaska Supreme Court's decisions interpret and apply the extremely broad principles advocated by the State about what it takes to create an R.S 2477 SLE and what the scope of a valid SLE might be, but <u>without ever reaching any question about what the federal law itself might require, permit or prohibit</u>. In effect, since the views of the federal government about R.S. 2477 have not been represented in these state court cases, very aggressive interpretations of R.S. 2477 advanced by private litigants have gone unchallenged.

One of many comprehensive studies of the subject, a 1993 report of the Congressional Research Service ("CRS") entitled "Highway Rights of Way: The Controversy Over Claims Under R.S. 2477," presents a very detailed history of the statute and its interpretation by federal agencies and by federal and state courts. It identifies many of the fundamental disagreements. In the same year, 1993, the U.S. Department of the Interior submitted a comprehensive report on the subject to Congress in which it described the pervasive confusion about R.S. 2477 that has resulted from an accumulation of state court decisions applying various state laws, many inconsistent with one another, that generally just simply ignore the background of federal law by which Congress limited what rights the states can claim under R.S. 2477. There is a large body of law and scholarly literature about the primacy of the federal law in deciding disputes about the interpretation of Congressional acts granting rights in federal public lands. But the Alaska

Supreme Court and other state courts have almost never even mentioned it – again, presumably because the litigants advocating their cases in the state courts did not think to bring up any question of federal law.

Here is just one example of the disagreement between state and federal land management agencies, offered to illustrate the depth of the divide between the state and federal positions: The Alaska Department of Natural Resources ("DNR") reportedly maintains that there is a valid R.S. 2477 SLE on the property in question here even though there is no road there, no proposal to build a road there, no trail there, and indeed no evidence that the property has ever been physically disturbed or altered by anyone, ever, in more than one hundred years, other than for construction of a home on it. In contrast to this legal position taken by DNR, it has been the consistent position of the U.S. Department of the Interior that no R.S. 2477 SLE can exist unless a road was constructed on it while the property was "public land" – that is, before a homesteader applied for entry or obtained a patent. In 1986, in a "friend-of-the-court" brief filed in a lawsuit in the U. S. District Court in Alaska, the United States Department of Justice stated the U.S. position that if Alaska purports to accept a SLE without any actual or even planned construction "the purported acceptance exceeds the scope of the [R.S. 2477] offer and is invalid." Alaska Greenhouses, Inc. v. Municipality of Anchorage, Case No. A85-630 Civil.[7]

In 2005, the U.S. Court of Appeals for the Tenth Circuit issued a landmark decision that includes a comprehensive discussion of these issues and decides some of the more significant questions about R.S. 2477 in ways that contradict the legal positions of many states, including Alaska. Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F. 3d 735 (10 Cir.2005). Although this dense fifty-page decision covers many legal issues concerning R.S. 2477, "the central question" it addresses is "how a valid R.S. 2477 right-of-way is acquired." Id. at 758. The Court began by noting that "R.S 2477 is a federal statute and it governs the disposition of rights to federal property," citing the Supreme Court decisions establishing that "the construction of grants by the United States is a federal not a state question." Id. at 762. In reviewing prior state and federal court decisions and agency rulings about R.S. 2477 over many decades, it observed that they have generally applied state law rules. However, "[t]his did not mean, and never meant, that state law could override federal requirements or undermine federal land policy." Id. at 766. "To the extent that a state law definition would frustrate federal policy under R.S. 2477, it will not be adopted." Id. at 767-68. In short, the manner by which the Alaska Territory could accept a R.S. 2477 easement on a surveyed section line on federal public

[7] In addition to federal SLEs, R.S. 2477 allows for the acquisition of a public right-of-way on federal land not on surveyed section lines. A prominent example of this is the Trans-Alaska Pipeline System haul road, constructed on a R.S. 2477 right of way based on a "acceptance" of the R.S. 2477 offer that was upheld in 1973 in Wilderness Society v. Morton, 479 F. 2d 842, 882-883 (D.C.Cir.1973), cert. denied, 411 U.S. 917 (1973). Starting almost fifty years ago, during Congressional debates about management of federal public lands leading to legislation such as FLPMA (1976) and ANILCA (1981), R.S. 2477 became extremely controversial and provoked a great deal of litigation and legislative argument at both state and federal levels. The controversy almost exclusively involved these other rights-of-way, not the SLEs. Longstanding disagreements about the existence and scope of R.S. 2477 SLEs has been overshadowed since then by the major political controversy surrounding R.S. 2477 rights of way claimed by people who created primitive roads and trails on remote federal lands. This was brought into focus in Alaska by Joe Vogler's federal court case, and resulted in state and federal legislative initiatives by advocacy groups with sharply opposing views. But, in Alaska, very little of this political controversy, litigation and legislative action dealt with R.S. 2477 SLEs.

land and the uses that may be made of the SLE if validly accepted, are ultimately question of federal law.

The foregoing discussion explains two basic points: (1) the state and federal governments broadly disagree about R.S. 2477 SLEs, and (2) just because a state asserts a liberal position which might be accepted by state courts this does not mean that the state's position is valid under the paramount federal law. That brings the discussion around to the issue presented by the Campbell Lake Joint Statement. Our conclusion is that the federal offer of the SLE on this land, if there was one, was never effectively accepted by the Territory or State; and therefore it did not bring a federal SLE into being.

The R.S. 2477 "offer" extended by the United States can be accepted in either of two ways. It can be accepted by the physical use of the land or it can be accepted by some other "positive act on the part of the state [or, in his case, the Territory] clearly manifesting an intention to accept a grant." Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961). Alaska and a few other states have taken the very aggressive legal position that one kind of a "positive act" that is sufficient to constitute acceptance of the R.S. 2477 offer is a general statute purporting to accept SLEs on all available section lines in the State, in the aggregate, without reference to location, need or current or intended use.

The federal government has rejected the State's aggressive position about what kind of an "official act" is sufficient to accept the federal offer. Since at least 1898, the federal government's position has been that the R.S. 2477 offer cannot be accepted by a general statute like Alaska's and that a R.S. 2477 SLE cannot be created without a site-specific acceptance coupled with actual construction of a highway. After all, in R.S. 2477 Congress offered section-line easements for "the construction of highways across public lands." The federal government's settled understanding of these words is that acceptance of a federal SLE offered by R.S. 2477 is not accomplished by "mere declarations of highways along section lines without actual construction." Congressional Research Service Report for Congress, "Highway Rights of Way: The Controversy Over Claims under R.S. 2477" (1993), page 21.

There is a large body of scholarship and legal analysis that supports this view. One prominent document on the subject is a legal opinion issued on April 28, 1980, by the Deputy Solicitor of the U. S. Department of the Interior directed to the Assistant Attorney General for the Land and Natural Resources Division of the U. S. Department of Justice, known by the name of its author as the "Ferguson Opinion." It is widely cited in legislative reports, court decisions and law journal articles because it provides a comprehensive statement of the history and current legal position of the federal government on these issues. Among other matters, it discusses the question of how states may "accept" the R.S. 2477 "offer" for SLEs. It identifies three general approaches. The most aggressive approach described is the one taken by Alaska, Kansas and two or three other states. These states claim to have acquired federal SLEs under R.S. 2477 simply by passing statutes that, as described in the Ferguson Opinion, purport to establish such rights-of-way along "all section lines. . . even if no highway had been either constructed or created by use." The second approach by which some states have attempted to accept the R.S. 2477 offer to create SLEs requires actual use of the right-of-way but without necessarily requiring construction. The third alternative, followed by Arizona, is to accept the SLE offer by a formal

government resolution after it has been constructed as a highway. The Ferguson Opinion concluded that the first two approaches do not satisfy the requirements of R.S. 2477 and therefore do not result in valid SLEs. Although some states predictably refused to accept the Ferguson Opinion, its conclusion on this point has apparently not been refuted by any court that has considered it.

As noted earlier, the Alaska Supreme Court has not addressed the fact that Alaska's position about acceptance of R.S. 2477's offer of SLEs is directly contradicted by the longstanding interpretation of the federal government. A possible explanation for this circumstance is this: For years lawyers have argued, and courts have for the most part just assumed without directly deciding, that the matters of how an R.S. 2477 SLE may be accepted, and what activities are permitted in such a SLE, are left by federal law to the states to decide – that is, that the subject of acceptance is controlled by state law and states can make up any rules they choose. But this is not correct. States do not have the power to decide what Congress offered in R.S. 2477. Courts agree that when Congress offers to grant an interest in land, the matter of defining what interest has been offered is a question of federal law.

As previously discussed with reference to the Tenth Circuit's SUWA decisions, this idea that state rules can be used to interpret and apply R.S. 2477, even though it is a federal statute, has been around for a long time and has been accepted, with some caveats, by the Department of the Interior and the Department of Justice. The State of Alaska and a few other states have treated this principle as a green light to adopt any rules they see fit, no matter how liberal or aggressive they choose to be – as if the federal law (R.S. 2477 itself) imposed absolutely no limit on what they can do. But that is a mistake. As we know from the SUWA decision, there is an important limit: state laws on what it takes to accept an R.S. 2477 SLE or what activity is permitted in a valid federal SLE cannot "override federal requirements or undermine federal land policy." Id., 766. This is not a new idea conjured out of thin air in 2005 by the Tenth Circuit in its SUWA decision to the great surprise of everyone. It is a settled rule of long standing: "state law may govern how these roads are established, but only to the extent that it is not inconsistent with federal law." U. S. Department of the Interior, Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands (June 1993), page 15; Ferguson Opinion dated 4/28/80.

In enacting R.S. 2477, did Congress really intend to allow states to do what the Territory of Alaska tried to do: tie up all of the surveyed section lines on federal public land, everywhere in the Territory, simply by passing a law that by general language categorically accepts an SLE on every available square foot in the State, without being site-specific and without requiring construction or even planned construction of a highway? Answer: No. Congress had no such intent. For more than one hundred years, the federal government has said that R.S. 2477 does not allow States to accept SLEs in this manner. The Court of Appeals for the Tenth Circuit agreed in its 2005 SUWA decision, providing an exhaustive discussion of the many conflicting state and federal rules, and it generally approved the practice of borrowing state law as a convenient way to adjudicate the questions about how R.S. 2477 works – but with the essential limitation that this historical practice "did not mean, and never meant, that state law could override federal requirements or undermine federal land policy." 425 F. 3d at 766, text accompanying footnote 17.

The Tenth Circuit decision offered an example of a state law that went too far and overrode the federal requirement. Its example: "a state law purporting to accept rights of way along all section lines . . . in advance of an apparent necessity therefor, or on the mere suggestion that at some future time such roads may be needed." Id. That is exactly what the Territory of Alaska tried to do, in the enactments on which the State relies. The Ferguson Opinion, the CRS Report, the USDOI Report, various DOI regulations and BLM manuals all concur with what the Tenth Circuit said. In fact, as noted earlier, the Ferguson Opinion singles out the Alaska situation as being contrary to federal law, because Alaska attempted to accept R.S. 2477 SLEs on all surveyed federal section lines by means of a Territorial statute that that is not site-specific and does not require construction of a highway, or even a plan to construct one. The states can only accept what Congress offered in R.S. 2477 and not more. Congress did not offer to turn over SLEs on every surveyed section of federal public land in the Territory of Alaska, without any showing of need and without actual construction of a highway.

The 1980 Ferguson Opinion sums it up this way: "R.S. 2477 was an offer by Congress that could only be perfected by actual construction, whether by the state or local government or by an authorized private individual, of a highway open to public use." Acceptance requires more than simply nominating, in one fell swoop, every surveyed section line on federal public land for acquisition as a SLE. To accomplish acceptance the action must be "perfected" or "completed" by constructing a highway on each specific right of way the state seeks to acquire.

The SUWA decision on this point of law was applied by a federal district court in the case of County of Inyo v. Department of the Interior, 873 F.Supp.3d 1232 (E.D. Cal.2012). That case involved an alleged right-of-way claimed based on alleged acceptance of the R.S.2477 federal offer by an "official act" of the county. In this case, the act purporting to constitute "official acceptance" was the adoption by the County Board of Supervisors in 1948 of resolutions that attached maps and route descriptions referring generally to various sites at which the County evidently desired to acquire rights-of-way. The Court ruled that the county's purported acceptance by this means was not effective under R.S. 2477 because it was not "sufficiently specific." The Court followed the SUWA decision's holding that Congress never intended "to grant a right of way over public lands in advance of an apparent necessity therefore, on the mere suggestion that at some future time such roads may be needed." Id., at 1242-43, quoting SUWA, 425 F.3d at 766.[8]

Against this backdrop of paramount federal law, what has the Alaska Supreme Court done? First, in 1961, in the case of Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961), it said the R.S. 2477 offer could be accepted either by actual public use meeting certain standards or else by "some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept the grant." It did not explain what kind of a "positive act" it

[8] In Lyon v. Gila River Indian Country, 636 F.3d 1059 (9 Cir.2010), the Ninth Circuit considered a case involving disputed federal section-line easements alleged to have been acquired under R.S. 2477 by the "official act" of a 1922 county declaration purporting to accept them. The Court did not reach the question of whether that was a sufficient action to accomplish acceptance under federal law, because it held that the land involved was not "public land" on the relevant date and therefore was not subject to R.S.2477.

meant, and it did not mention that the "positive act" would have to satisfy the federal requirements that the U. S. Department of the Interior had recognized for nearly 100 years.

This 1961 court decision set the stage for a disagreement between the first William Egan administration and the later Keith Miller administration about whether actions taken years earlier by the Territorial Legislature constituted the required "positive act." In the Egan administration the Attorney General issued a legal opinion in 1962 advising that a 192 Territorial Act was not sufficient to accept the R.S. 2477 offer for two reasons: he opined that the Alaska Organic Act did not give the Territory the power to pass such a law and, even if it did, he opined that the 1923 Act was not sufficient as an acceptance of the federal offer because it used the word "dedicate" rather than the word "accept." 1962 Op. Atty. Gen. No. 11, July 26, 1962. Almost seven years later, a different Alaska Attorney General issued a different legal opinion, disagreeing with the 1962 opinion on both of those two points. The 1969 opinion concluded that the Territory did indeed have the power under the Alaska Organic Act to pass a law addressing this subject and that despite its use of the word "dedicate" rather than "accept" the intent of the law was to accept the federal grant. 1969 Op.Atty.Gen.No. 7, December 18, 1969.

As was the case with the 1961 Hamerly v. Denton decision, neither the 1962 nor 1969 Attorney General's opinion discussed the question of whether the Territory's statutes purporting to establish R.S. 2477 "highways" by a general "legislative fiat" (as the 1962 opinion termed it) satisfied the requirements of the federal law itself, R.S. 2477.

Next, in 1975 the Alaska Supreme Court considered these two opposing Attorney General's opinions and decided that the 1969 opinion was correct on the two questions is addressed. Girves v. Kenai Peninsula Borough, 536 P. 2d 1221 (Alaska 1975). Once again, there was no consideration given to the question of whether the Territorial laws involved met the federal law requirement for acceptance of the R.S. 2477 offer of a SLE on federal public land – the issue that was addressed in the DOI's Ferguson Opinion, the Justice Department's brief filed in the Anchorage Greenhouses case, the Tenth Circuit's SUWA decision and elsewhere. All the Court decided in the Girves case was that the 1969 Attorney General's opinion had correctly answered the two questions it addressed - (1) whether the Territorial Legislature had the power under the Organic Act to pass a law on this subject, and (2) whether its use of the word "dedicate" rather than "accept" mean that it did not intend to "accept."

The Girves decision may have been correct, on the questions it actually decided. But it only decided the questions that were put to the Court. It did not consider the question of federal law: what does R.S. 2477 itself require in order for a valid acceptance to occur? Insofar as someone might read the Girves decision to imply a ruling that the Territory's attempt to accept SLEs on all surveyed federal "public land" in Alaska, by means of a blanket statement that is not site-specific and does not require the "construction" of a "highway" (as R.S. 2477 literally requires), the Department of the Interior and various legal scholars have consistently rejected that view.

The State's "management" of federal SLEs, itself, represents an implied concession that its attempt to accept all SLEs by a general act of the Territorial Legislature is ineffective to serve as acceptance under the federal statute (R.S. 2477). The Department of Transportation and Public

Facilities reportedly yields management of claimed SLEs to the Department of Natural Resources if it deems the SLEs to be unnecessary for present or future use as roads. The transportation planners evidently have no interest in these SLEs. Since the federal statute only offers SLEs for use as constructed highways, logically all R.S. 2477 SLEs managed by the Department of Natural Resources, being neither used or desired for use as highways, exceed the offer made by Congress and are therefore invalid.[9]

If an SLE existed, at one time, would it still exist or was it vacated? [The Territorial Act of 1923 specifically recognized that the so-called "highway" on the section line could be "vacated by any competent authority." Prior to enactment of the statute establishing the DNR as the exclusive authority for SLE vacation and prescribing the standards to be applied, what authority or authorities were legally competent to vacate an easement? What law governed? For example, could a federal, state or local land use action vacate? If one assumes, hypothetically, that a SLE was created on this land, does it still exist today, or was it vacated or abandoned or otherwise extinguished, sometime between 1923 and today? Answering this question requires research that we have not undertaken.

Another unanswered question: When the Territory attempted or purported to accept the R.S. 2477 "offer" of an SLE on this section line, was this land "public land" to which the offer applied? DNR assumes that it was. We have not delved deeply into this question, but note the following facts that may warrant further investigation: There is a reference to a 2/23/09 Presidential Proclamation 852 reportedly reserving the lands for the Chugach National Forest, and to Executive Order 2589 reportedly reserving timber on lands within 5 miles of the Alaska Railroad right-of-way. The 2/23/09 Chugach National Forest reservation would have made this section line unavailable under R.S. 2477; but it was reportedly revoked as to this land by Presidential Proclamation 1519. We have not examined those documents to confirm this. There is also the reservation of timber. Was it too revoked? If not, would it make the lands unavailable under RS 2477 – even though it reportedly applied only to the timber on the land and not the land itself? Wouldn't allowing the Territory to acquire an SLE in the area covered by a timber reservation threaten the federal timber resource that the reservation was imposed to protect, thus undermining the federal land management interest? Maybe that means the R.S. 2477 "offer" did not include this land, at least for so long as the timber reservation remained in effect.

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[9] There is another issue about whether R.S. 2477 SLEs on this land were accepted by the Territory: There is a theory holding that the question of whether any particular R.S. 2477 SLE (such as the one under discussion here) came into being or did not is to be decided based on the state of the law that was in effect on the date that the property ceased to be "public land" and was therefore no longer subject to the R.S. 2477 offer. In the case of the Alm and McCullough homesteads, these dates were in 1948 and 1949, when they filed their applications for entry. If the SLE did not exist on those dates, they acquired the land free and clear of any SLE. If the State later changed its legal position to assert that there was an SLE, that would be a confiscation of property. What did it take to accept the SLE, according to the law in effect then? We know that in 1962 the AG determined that the Territorial Acts did not constitute acceptance. Was this a confirmation of the law as it was understood at the time, or was this a rejection of the contemporary understanding?

What view of the law was embraced by the Territory in 1948 and 49? The 1993 CRS Report discussed earlier cites a 1938 Interior Department regulation, 43 C.F.R. 244.55, that reportedly states that acceptance of the R.S. 2477 right of way offer would not be effective until a "highway" was "constructed or established." If Alm and McCullough had asked the Interior Department in 1949 whether there was an R.S. 2477 SLE on the boundary between Sections 14 and 15, what answer would they have received?

Finally, regarding the issue of "acceptance," we note that there is another theory of how the R.S. 2477 "offer" procedure works. Under this theory, the process of acceptance could be a two-step process "initiated" by an official act indicating the state's intention to accept the grant and then later "perfected" by the actual construction of a highway which is the action that fulfils the federal requirement for acceptance. The acquisition of the R.S. 2477 SLE would not be completed until the highway is constructed. Under this view the Alaska Territory's 1923 enactment, and its reenactment in 1953, would have been sufficient to initiate the process of acceptance. However, since R.S.2477 was repealed in 1976, the acceptance would only have been perfected as to SLEs on which highways were constructed before the repeal.

The "scope of use" question. The discussion turns now to a different legal question: If there were a valid R.S. 2477 federal SLE on this land, what activities or uses would be allowed? Just as there has historically been a broad difference of opinion between the State and the federal government about the rules by which an R.S. 2477 SLE can be accepted, there has been a similar difference of opinion between them about what activities can be permitted in a valid R.S. 2477 SLE. The fundamental problem that accounts for this difference of opinion is that the State has assumed that once it acquires a R.S. 2477 right-of-way or SLE it is entirely free to decide, as a matter of state political choice and without any limitation by federal law, what activities will be allowed in the right-of-way or SLE.

The general principle that applies in answering the question of whether a state's action suffices to accept the "federal offer" also applies in this situation: within limits states are free to develop their own "scope of use" rules, and these rules may be "borrowed" by courts to determine federal SLE scope-of-use questions, but this is all subject to the limitation that state law cannot "override federal requirements or undermine federal land policy." The scope of a grant of federal land such as a R.S. 2477 SLE is a question of federal law, not state law. U. S. v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411, 1413 (9 Cir. 1984). If a landowner like the United States offers to give someone a limited right to use its property for a specifically-stated activity (for example, under R.S. 2477, for "construction" of a "highway"), and the other party accepts that offer, the accepting party does not become entitled to use the land for some other purpose that is beyond the scope of what the landowner offered. To state this differently: the State of Alaska cannot accept what the United States offered under R.S. 2477, which is a right to engage in certain limited activities on the land along the section line, and then simply decree that the right it acquired from the United States is broader that what was offered. But it appears that this is what the State of Alaska has done in the case of federal SLEs. The Legislature enacted a statute that defines the word "highway" broadly to include activities that exceed what R.S 2477 allows.

This state-federal disagreement is presented vividly in a comparison of two court decisions about whether the permissible scope of use of an R.S. 2477 federal SLE includes electrical transmission lines. The state case was decided in 1983; the federal case was decided one year later, in 1984. In the 1983 case, the Alaska Supreme Court ruled that the State could permit an electric utility to place power lines in a federal SLE as an incidental use of a highway right-off-way. Fisher v. Golden Valley Electric Association, 658 P.2d 127. The Court's decision relied solely upon an interpretation of state law, and, just like the Court's Girves decision, did not recognize that there is a federal law limitation on how far the state law can go on this issue.

To the contrary, the Court expressly rejected the proposition that the scope of use of a R.S. 2477 SLE is a matter of federal law. As later federal court decisions would demonstrate, that was incorrect. One year later, the U.S. Court of Appeals for the Ninth Circuit ruled that the scope of use of the R.S. 2477 right-of-way or SLE is controlled by federal law, and that as a matter of federal law "power transmission is not within the scope of an R.S. 2477 right of way." U. S. v. Gates of the Mountains Lakeshore Homes, 732 F.2d at 1413. This ruling states a principle of federal law that the Alaska Legislature, the Department of Natural Resources and the Department of Transportation and Public Facilities have either overlooked or deliberately ignored.

The settled position of the federal government is that a R.S. 2477 SLE may be used for a constructed highway only, and that other uses are not permitted. The authorities on this point are voluminous and have been reviewed at length in the materials cited earlier in this report. A pedestrian trail or walkway in a R.S. 2477 SLE would be illegal for the same reason that the power line in the Gates of the Mountains Lakeshore Homes case was illegal – it is not an activity that Congress authorized under R.S. 2477.

Skeptics might suggest that would be fanciful to expect a court to revisit prior Alaska Supreme Court decisions about R.S. 2477 SLEs or to question legal interpretations that have been adopted by state agencies, for fear of "upsetting the applecart." There are several obvious responses to this. In the first place, the fact that federal agencies have never accepted the State's aggressive policies on R.S. 2477 SLEs is certainly not a secret – Alaska's DNR and DOT/PF and Attorney General's office have known for a long time that the State's positions on these questions runs counter to the federal position. (One need only look to the Alaska Greenhouses litigation thirty-five years ago in the U.S. District Court in Anchorage, in which the U. S. Justice Department filed a friend-of-the-court brief and in which the State also participated.) The state agencies could not claim surprise.

Second, the federal law is what it is. The decisions of the Department of the Interior, the Ninth and Tenth Circuits and other federal courts are clear. The Alaska Supreme Court's decisions have never addressed federal law because the litigants involved have evidently never raised the question of how it might apply.[10]

Third, in Alaska at least, section lines on which someone might clam a federal SLE but on which no road has been constructed are probably not numerous. By DOT&PF's contemporary design and construction standards, it is unlikely that they important to the State. The only section lines on which an R.S. 2477 SLE might even be claimed are section lines established by an approved federal survey prior to the 1976 repeal; and only a tiny fraction of the acreage in Alaska falls into that category. Future highways will be sited and constructed in places that engineers and planners find most suitable for them. Section lines that have not already been developed have probably been passed over for a good reason – they are not necessary and feasible routes for road construction.

[10] The sole exception to this of which we are aware is the Alaska Supreme Court's Fisher v. GVEA decision in 1983, in which the Court stated that the scope of use of a R.S. 2477 SLE is a question of state law,. This view of the federal law was rejected the following year by the Ninth Circuit in the Gates of the Mountains Lakeshore Homes case. We assume that the Alaska Supreme Court would defer to the Ninth Circuit and accept its ruling on this question of federal law.

Conclusion. The foregoing lengthy discussion of R.S. 2477 federal section-line easements explains several propositions that conflict with the settled position that the State has taken for many years: (1) that although state laws may be "borrowed" and applied to flesh out the details of interpretation of R.S. 2477, these state laws cannot override federal requirements; (2) that as a matter of federal law, a state law like Alaska's that purports to accept R.S. 2477 SLEs along all surveyed section lines in the State, without any site-specific determinations as to the necessity of any particular SLE, is not a valid acceptance of the federal offer under R.S. 2477; and (3) that if a valid R.S. 2477 is acquired by the State, by means of a legally-sufficient act of acceptance, it may only be used for the purpose authorized by Congress: "construction of a highway," and not for a trail or pedestrian walkway. The Alaska Department of Natural Resources might disagree with each of these three points. However, we would challenge DNR to find judicial decisions based on federal law that refute them and support DNR's position. We did not find any.

DATED this 5th day of October 2020, at Anchorage, Alaska.

HOLMES WEDDLE & BARCOTT

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