

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

FRIENDS OF THE STEWART PUBLIC TRAIL, INC., an Alaska Non-Profit Corporation,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
FRANKLIN D. PUGH, Jr., et al.	)	
	)	
Defendants.	)	
<hr style="width:45%; margin-left:0"/>		Case No. 3AN-19-05746 CI

**FINDINGS OF FACT & CONCLUSIONS OF LAW**

***I. Introduction***

This case concerns a putative public prescriptive easement that purportedly grants the public at large the right to access a segment of a historic homestead road in South Anchorage (“the Stewart Trail” or “the Trail”) for non-motorized recreational purposes. Friends of the Stewart Public Trail, Inc., an Alaska Non-Profit Corporation (“Plaintiff” or “Friends”) brought this action against Franklin and Oksana Pugh (“the Pughs”) and Mattanaw<sup>1</sup> (collectively “Defendants”). The court held a 14-day non-jury trial beginning on January 18, 2022 and concluding on March 2, 2022. Plaintiff and the Pughs were both represented by counsel. Mattanaw proceeded *pro se*. At the conclusion of trial, the court

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<sup>1</sup> While the complaint names Christopher Cavanaugh as a defendant, he has now legally changed his name to “Mattanaw CMC Mattanaw” and prefers to be known as “Mattanaw.”

took the matter under advisement. After considering the evidence offered at trial and the law applicable to public prescriptive easements, the court makes the following *Findings of Fact* and *Conclusions of Law* set forth below.

## ***II. Applicable Law***

### **A. Public Prescriptive Easements**

“Prescriptive easements may be obtained either by private individuals or by the general public.”<sup>2</sup> Public prescriptive easements require the same elements as private prescriptive easements.<sup>3</sup> ““The only difference is that a public prescriptive easement requires qualifying use by the public, while a private prescriptive easement requires qualifying use only by the private party.”<sup>4</sup> To establish a public prescriptive easement under Alaska law, a claimant must show three elements: (1) continuous use by the public at large for at least ten years; (2) open and notorious use by the public at large for at least ten years; and (3) hostile use, where the public acts without permission from the landowner.<sup>5</sup>

In order to demonstrate that the public’s use is continuous and uninterrupted, a plaintiff may rely on “evidence of continuous use by other members of the general public” as opposed to “use by [an] organization itself or by any individual member.”<sup>6</sup> To establish

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<sup>2</sup> *Interior Trails Pres. Coal. v. Swope*, 115 P.3d 527, 529 (Alaska 2005) (internal citation omitted).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (quoting *Brimstone Mining, Inc. v. Glaus*, 77 P.3d 175, 181 (2003)).

<sup>5</sup> *Id.* at 530 (internal citation omitted).

<sup>6</sup> *Id.* at 531 (internal citation omitted).

abandonment of a prescriptive easement claim, or demonstrate interrupted use, the “period of non-use must indicate that the adverse user had ceased [their] use and claim.”<sup>7</sup> Interruption of use “must be caused by the record owner or third parties.”<sup>8</sup> To establish open and notorious use, “the adverse user need not demonstrate that the record owner had actual knowledge of the adverse party's presence. The adverse user must show only that a duly alert owner would have known of the adverse presence.”<sup>9</sup> Hostility requires a user to “have acted as if he were claiming a permanent right to the easement.”<sup>10</sup> Occupancy of land is legally hostile when it is not dependent on the consent or permission of the landowners.<sup>11</sup> The court applies an objective test to determine “whether the possessor acted toward the land as if he owned it, without the permission of one with legal authority to give possession.”<sup>12</sup>

There is generally a presumption that use of another’s land is permissive.<sup>13</sup> This presumption has not been discussed or applied in every prescriptive easement or adverse possession case.<sup>14</sup> For example, in *Dickson v. State*, the Alaska Supreme Court did not discuss the presumption of permissive use.<sup>15</sup> There, landowners argued that their father,

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<sup>7</sup> *Swift v. Kniffen*, 706 P.2d 296, 303 (Alaska 1985).

<sup>8</sup> *Id.*

<sup>9</sup> *McDonald v. Harris*, 978 P.2d 81, 85 (Alaska 1999) (internal citations omitted).

<sup>10</sup> *HP Ltd. P'ship v. Kenai River Airpark, LLC*, 270 P.3d 719, 732 (Alaska 2012) (quoting *Swift*, 706 P.2d at 303 (citing *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1331 (Alaska 1975))).

<sup>11</sup> *Vezev v. Green*, 35 P.3d 14, 22–23 (Alaska 2001) (internal citation omitted).

<sup>12</sup> *HP Ltd. P'ship*, 270 P.3d at 732 (internal quotation marks and citations omitted).

<sup>13</sup> *Yuk v. Robertson*, 397 P.3d 261, 266 (Alaska 2017).

<sup>14</sup> *Id.* at 266 n. 29.

<sup>15</sup> 433 P.3d 1075, 1085 (Alaska 2018).

the prior owner of the property at issue, permitted the public to use a homestead road for many years.<sup>16</sup> The notion of purported permissive use by the public was undercut by a number of witnesses testifying that they used the road without permission, in addition to the father's general hostility towards public use.<sup>17</sup> The Court affirmed the superior's court's finding that the public's unpermitted use of the homestead road at issue satisfied the hostility requirement for the establishment of a public prescriptive easement.<sup>18</sup>

*1. Hostility and the presumption of permissive use*

In cases where the presumption of permissive use applies, the adverse claimant bears the burden to rebut the presumption "by clear and convincing evidence that the use was not permissive. To rebut that presumption adverse possessors must show they were 'not on the owner's land with permission, and that the record owner could have ejected' them."<sup>19</sup> Determining whether an adverse user's initial use of the property was permissive is a crucial fact because it determines the degree of proof necessary for the claimant to successfully rebut the presumption.<sup>20</sup> When use of property is initially permitted, it is more difficult to establish hostile use.<sup>21</sup>

In the context of a public prescriptive easement case, the adverse user is the general public. Use by members of the public is distinguishable from use by adjoining property

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Yuk*, 397 P.3d at 266–67 (internal citations omitted).

<sup>20</sup> *Dault v. Shaw*, 322 P.3d 84, 94 (Alaska 2013).

<sup>21</sup> *Yuk*, 397 P.3d at 266. The "burden can be difficult to overcome if evidence shows possession began permissively, such as with a lease."

owners, such as neighbors, that may also use the putative easement. Only the public's use is relevant to the analysis. Landowners may not tack on, or aggregate, adjoining property owners' use of the property to the public's use to demonstrate that the public's use began permissively. Put differently, an adjoining property owner's initial permissive use of the land at issue is not determinative of whether the public's use was permissive.

*a. Determining whether an adverse user's initial use of land was permissive or nonpermissive*

Initial use of land is permissive when the adverse user contemplates continued use as contingent upon the permission of another.<sup>22</sup> "Permission contemplates the servient landowner's right to revoke that permission and prevent further use of the servient owner's land."<sup>23</sup> In public prescriptive easement cases, the initial use of property has been found to be permitted in situations where the interests of private landowners and the public are sufficiently aligned.<sup>24</sup> This has occurred in the context of lease agreements<sup>25</sup> and in situations where the public's use of land may have been allowed by the landowner to facilitate the public's access to the landowners' business.<sup>26</sup> For example, in *Dillingham Commercial Co., Inc. v. City of Dillingham*, the Alaska Supreme Court found that the public's use would be permissive if they used the land at issue only to access stores along

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<sup>22</sup> *Dault*, 322 P.3d at 93 n. 12.

<sup>23</sup> *Weidner v. State, Dep't of Transp. & Pub. Facilities*, 860 P.2d 1205, 1210 (Alaska 1993).

<sup>24</sup> *Id.*

<sup>25</sup> *City of Anchorage*, 530 P.2d at 1329–32.

<sup>26</sup> *Dillingham Com. Co., Inc. v. City of Dillingham*, 705 P.2d 410, 417 (Alaska 1985).

the alleyway as patrons because such “use did not contemplate unrestricted future access so much as permission to use the land as an incident to patronizing the stores.”<sup>27</sup>

In scenarios involving a purported private prescriptive easement, initial use has been determined to be permissive where an adverse user’s use of land is initially afforded by accommodation and consistent with permission.<sup>28</sup> For example, in *Dault v. Shaw*, an individual claimant, who was a lot owner, sought a prescriptive easement over a trail he used to access his property. The Court found that the lot owner’s use began permissively because the trail at issue was initially created by subdivision developers “to facilitate sales” for prospective buyers to gain access to the property, and as lots were sold, new lot owners were granted permission to use the trail.<sup>29</sup> Essentially, “the new lot owners’ uses of the trail were consistent with the concept of permission.”<sup>30</sup> The lot owners’ use “did not necessarily contemplate unrestricted future use of the trail but could be pursuant to an accommodation afforded by the subdivision developers to make the lots more attractive for sale.”<sup>31</sup>

Initial use of land is nonpermissive when the public’s use contemplates unrestricted future access not subject to permission of another.<sup>32</sup> In public prescriptive easement cases, use of property begins in an unpermitted manner in situations where the interests of private

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<sup>27</sup> *Weidner*, 860 P.2d at 1210 (discussing *City of Dillingham*, 705 P.2d at 416–17).

<sup>28</sup> *Dault*, 322 P.3d at 94.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 93 n. 12. The Court distinguished *Dault* from *Weidner*. In *Weidner*, the Court found that the State’s construction of public roadway on private land demonstrated that the State did not intend access to be contingent upon the permission of a private landowner.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

landowners and the public are not sufficiently aligned. This occurs when the public expects uninterrupted future use of land, and the use is inconsistent with the concept of permission.

A claimant's burden to rebut the presumption is more difficult if use of the property was initially permitted: a demonstration of proof of a distinct and positive assertion of a right hostile to the owner of the property is required.<sup>33</sup> If the initial use of property was unpermitted, the claimant's burden to rebut the presumption is less difficult: a showing of mere owner acquiescence will suffice.<sup>34</sup>

*b. Rebutting the presumption when initial use was permitted*

When use begins permissively, it cannot become hostile until the presumption of permissive use is rebutted "by proof of a distinct and positive assertion of a right hostile to the owner of the property."<sup>35</sup> A distinct and positive assertion of a hostile right "must take the form of conduct that would give the owner of the property notice of hostility and thus of the need to protect the owner's interest."<sup>36</sup> Proving owner acquiescence alone does not satisfy the claimant's burden to show the claimant's assertion of a hostile right.<sup>37</sup>

*c. Rebutting the presumption when initial use was unpermitted*

When the initial use was nonpermissive, the presumption may be rebutted when the adverse claimant acted as if the land were his, and he used the land without permission of

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<sup>33</sup> *Id.* at 94.

<sup>34</sup> *Id.*

<sup>35</sup> *Cowan v. Yeisley*, 255 P.3d 966, 974 (Alaska 2011) (internal quotation marks and citations omitted).

<sup>36</sup> *Dault*, 322 P.3d at 94.

<sup>37</sup> *Id.* at 95 (internal citation omitted).

the owners.<sup>38</sup> “Evidence of a landowner’s acquiescence is not enough to extinguish an adverse user’s claim; the question is whether the landowner intended to permit the use or merely acquiesced in that use.”<sup>39</sup> “The hostility element turns on the distinction between acquiescence and permission”<sup>40</sup> and “[t]he key difference between acquiescence by the true owner and possession with the permission of the true owner is that permissive use requires acknowledgment by the possessor that he holds in subordination to the owner’s title.”<sup>41</sup>

A landowner merely acquiesces when there is no evidence that an adverse claimant was given formal permission to use the land or when an adverse claimant never discussed permission with the landowners.<sup>42</sup> Thus, the friendly disposition of a landowner is a characteristic of acquiescence rather than an affirmative intent to grant permission.<sup>43</sup>

Additionally, the following acts by an adverse user are likely demonstrations of treating the land as their own and support a finding of hostile occupation: performing maintenance of the land; or inserting physical structures on the land.

### ***III. Findings of Fact***

Members of the public testified at the trial regarding their use of the Trail. Current and former landowners also testified. The court admitted exhibits into evidence.

The court makes the following findings of fact.

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<sup>38</sup> *Yuk*, 397 P.3d at 266–67 (internal citations omitted).

<sup>39</sup> *HP Ltd. P’ship*, 270 P.3d at 733 (internal citation omitted).

<sup>40</sup> *Swift*, 706 P.2d at 304.

<sup>41</sup> *Hubbard v. Curtiss*, 684 P.2d 842, 848 (Alaska 1984) (internal citations omitted).

<sup>42</sup> *Tenala, Ltd. v. Fowler*, 921 P.2d 1114, 1120 (Alaska 1996).

<sup>43</sup> While a landowner’s overt “hostility” or displeasure towards an adverse user’s occupation of their land supports a finding of hostility, it is not required.



### **A. Geographical description of the Trail**

The Trail begins at the terminus of Steamboat Drive and runs south-southeast for roughly 1.75 miles. It crosses four tracts of land in the following order: the Pugh tract (formerly the Schoff tract); the Mattanaw tract (formerly the Miller tract); the Waddell tract;<sup>44</sup> and the Stewart tract.<sup>45</sup>

A map of the Trail crossing the four tracts was admitted at trial (Exhibit 1010). The exhibit is attached to this order.

### **B. Historical ownership, use, and characteristics of the Trail**

As reflected below, many witnesses referred to the “red gate.” Testimony established that the red gate is located at the terminus of Steamboat Drive. Prior to the Pughs’ property purchase, the red gate, which was padlocked, prevented vehicle use of the Trail. Individuals could easily walk around the sides of the red gate to access the Trail.

Many witnesses referred to two specific sets of “switchbacks” that intersected with the Trail. The evidence generally established that, heading down the Trail from Steamboat Drive, the first set of switchbacks were about  $\frac{3}{4}$  of a mile up the Trail and lead to what is known as Baldy ridge and also referred to as the airstrip, because a homesteader above the Trail previously put in an airstrip. The first set of switchbacks are located on what is now Mattanaw’s property.

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<sup>44</sup> Donald E. Waddell and Penny Waddell are not parties to this quiet title action.

<sup>45</sup> Currently, the Stewart tract is now two tracts owned by the Alaska Botanical Garden and the Alaska Zoo.

The second set of switchbacks are towards the end of the Trail located on what was the Stewart property. They lead up into Chugach State Park. Hikers could use the switchbacks to hike to McHugh Peak or hike down from the Park onto the Trail.

Several witnesses also testified about a split in the Trail, roughly halfway down it. The split is about a quarter of a mile long, and the splits then rejoin and the Trail continues. The split is located on the Waddell property.

*1. Members of the public*

*Jerome Lewanski.* Mr. Lewanski came to Alaska in 1982 or 1983. At first, he lived in McGrath but soon moved to Anchorage in 1985 when he was hired as a park ranger for Chugach State Park. Mr. Lewanski, his wife, and one of their daughters currently own Fire Island, a bakery in Anchorage.

As a park ranger, Mr. Lewanski was in the field 90% of the time when working. In 2002, he was promoted to superintendent, and his time in the field decreased. Mr. Lewanski became the Director of State Parks in 2005, which involved managing all state parks in Alaska.

Beginning in 1985, Mr. Lewanski would be on the Trail anywhere from three times per month on the low end, to 10-12 times a month on the high end. He traveled the Trail for several purposes: to understand the boundaries of the park and its uses, and to identify what future access to the park might look like. Mr. Lewanski's time on the Trail gradually increased from 1985 to 2002 as a park ranger. When he became superintendent, his field

time diminished to six times a month. He also used the Trail personally anywhere from one to four times per week for hiking, walking his dog, skiing, and running.

Each time Mr. Lewanski was on the Trail, he saw other people and evidence of use. During his years as a park ranger, he observed a gradual increase in usage over time. By the time he became superintendent, Mr. Lewanski considered the Trail to be frequently used by members of the public.

Mr. Lewanski never hid his use of the Trail. When working, he would wear his uniform and drive his ranger truck. Mr. Lewanski was aware that the Trail traversed private land. At one point, he had a casual conversation with an unidentified landowner but they did not discuss permission. Mr. Lewanski never received express permission to use the Trail.

While testifying, Mr. Lewanski reviewed Exhibits 1024, 1025, 1026, and 1033. Each exhibit showed the Trail at different times in 1990, 1996, and 2005, with the Trail becoming wider as time went on. Mr. Lewanski recalled that someone widened the Trail at some point, but could not recall who did it. Regardless, the Trail's centerline would have stayed about the same even after widening. He noted that there are "offshoots" that travel off of the Trail. Specifically, Mr. Lewanski testified that there is one offshoot that goes from the Trail to Baldy, or the airport, and that there is an additional offshoot he characterized as a switchback that is located near the end of the Trail that leads to a ridge. He does not consider either of these offshoots to be a part of the Trail.

Mr. Lewanski reviewed the October 2002 Chugach State Park Access Inventory, Exhibit 1035, while testifying. This 2002 document describes how “people get into the park,” and it indexes access. Page 63 describes “S49: Stewart Road” with “Traditional Access, potential:”

The Stewart Road is located in T1 1N, R3W, Sections 11, 12, and 13 running from Mountain Side Village Subdivision along the base of the Northwest Rib of McHugh Peak above Potter Creek. Residents of this area use the Stewart Road to access the McHugh Peak Complex. Residents of this area currently run, ski, bike, hike, skijour and snowshoe along this road and up the switchback trail to the northwest rib of McHugh and as an approach to climbing McHugh Peak in Chugach State Park. Development of a neighborhood trailhead [sic] in this location would provide convenient access for local residents to McHugh Peak and the Northwest Rib, a ridge walk with views of Turnagain Arm, the Kenai Peninsula, and the Alaska Peninsula. Development and changes in landownership have resulted in “No Trespassing” signs, gates, and fences blocking access to user-established trails. Conflicts between landowners and local trail users trying to gain access to Chugach State Park and the McHugh complex will continue to increase as development in this area occurs ever closer to the Park.

*Recommendations:* Work with the Municipality to negotiate road or trail easements with local landowners and non-profit organizations to secure a developable parcel for a neighborhood trailhead.

Consistent with this inventory, Mr. Lewanski, as a park ranger, would direct people to use the Trail to reach the McHugh Peak.

According to Mr. Lewanski, any gates, fences or “no trespassing” signs referenced in the Inventory that may have been on the Trail did not deter all members of the public from using it.<sup>46</sup> The phrase “traditional access” was used in the Inventory when the Park

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<sup>46</sup> Mr. Lewanski did not specifically recall signage or gates, but he indicated that, even if there were signs, etc., the public continued to use the Trail.

could not determine when use had started, and the word “potential” used in the Inventory could mean that, in the future, the Park might be interested in constructing parking or other facilities to support use of the Trail.

On Page 75 of Exhibit 1035, the Trail is marked as S49 and qualifies as a “pedestrian corridor,” which, according to Mr. Lewanski, meant that is how people could get into Chugach State Park. Mr. Lewanski believes that people used the Trail to access Chugach State Park since the Park’s inception in 1970.

Mr. Lewanski confirmed the accuracy of his affidavit, admitted as Exhibit 1101. In his affidavit, Mr. Lewanski provided the following information: (1) he has lived in Anchorage since 1985; (2) Mr. Lewanski is very familiar with the location of the Trail; (3) he began using the Trail in 1986 for personal use including exercise and recreation, and to gain access to the Park; (4) as Chief Ranger of the Park, Mr. Lewanski used the Trail to access park land in the upper valley; (5) he has used the Trail every year from 1986 until it was blocked against pedestrian use at the end of Steamboat Drive in about 2015; (6) Mr. Lewanski’s use has included hiking, dog walking, cross-country skiing, and mountain running; (7) at times, he used the Trail with his wife, Janis Fleischman, and with friends, including Natalie Phillips (deceased), Else Aegerter, and Jess Grumblatt; (8) before the Trail was blocked, Mr. Lewanski was never prevented nor obstructed from using the Trail by any of the landowners; (9) his use was always overt, and never clandestine; (10) Mr. Lewanski never asked for or received the permission of a landowner, and he always considered the Trail to be a public access route; and (11) as both Chief Ranger and

Superintendent of the Park, Mr. Lewanski directed many people to the Trail as access into the Park – it was an alternate way to hike to the McHugh Peak area.

On cross-examination, Mr. Lewanski described the Trail as about 1.7 miles in length. He does not recall a gate being at the juncture of Steamboat Drive and the Trail when he first started using it. Mr. Lewanski believes he was always aware that the Stewarts homesteaded on the Trail, and he recalled seeing Mrs. Stewart's poppies. He estimated that he used the Trail in his personal capacity about one to two times per week, and as a ranger about three times per month. Mr. Lewanski would see other people using the Trail, but did not know who they were. He recalled steady users of the road, and he would sometimes talk with people and learn they lived in the area. At times, Mr. Lewanski saw evidence that others used the road, such as footprints, dog tracks, and bike tracks – he could not say who made those tracks.

At one point, Mr. Lewanski had contact with an unidentified landowner. He was walking out on the Trail from Steamboat Drive and the person was also walking out; this was probably during the 1990s. The person did not give a name; he just said he was a landowner. The conversation was casual and short, and at the time, Mr. Lewanski had a park ranger uniform on. There was not a discussion of permission, but there was no indication that the landowner was opposed to his use.

Mr. Lewanski recalls that the red gate went up around 1997; he does not have vivid memories of that, but thinks the gate was steel-barred and constructed from a pivot point on the side of the trail such that the gate could connect with a post on the other side of the

Trail. Mr. Lewanski understood that the gate was meant to prevent vehicular traffic, and that it was easy for a person to walk around it.

Mr. Lewanski felt that, from 1986 forward, people were welcome to use the Trail respectfully. If someone had signaled that his use was not welcomed, Mr. Lewanski would have stopped using the Trail. In fact, when the barricades went up that appeared to prevent pedestrian traffic, he did stop using the Trail. He does not recall when the barricades went up.<sup>47</sup>

In terms of specific characteristics of the Trail, Mr. Lewanski recalled that the Trail split in one place for about 20 yards, and he considers both parts of the split to be the Trail.

*Nancy Pease.* Ms. Pease grew up in Anchorage. After graduating from Dartmouth College in 1982, she worked in Juneau for a time before going to University of California, Berkeley, where she received a degree in 1989. Ms. Pease then returned to Anchorage.

Ms. Pease has done a variety of work in the past, including working for environmental planning firms and the Department of Natural Resources. She also stayed at home to care for her children while doing intermittent consulting work. In 1990, Ms. Pease served on the Chugach State Park advisory board; she also served on the Municipality of Anchorage's Planning & Zoning Commission at one point.

Ms. Pease is a life-long runner who has been inducted into the Alaska Hall of Fame for her many running accomplishments. According to her testimony, Ms. Pease first used

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<sup>47</sup> Testimony from other witnesses established that Mr. Pugh reinforced the red gate, or put up barricades, in 2015.

the Trail in the summer of 1975 when she was training for her first marathon, the Mayor's Midnight Sun Marathon in Anchorage. That summer, she would run up Cobblestone Road and continue on to the Trail. Ms. Pease was 13 years old at the time, and she continued to use the Trail to train for marathons in high school. Ms. Pease was aware that the Trail traversed homestead properties, but to the extent her 13-year old self thought about property ownership, she did not think of the Trail as private property.

During her high school and college years, it was fairly common for Ms. Pease to observe other athletes and hikers using the Trail. As the nearby subdivisions filled in, she would recognize the same users and the same dogs on the Trail. Ms. Pease would see evidence of other users too: footprints, dog droppings, and sometimes a "bit of brush clearing."

Ms. Pease has used the Trail "hundreds of times." For almost the entire history of her use, there were no signs on the Trail. To her knowledge, Ms. Pease never met or encountered a landowner on the Trail, including the Stewarts. Prior to 2012, she never had interactions with a property owner.

Ms. Pease described the Trail as a good place to take children because it is open, and a person can see wildlife and dogs approaching. She carried her own children in backpacks on the Trail when they were very young. As her children aged, she enjoyed taking her children's friends, and her own friends, to the Trail. Ms. Pease never tried to hide her use of the Trail, and she went at all times of the day. She felt the Trail was open



to the public because she saw the public use it. Before the red gate went up, Ms. Pease sometimes saw motorcycles and vehicles on the Trail.

In 1997, Ms. Pease moved into a house off of Potter Valley Road, located about three miles from the Trail. From 1997 to 2010, she would run to the red gate and access the Trail or reach the Trail via other trails feeding into it. She would also hike and ski at times, and occasionally she would bike. Ms. Pease would use the Trail a few times in the winter months. In the spring before her husband left for commercial fishing, Ms. Pease might use the Trail a total of two or three times. During the summer months (characterized by Ms. Pease as lasting four to four and one-half months), she would use the Trail three to four times each week. Ms. Pease estimated that she would use the Trail each year approximately 50-80 times. Starting around 2010, Ms. Pease would see other people on the Trail just every time she used it.

Ms. Pease confirmed that the information in her affidavit, Exhibit 1112, is accurate. The affidavit includes photographs taken both on the Trail and above it from the "Brewster" airstrip and ridge, which Ms. Pease reached via the Trail. As stated in her affidavit, Ms. Pease did not seek nor receive permission from a landowner to use the Trail. She always considered it to be a public trail.

*Jill Fredston.* Ms. Fredston has degrees from Dartmouth College and University of Cambridge. She was the Director of the Avalanche Forecast Center from 1983 to 1986. Thereafter, Ms. Fredston and her husband started a non-profit, the Alaska Mountain Safety Center, and ran the Alaska Avalanche School. She is the author of three books.

Ms. Fredston moved to Alaska in the summer of 1982; she immediately began “haunting trails.” Her use of the Trail started in the fall of 1982, and Ms. Fredston soon observed the boat<sup>48</sup> at the end of the Trail on the Stewarts’ property; upon learning about the Stewarts, she went to their downtown photo shop to meet them.

In 1985, Ms. Fredston began building a home in Bear Valley. She moved in, along with her partner, in 1986. From 1986 to 2007, Ms. Fredston would use the Trail a few times a week. When her parents would visit from the lower 48, they would also use the Trail. In addition, Ms. Fredston had a friend, a single mother with cancer who lived near the Trail; together, they would use the Trail when Ms. Fredston would visit the friend “all the time” from 1999 to 2007. After her friend died in 2007, Ms. Fredston went to the trail “less often.”

Ms. Fredston started leaving Alaska in the summers starting in 1986 to go on rowing expeditions. When she was in Alaska, Ms. Fredston would use the Trail approximately two to three times per week. About 75% of the time, Ms. Fredston would drive to the gate, but at times she would hike to the end of the Trail and use it from that direction, i.e., she would use the second set of switchbacks from above the Stewarts’ property and hike down to the Trail. Other times, she would “drop down” to the Trail another way. Her parents frequently visited for Thanksgiving, and together the family would use the Trail.

In 2009, Ms. Fredston went on an extended sailing trip that lasted until 2016, and she came back to Alaska only occasionally. As a result, her use of the Trail diminished, but

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<sup>48</sup> Evidence established that the Stewarts perfected their homestead by bringing a boat to their property and living in it for the requisite period of time.

when she and her husband were in Anchorage, they would use it. And when her husband had surgery in 2014, they used it almost every day for a period of time.

Ms. Fredston described the Trail as a “good, flat trail, more like a road.” It was “absolutely” well-used, and she would see other people “all of the time,” and she would always see parked cars at the gate when accessing the Trail that way. Ms. Fredston testified that it was rare not to see another person using the Trail. She would see evidence on the Trail of other users, too, in the form of ski tracks, footprints, and dog prints.

When using the Trail, Ms. Fredston never tried to hide her use. As she testified, “there was no need,” because she considered the Trail to be a public trail. Ms. Fredston would often pick up trash if she saw some on the Trail.

Ms. Fredston testified that she never met anyone on the Trail that she knew to be a landowner, with the exception of Mrs. Stewart, who never identified herself as a landowner to Ms. Fredston; the two of them would talk about poppies<sup>49</sup> and mountain sheep, which inhabit the valley. At times, Ms. Fredston would see Mr. Stewart, but mostly she encountered Mrs. Stewart. Both of them were friendly to her. Ms. Fredston does not recall any signs being placed on the Stewarts’ property.

*Page Spencer.* Ms. Spencer grew up on the Kenai Peninsula on a homestead. She has three degrees: a B.S. in biology (received in 1972), a Master’s in applied plant ecology

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<sup>49</sup> Many witnesses described Mrs. Stewart’s love of poppies, which grew on her property.

(received in 1975), and a Ph.D. in applied ecology (received in 1980 or 1981). She moved to Anchorage in 1979 or 1980. Ms. Spencer retired in 2010 or 2011.

After she received her Ph.D., Ms. Spencer worked for the Bureau of Land Management (“BLM”); her work included vegetation mapping and overseeing Environmental Impact Statements (EISs). Then, she worked for the National Park Service in a variety of roles.

When Ms. Spencer was working towards her bachelor’s degree at University of Alaska Fairbanks, her family moved to Anchorage, and she would visit them in the summers. They would explore the Potter Valley and areas around it. Ms. Spencer recalls traveling on the Trail as part of those summer explorations during the 1969-1971 timeframe.

Ms. Spencer moved full-time to Anchorage around 1979. She used the Trail, along with many others trails. Her siblings were athletic (her brother, Bill, was in the Calgary Olympic games and her sister, Lynn, participated in three Olympics) and would use the Trail to train for ski racing and mountain running.

In 1996, Ms. Spencer moved into a neighborhood near the Trail and lived there for approximately 10 years. The Trail became her “go to” for hiking, exercise, berry picking, wildlife viewing, photography, skiing, telemarking, and mushroom picking in the spring. From her home, it would take Ms. Spencer about 10 minutes to walk to the Trail. She would access the Trail via the red gate or by other means.

During the 10 years she lived in the neighborhood, Ms. Spencer would use the Trail three to four times a week. She would access the Potter Valley using the Trail, and sometimes she would go to the head of the Trail (i.e., the Stewart property) and up the zig zags, or she would branch off on a side trail. When Ms. Spencer moved away from the neighborhood in 2005, she used the Trail less frequently, but did continue to utilize it.

Ms. Spencer testified that she would take her mother to the Trail because it was flat, even, and sunny – her mother loved being there. In terms of other users, Ms. Spencer would not see others every time she used the Trail, but frequently she would. She also saw evidence of use: human tracks, dog tracks, ski tracks, and snow machine trails at times. The Trail was quite packed-down, and she never had problems finding the Trail.

Prior to 2010, Ms. Spencer believed that the Trail was open to the public, and she believed the public had the right to access to the Trail. Prior to 2010, Ms. Spencer never spoke with anyone purporting to be a landowner.

When she first started using the Trail, there was not a gate. Later, gates went up. The first one was “kind of flimsy” and would open up and fold out. The second gate was “pretty stout,” and it was called the red gate because it was red-enameled. Ms. Spencer described two “zig zag” trails off the Trail – her descriptions were consistent with what other witnesses characterized as the switchbacks. She also recalled the split in the Trail.

Ms. Spencer confirmed the accuracy of her affidavit (Exhibit 1124) and talked about the photos attached to it. Page 12 is a photograph taken by Ms. Spencer in 2004 from the edge of the Trail and it shows the Trail itself: it is obviously well-used. Page 22 is a

photograph taken of Ms. Spencer's husband in 2010; there are walking tracks, dog tracks, and ski tracks in the snow in the photograph – according to Ms. Spencer, signs of others using the Trail in this manner was common a few days after a snowstorm. Page 24 shows Ms. Spencer's mother at the red gate in 2011 – again, the photograph reflects tracks of other users in the snow. Finally, Page 30 depicts Ms. Spencer's sister, Lynn, on the Trail with evidence of heavy use by others reflected in the snow.

*Donna Basinger.* Ms. Basinger has a background in education. She moved to Alaska in 1991 when her husband became rector of the All Saint's Episcopal church in Anchorage. In 2013, Ms. Basinger and her husband moved out of state for about seven years. They returned to Alaska to retire.

Shortly after Ms. Basinger moved to Anchorage, a group of women in her neighborhood decided they would find someone who knew the local trails and could lead them on hikes. This led to the formation of Happy Hikers in 1991. The group still exists.

In the beginning, Happy Hikers had about eight or nine members. Currently, there are 300 people on the Happy Hikers' mailing list. When the group first formed, there would be a "Peak a Week" on Wednesday where the group would take a scheduled hike. This occurred year-round, with the group snowshoeing or skiing during the winter months. Around 2006, the group added a Monday hike, too.

Ms. Basinger would hike with members of the Happy Hikers on non-scheduled hikes. Eventually, she was hiking almost every day with others. Around 2002, Ms. Basinger created a website for Happy Hikers so that individuals could view it and see the

scheduled hikes. Originally, the non-scheduled hikes were not on the website, but sometime after 2013, they were included and characterized as “no contact” hikes, meaning nobody was in charge of leading the hike.

Ms. Basinger recalls that the Happy Hikers first used the Trail in 1997, and they hiked it once in 1997 and another time in 1998. She was on one of those hikes. When asked how the Happy Hikers learned of the Trail, Ms. Basinger thought they probably selected it from the 55 Ways to the Wilderness book because that is how the group selected hikes at that time.

Ms. Basinger estimated that, in the beginning, Happy Hikers would use the Trail about two times per year for the scheduled hikes. She did not recall much use of the Trail for the non-scheduled hikes. But in 2003, a group decided to hike the Chilkoot Trail and used the Trail to train; they would take the steep part (i.e., the first set of switchbacks) to the airstrip and loop back to the Trail.<sup>50</sup> Ms. Basinger estimates that the group used the Trail five or six times for this purpose before the July 2003 Chilkoot Trail hike.

Over time, the Happy Hikers’ use of the Trail increased. Ms. Basinger testified that from 2006-2009, the Trail was on the “Monday hikes” schedule at least six times a year. Each year on Ms. Basinger’s birthday, the Happy Hikers scheduled a hike on the Trail. For the Monday hikes, the group would meet at Carol Sheridan’s home because Ms. Sheridan had a 12-passenger van to transport hikers. About 25% of the time, they would use the

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<sup>50</sup> Ms. Basinger did not testify that the group looped back to the Trail by using the second set of switchbacks near the end of the Trail/on the former Stewart property, but considering the evidence, it is reasonable to assume that this is what the group did.

Trail in a loop fashion, accessing the Trail via the switchbacks about  $\frac{3}{4}$  of a mile down the Trail.<sup>51</sup>

From about 2010 to 2013, when Ms. Basinger left Alaska, the Happy Hikers scheduled hikes on the Trail at least 20 times per year. The hikes included “the loop” hike described above as well.

When using the Trail, Ms. Basinger recalls encountering other people about 50% of the time. She described the Trail as “very well-used” – in the summer, she could see the packed-down trail, and in the winter, there were footprints, ski and snowshoe tracks, and dog tracks. Ms. Basinger never tried to disguise her use of the Trail, and she implied that, in any event, it would have been difficult to hide a group of hikers.

On direct examination, Ms. Basinger testified that, throughout her years of using the Trail, she did not know it was on private land. On cross-examination, Ms. Basinger reviewed Exhibit 1041, *55 Ways to the Wilderness* (the book used by the Happy Hikers to select hikes); and considered the language: “Hikers are welcome if they respect private property ....” After considering the language, Ms. Basinger explained that she believed the Trail was public, and she understood that private land needed to be respected. She thinks the Happy Hikers felt the same way.<sup>52</sup> Ms. Basinger doesn’t recall ever talking to a

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<sup>51</sup> On cross-examination, Ms. Basinger described the route the group would take: they would go up a steep path outside of the red gate to the airstrip, or tabletop, above the Trail, hike from there, and then drop down to the Trail via the switchback about  $\frac{3}{4}$  of a mile along the Trail. This loop thus involved the group using part of the Trail, but not all of it.

<sup>52</sup> On cross-examination, there were many questions on this topic. Eventually, Ms. Basinger’s position on the language crystalized, at least for the court, as follows: (1) she



landowner, and Ms. Basinger was firm that she never asked a landowner for permission to use the Trail.

Ms. Basinger confirmed the contents of her affidavit, Exhibit 1071, with one correction.<sup>53</sup> She discussed some of the photographs attached to the affidavit: (1) the second photograph was taken on the Trail in 2012 and depicts Happy Hikers on the trail, and it also looks as though the Trail was “stomped down by a small army”<sup>54</sup>; (2) the seventh photograph shows two people and a dog near the red gate; and (3) the tenth photograph depicts a group of about 25 Happy Hikers inside the red gate, using the Trail to access another location in Chugach State Park.<sup>55</sup> Ms. Basinger also confirmed that she and Erin Oba are the two individuals in a photograph attached to another person’s affidavit (Exhibit

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does not know whether the Happy Hikers used the First Edition of 55 Ways or a later version; (2) because the later editions did not include the language about “being welcome if respectful of private property,” she cannot say if she actually read that specific language before starting use of the Trail; (3) regardless, Ms. Basinger would have used the book to identify potential hikes and figure out how to get to them – she would not have been looking to the book to consider or identify land ownership; and (4) she believed the Trail was public, and she understood that she (and the other hikers) needed to respect private property.

<sup>53</sup> The affidavit states that she first started using the Trail in 1995; Ms. Basinger corrected this to 1997 while testifying.

<sup>54</sup> On cross-examination, Ms. Basinger confirmed that she did not know who left most of the tracks visible on the Trail in the second photograph; specifically, she did not know if landowners left the marks or if they were left by users with permission.

<sup>55</sup> The photograph caption refers to McHugh Peak, but Ms. Basinger corrected this: the hike started on the Trail and went to the Rabbit Lake trail. On cross-examination, Ms. Basinger testified that she could not be sure that the photograph was taken on the Trail as opposed to another location on the hike, but she was certain that the group used the Trail on that day.

1122); she recalls the photograph being taken during a Happy Hikers outing on the Trail where it splits.

Ms. Basinger acknowledged there was a “no parking” sign at the red gate; the Happy Hikers respected it, and parked away from the red gate as well as carpooled to minimize cars. She could not recall when the red gate first went in.

*Valerie Phelps.* Ms. Phelps is a physical therapist in Anchorage; she obtained a bachelor’s degree and then a doctorate of science in physical therapy. Ms. Phelps has now been a physical therapist for 41 years. She is married to Peter Burke.

Ms. Phelps moved to Anchorage in 2000 and promptly began using the trail system in the area. She and her husband built a home at the corner of Spain and Switzerland, just below the Trail. Almost immediately, they found the Trail.

From 2004-2012, Ms. Phelps and her husband tried to use the Trail at least once a weekend. In the summer, they mostly hiked; in the winter, they snowshoed. Frequently, they would take friends and visitors with them. In the early days of living near the Trail, Ms. Phelps would hike it with a colleague; in about 2013, her “walking buddy” became Stephanie Rhoades. During use of the Trail, Ms. Phelps would encounter other people.

Ms. Phelps considered the Trail to be well-marked. In the winter, she always saw classic cross-country skiing grooves and would avoid damaging them. Prior to 2012 (when the Pughs purchased their property), Ms. Phelps believed the Trail to be a public trail because “it looked like one.” She and others would refer to the Trail as “the Red Gate Trail.”

During her testimony, Ms. Phelps described photographs of hers that were admitted into the record.<sup>56</sup> One photograph was taken about halfway down the Trail at her favorite spot in about 2005.<sup>57</sup> Another photograph was taken in about the same location in 2007; the person in the photograph is a physical therapist from Chile who was visiting in about 2007.<sup>58</sup> A third photograph, also taken in 2007, shows three individuals (Ms. Phelps and two young physical therapists) in the same location.<sup>59</sup> Yet another photograph shows Ms. Phelps with her friend, Sandra Chow, on the Trail in 2007; Ms. Phelps explained that she and Ms. Chow would hike together on the Trail nearly every weekend from 2004 to 2010.<sup>60</sup> Another photograph shows Ms. Phelps with several “walking buddies” on the Trail in 2008.<sup>61</sup> An additional photograph depicts the Trail in fall, Ms. Phelps’s favorite time of year.<sup>62</sup> Finally, a photograph shows a colleague of Ms. Phelps’s near the red gate, snowshoeing on the Trail in 2009.<sup>63</sup>

Ms. Phelps described the Trail as being approximately two miles long, and she testified that she has been to the end, which she described as where the dirt road terminates in a bit of a circle, and where poppies would grow in the summer. After that spot, the road became very narrow. To reach the Trail, Ms. Phelps would hike from her home on an

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<sup>56</sup> See Exhibit 1114.

<sup>57</sup> *Id.* at 5.

<sup>58</sup> *Id.* at 6.

<sup>59</sup> *Id.* at 8.

<sup>60</sup> *Id.* at 9.

<sup>61</sup> *Id.* at 10.

<sup>62</sup> *Id.* at 11.

<sup>63</sup> *Id.* at 12.

easement to reach the red gate; however, when the barbed wire and other reinforcements of the gate went up, Ms. Phelps started using a different trail from her home to access the Trail.

Prior to 2012, Ms. Phelps never spoke with anyone claiming to be a landowner, and she has never asked anyone for permission to use the Trail. More recently, there have been two occasions where somebody called the police to have her removed from the Trail. The first time, she communicated to an officer that the Trail was public and she would continue to use it; she then declined to leave the Trail. The second time, Ms. Phelps was with Ms. Rhoades. They waited for the police to arrive, and Ms. Rhoades spoke to the officers.

*John Riley.* Mr. Riley moved to Anchorage in the fall of 1984. He first learned about the Trail when he looked at purchasing a home on Italy Circle. Mr. Riley loved the home's natural setting and, in 1985, purchased it. The house is located about a quarter or half mile from the red gate.

By way of educational background, Mr. Riley has a bachelor's and master's in Zoology, as well as a degree in Physician Assistants Study. After receiving his Master's in 1982, he moved to Alaska. Mr. Riley has worked in the health field for many years, including working at the Anchorage Neighborhood Health Center as a Physician's Assistant.

Mr. Riley estimated that he used the Trail a couple of times each week on average from 1985 to 2012. He skied, skijored, snowshoed, biked, walked, viewed wildlife, berry picked, and took photographs on the Trail. Typically, Mr. Riley would use the Trail more

in the winter than the summer, but even in summer months, he would be on the Trail about once a week.

When using the Trail, Mr. Riley would see other people using it, too. The longer he lived in the area, the more users he saw on the Trail. It was not uncommon for Mr. Riley to see up to a dozen people on the Trail at times. He would observe evidence of use too, including ski tracks (Mr. Riley testified it was rare that he would be the first person to ski on fresh snow on the Trail), snowshoe tracks, and evidence of dogs. Mr. Riley testified that there were people in the neighborhood who regularly snowshoed on the Trail. By the early 1990s, “everyone” in the neighborhood had children, so families would hike on the Trail.

Once, around 10-15 years ago, Mr. Riley saw Craig Medred cutting alders about halfway up the Trail.<sup>64</sup> Over the years, he has seen evidence of vegetation having been cut back to allow people to pass. He recalled that, in about 1996, the Stewarts hired someone to trim alders on the Trail.

For the first two decades of his use, Mr. Riley would drive to Steamboat Drive or take a utility easement from his home to the red gate. He did not know who controlled the red gate, though he occasionally saw Mrs. Stewart using the road (i.e., the Trail) to get to her property. Mr. Riley roughly recalls a post on the red gate prohibiting motorized traffic, but Mr. Riley always perceived the Trail as public. After 2012 (when the Pughs purchased their property), Mr. Riley started accessing the Trail from the end of Switzerland.

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<sup>64</sup> Mr. Riley saw Mr. Medred recreating at other times and at other locations, including off the Trail.

Prior to 2016, Mr. Riley never sought permission from anyone to use the Trail and never had contact with any landowners. In 2016, Mr. Riley and his partner, Becky Judd, encountered Mr. Pugh driving on the Trail. He stopped and asked them to sign a document granting permission to use his property. They did so.

*Peter Crimp.* Mr. Crimp moved to Anchorage in 1983 but soon took a job in Fairbanks. He returned to Anchorage in 1991 or 1992. He and his family lived off of Goldenview Drive. Mr. Crimp believes that his family started using the Trail in about 1994.

By way of background, Mr. Crimp has a bachelor's in biology and a master's in forestry. He has done a number of things, work-wise, including working for the Alaska Energy Authority. His family has also commercial fished since 1984.

From 1994 to 2015, Mr. Crimp recalls using the Trail about an average of about three times per month, for about nine months each year – for the other months, he would be gone commercial fishing. His family would hike and walk their dog; in the winter months, he would ski the Trail. One year, Mr. Crimp lived in Holland for a year (from about September 1998 to July 1999) and thus did not use the Trail.

Mr. Crimp described the Trail as a sunny area, one where he had many memorable times, and as well-established. It was easy to walk on, and easy to get to. Mr. Crimp recalled going on a moonlight ski with his book club on the Trail and enjoying beautiful views. Mr. Crimp testified that it would be rare not to see someone else on the Trail, and there would typically be two to three cars parked by the red gate. He would see families walking on the

Trail as well as evidence of use. Mr. Crimp described the Trail as “a very heavily used public route.”

Prior to 2012, Mr. Crimp never spoke with anyone about permission to use the Trail, nor did he speak with anyone purporting to be a property owner. He considered the Trail to be a public trail.

*Ruth Glenn.* Ms. Glenn moved to Alaska in 1977 and lived in Kotzebue and Fairbanks until moving to Anchorage in 1987. She worked in various positions, including serving as Executive Director of the Anchorage Concert Association, until her retirement in 2017.

Ms. Glenn testified that she first used the Trail in 1991 with a friend, Bonnie Bernholz, who lived near it. Then she moved to a home located about a mile away from the gate and started using the Trail more at that time, in 1992 or 1993. Ms. Glenn would use the Trail for her regular six-mile run up to the end of the Trail and back.

From 1992 to 2010, Ms. Glenn used the Trail two to three times per week for running, hiking, and skiing. It was her “go to” trail for after-work recreation. She accessed the Trail by walking up from her home to Mountainside and accessing it there; other times, she would use the powerline easement that goes up from Switzerland and enter in “right by” the gate. Occasionally, Ms. Glenn would use a social trail off of Switzerland to reach the Trail.

Ms. Glenn described the Trail as a “year-round” trail, and noted that it was terrific for skiing because it faced south and was sunny. There were many uses for the Trail: when

it was snowy, the Trail was skiable, and when there wasn't any snow, the Trail was bike-able. Ms. Glenn would take her dogs for walks on the Trail. In addition, Ms. Glenn's and her husband's children would hike on the trail with them, and the children would ski and snowboard on the Trail, often bringing their friends. The family had a tradition of using the Trail on Thanksgiving and Christmas as well as on Solstice. When the children would come home from college, they would use the Trail.

When using the Trail, Ms. Glenn would usually see other people as well as evidence of use, such as footprints. She thought the Trail was public and the land around it was private. Ms. Glenn saw people who lived in the area using the Trail as well as individuals who did not live nearby. She considered the Trail to be public.

Ms. Glenn understood that the Stewarts owned property on the Trail as well as Mr. Waddell. With the exception of Mrs. Stewart, Ms. Glenn did not talk with any landowners prior to 2012, and she never discussed the issue of permission to use the Trail with a landowner. The one time she met Mrs. Stewart at the end of the Trail, the conversation involved Mrs. Stewart confirming that Ms. Glenn was not picking poppies located off of the Trail because Mrs. Stewart was waiting for them to go to seed. There was no discussion of permission to use the Trail, and Ms. Glenn did not consider the conversation to imply permission.

During her testimony, Ms. Glenn referred to an affidavit that she had previously provided in the litigation, Exhibit 1088. She went through photographs attached to the affidavit, describing where the photos were taken including: (1) a photo taken just before



the split in the Trail; (2) a photo taken just after the split in the Trail; (3) a photo of her daughter and her daughter's dog on the Trail; (4) a photo taken off the Trail but on a day when she likely would have continued a couple of miles on and used the Trail; and (5) a photo taken on a ridge above the Trail after walking on the Trail to access the ridge.

In terms of the location of the Trail, Ms. Glenn considered the Trail to be located at the red gate to the end of the homestead road, where the Stewarts' homestead was located. She believed the gate was used to prevent vehicles from accessing the Trail.

*Judith Caminer.* Ms. Caminer is partners with Roger Marks. They live about five miles from Steamboat Drive; it takes Ms. Caminer about 15 minutes to get to the Trail.

It is Ms. Caminer's understanding that the Stewarts received a patent on their homestead in the late 50s or early 60s; she believes that a "cat skinner" carved a road in the 1960s so that the Stewarts could reach their property. Ms. Caminer has seen maps that clearly depict a road in the 1960s. Although Ms. Caminer never met Mrs. Stewart, she has read that Mrs. Stewart welcomed hiker and trail users as long there was no vehicular traffic.

According to Ms. Caminer, the Trail starts at the red gate at Steamboat Drive and ends at the Stewart property where it starts to go uphill to access the ridge. She does not believe there were "no trespassing" signs in the earlier days of using the Trail; she thinks those were added later.

When Ms. Caminer would use the Trail, about half of the time she would be with the Happy Hikers. Ms. Caminer joined the Happy Hikers in 2008. From 2013 to 2020, she

created the calendar of hikes. Most of the hikes that were planned, including those on the Trail, actually did happen.

Ms. Caminer's first distinct memory of using the Trail was 1997, when her friends who lived in the neighborhood showed it to her. Ms. Caminer recalls there was a steel crossbar meant to block vehicular access, but it did not prevent pedestrian access. According to Ms. Caminer, "everyone felt it was a public trail."

From 1997 to 2015, Ms. Caminer used the Trail. She estimated that she used it four to six times a year before 2008. Then she retired, and her use of the Trail doubled to about eight to 12 times per year. When using the Trail, Ms. Caminer would access it from Steamboat Drive about 90% of the time; the other 10% of the time, she would come down to the Trail from mountainside area above it. Ms. Caminer recalls that she would go to the end of the Trail, i.e., the Stewarts' property, about 75% of the time. When the gate was reinforced in 2015, Ms. Caminer, her friends, and the Happy Hikers suspended use.

Ms. Caminer's use of the Trail included hiking, dog walking, bird watching, skiing, snowshoeing, and photography. As for permission, she stated: "I crossed that land without permission, and didn't know who owned it." Ms. Caminer described the Trail as well-defined: "just follow your nose, and you get to the destination." When using the Trail, she often saw others enjoying it, too.

*Paula Cullenberg.* Ms. Cullenberg first began using the Trail in 1994 via Steamboat Drive. There was a red gate there blocking vehicles but not pedestrian traffic. Prior to

reinforcement of the gate, Ms. Cullenberg would see two or three cars at most parked there. She does not recall seeing “no trespassing” signs prior to reinforcement of the gate.

Ms. Cullenberg has walked the Trail many times. While using the Trail, she saw other people. She has come to learn that the Stewarts built the Trail, that the gate was designed to prevent vehicle use, and that people have been using the Trail since the 1960s.

Since the gate was reinforced, Ms. Cullenberg has not used the Trail because of the “negative energy.” Once, she and her husband were above the Trail and ran into Mr. Pugh; apparently, they were on his property because Mr. Pugh asked them to sign permission paperwork. Ms. Cullenberg and her husband started to do so, but when Mr. Pugh wanted to take their picture, they handed the paperwork back and left.

Ms. Cullenberg described the Trail as about two to three miles long and ending at a sort of cul de sac with lots of brush surrounding it. She characterizes the Trail as relatively wide, “a road really.” As to the split in the Trail, she considers both portions to be the Trail, but it is not necessary to have both for the Trail to exist.

Ms. Cullenberg used the Trail for 23 years before encountering a landowner (Mr. Pugh). Over the years, she used the Trail with her husband and their two sons, and with many friends.

*Becky Judd.* Ms. Judd lives on Italy Circle; she moved there in May 1992 with her former husband, Bruce Yates. She started using the Trail right away. For about two years, Ms. Judd would access the Trail from Switzerland via a couple of easements. Then, she

figured out it was easier to access the Trail from Finland. She accessed the Trail from Finland for many years.<sup>65</sup>

Originally the Trail was thick with alders, but eventually it was widened and became easier to use. Ms. Judd believes that signage went in once the Pughs bought the property. In 2016, she signed a permission form with Mr. Pugh.

Ms. Judd estimates that the Trail is about 2.5 miles long. She does not consider the first or second switchback to be part of the Trail, and she thinks the terminus is located where the poppies grow. Ms. Judd's use of the Trail has always been overt and direct.

Once, Ms. Judd was hiking on the Trail and met Mrs. Stewart driving out. They talked about the beautiful valley, and Mrs. Stewart asked her to put water from her bottle on the poppies when she passed by them. Ms. Judd interpreted the exchange as a "friendly conversation" and not as Ms. Stewart giving her permission to use the Trail.

Apart from her interactions with Ms. Stewart and Mr. Pugh, Ms. Judd never met any other landowners.

*Dianne Holmes.* Ms. Holmes moved to Alaska in 1959 and has lived on Mesa Place since 1976. She received a degree in anthropology from University of Alaska Anchorage in 1975 and subsequently received a degree as a radiological technician in 1963.

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<sup>65</sup> At some point, the Finland access became more difficult to access. Ms. Judd then began using another access point from Switzerland that meets the Trail. Ms. Judd does not recall when Finland became more difficult to access the Trail or when the additional trail from Switzerland leading to the Trail was put in.

In the 1990s, Ms. Holmes began accessing the Trail via Steamboat Drive. She first used the Trail minimally, less than once per year, before it was widened. She recreated the Trail by hiking. From about 2001 or 2002 through 2015, Ms. Holmes used the Trail at least once a year and traveled all the way to the Stewart homestead about 60% of the time.

When reviewing her affidavit, Ms. Holmes identified several photographs: (1) in December 2006 she was on the Trail with her husband in a glaciated area; (2) in the summer of 2007 she was on a hike on a switchback near the Stewart property; and (3) in October 2007 Ms. Holmes was on a hike with a friend in an area where the Stewart land meets the Brewster land.

Ms. Holmes' understanding of the Trail was that the early homesteaders used Cobblestone Road, which has now been developed, and that it ran through many homesteads as they were developed in the 1950s and 1960s as one continuous road. She could not determine when one homesteader's property ended and where another's began. She describes the beginning of the Trail as taking off from a curve near Mountainside Village and through the red gate. Ms. Holmes testified that the red gate was there to keep vehicles off of the road, that the gate was constructed by Mrs. Stewart, and that people could easily access the Trail around the gate. She recalls that she saw the red gate reinforced in November or December 2015.

Ms. Holmes testified that she is familiar with a set of switchbacks that come off of the Trail on the Stewart property. Ms. Holmes believes that people must be on the Trail to

reach the switchbacks but that she doesn't really consider them a part of the Trail. She believes that the Trail continues on to the end of Potter Valley to the Brewsters' land.

When Ms. Holmes was on a trip with the Botanical Gardens tour in 2002 or 2003, the group came across Mr. Waddell. Only the group leader spoke to Mr. Waddell. Ms. Holmes has never received any kind of express permission from any landowner. She did have a discussion with Mrs. Stewart about the public using the road, and she occasionally visited Mrs. Stewart.

*Helen Nienhueser.* Ms. Nienhueser wrote *55 Ways to the Wilderness*, which was published in 1972. In the early 1960s, Ms. Nienhueser became a member of a mountaineering club—a group of people who wanted to explore Alaska. She was the secretary for a year or two for the club in the 1960s.

The idea for her book *55 Ways to the Wilderness* was first raised by the Seattle Mountaineers, and Ms. Nienhueser was recruited to contribute in the late 1960s. She recalls that she probably reviewed hikes that were in *30 Hikes* (another hiking guide) in order to write the book.

Ms. Nienhueser testified about certain descriptions of the Trail in *55 Ways to the Wilderness*. One description states that the road is chained off by residents. She testified that the chains could have served the purpose of discouraging hunters but that she does not know for sure. Another sentence in the book reads, "Hikers are welcome if they respect private property. Do not attempt to drive a road when it is soft or wet and leave no litter." Ms. Nienhueser recalls that she probably got the information that hikers were welcome

from the Stewarts but was not positive. She testified that she began working on the book in 1968.

With the exception of the Stewarts, Ms. Nienhueser does not recall ever talking to any landowners. Ms. Nienhueser only remembers the Stewarts and that she may have had a conversation with them or another person who may have been living along the Trail. She could not recall whether there were other residents living on the Trail in the late 1960s.

Ms. Nienhueser testified that she got the impression that hikers were welcome to use the road from whatever conversation she had with Mrs. Stewart. She believes that respecting private property means to not “stray off the road into somebody’s backyard.” Ms. Nienhueser guessed that she was not thinking of the Trail as private property when she wrote the sentence about respecting private property, but she could not be certain.

*Mary Leykom.* Ms. Leykom has lived near the Trail since 2001, and she started using it in 2002. Most of the time, she accessed the Trail via the “Switzerland path,” but at times she would access through the red gate.

When Ms. Leykom first started using the Trail, it was a two-person-wide walking path, and then someone brought in a bulldozer and widened it. From 2002 to 2010, she used the Trail 20 to 30 times each year for exercise and recreation, as well as to access the airstrip above it. Ms. Leykom’s husband and her children used the Trail with her at times, and occasionally she would go up the Trail with neighbors. After 2010, her use of the Trail decreased because her dogs passed away, but she continued to ski in the Potter Valley using other trails.

Prior to the Pughs' purchase of their property, Ms. Leykom never sought or was given permission from a landowner to use the Trail. In her words, "[m]y sense was the neighborhood just used that trail ... I just didn't give the land ownership any thought. We just used it. It was part of our neighborhood." Ms. Leykom would see neighbors on the Trail; rarely, she would see people other than the neighbors on the Trail.

*Roger Marks.* Mr. Marks used the Trail about four or five times a year from 2000 until 2015. He used it year-round for hiking. Mr. Marks never asked a landowner for permission, although he understood that Mrs. Stewart did not care if people used the Trail.

*Dan Rogers.* Mr. Rogers has lived on Tree Top Circle for roughly eight years. He has a Bachelor of Science in physics and master's in electrical engineering from the University of Alaska Fairbanks. His family homesteaded near the location of the Trail and built their house in the mid-1970s.<sup>66</sup>

Mr. Rogers believed he had permission to use the road to reach his family's homestead, and that certain access points to the Trail, such as Steamboat Drive, were put in to provide the landowners on the Trail adjacent access. Mr. Rogers testified that there was an implied understanding that everybody used the Trail with permission. His understanding of the Trail was that hikers were welcome as long as they respected private

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<sup>66</sup> Mr. Rogers's family's property was just north of the Pughs' property. At times when Mr. Rogers referred to the Trail during his testimony, the court understood him to sometimes be referring to the longer, historical homestead road, of which the Trail is a part. Other times, such as when Mr. Rogers was describing recreational use on specific parts of the Trail, it was clear that he was referring to parts of the Trail that traversed the Schoff and Miller tracts.



property, did not attempt to drive the road when it was wet, did not tear up the road, and did not leave litter.

Mr. Rogers testified that he never asked for permission to use the Trail and was never granted express permission to use the Trail from anyone. He accessed Chugach State Park throughout his childhood and viewed the Trail “as a trail and we rode bikes on it, we walked on it, we took the dogs back there and threw balls for the dogs and did all that sort of stuff.” Mr. Rogers never thought about being unwelcome on the Trail until Mr. Pugh reinforced the gate.

Mr. Rogers testified that his family respected private property on the Trail by picking up trash and putting out fires. According to Mr. Rogers, the Trail was heavily used historically and Mr. Pugh “didn’t do his homework” before buying his parcel. In Mr. Roger’s mind, the Trail is clearly a historical access to the “top of the mountain,” i.e., McHugh Peak, to other private property, and to state lands. He recognizes that either side of the Trail is private property. He considers the Trail to be well-defined and pretty “monolithic” and “consistent.”

Mr. Rogers describes the Trail as a couple of miles long from the red gate to where the Stewart’s houseboat was. There were no signs or markings to distinguish where one private property ended and where another began. Mr. Rogers cannot recall when the red gate first went up. He understood that the gate was meant to preclude motorized use.

From 1976 to 1978, Mr. Rogers attended Service High School. During that time, he regularly used the Trail a few times a year. He ran cross country and would train on the

Trail. His team's normal route was to go down to the Trail and then go up the switchbacks that began about a mile in on the Trail. Sometimes, they would run to the Stewart homestead. He testified that he saw Nancy Pease on the Trail all the time during high school while she was a runner for Service High School.

Prior to 1980, Mr. Rogers recalls that there was significant public motorized use. Back in the 1970s, people drove snowmachines in ditches and rode dirt bikes on the Trail. At that time, the switchbacks were in good shape, and Mr. Roger's family would drive their four-wheelers to the top of a mountain.

Mr. Rogers does not recall ever meeting the Schoffs. He met the Millers once, and he saw the Stewarts at their photoshop but never saw them on their property on the Trail. For this reason, he believes that most of the motorized use prior to 1980 was not by landowners.

Prior to 1980, Mr. Rogers would occasionally drive on the Trail. After 1980, he no longer drove on the Trail and limited his use to hiking, biking, and berry picking. From the 1980s to 1992, his family was on the Trail a lot, and he would bike a couple times a month.

After 1992, Mr. Rogers developed a property nearby with his wife and used the Trail frequently. He primarily used the first mile of the Trail and would come down the first set of switchbacks that Tex Johnson put in and then would travel towards Steamboat Drive. After 2002, Mr. Rogers testified he really only went back to the Trail to see what was there; he described his use at that point as infrequent.

*David MacDowell.* Mr. MacDowell has lived in Anchorage for many years. He worked for British Petroleum for 35 years before retiring. In 1991, Mr. MacDowell purchased a home in Mountainside Village and, prior to that time, he owned a different home in the same area. Mr. MacDowell and his wife are “reasonable” hikers, i.e., not what he would characterize as “avid” hikers.

When the MacDowells purchased their home in 1991, the sellers described a nice walking path in the neighborhood and communicated that the landowners were agreeable to the public using the Trail. This made Mr. MacDowell believe that the Trail was on private property. After buying their home, the MacDowells would walk on the Trail two or three times each week in the summer months and less frequently in the winter months. Perhaps a dozen times over the years, Mr. MacDowell also rode a bike on the Trail. He does not recall being on the Trail prior to 1991.

Mr. MacDowell recalls that the “first gate” went up in the mid- to late- 1990s and that it prevented most vehicular traffic; walkers would access the Trail by going around the sides of the gate. He recalls a “no parking” sign going up on the gate around 2000.

Mr. MacDowell also remembers that, in the early 2000s – perhaps around 2003 or 2004 – there was heavy equipment for a number of weeks on the Trail for the purpose of widening the Trail. During that construction work, Mr. MacDowell observed a motorhome parked on the Trail for several weeks. Once, when walking by, he heard pots and pans banging, so he called out; when a man appeared, Mr. MacDowell asked if he could use the Trail. The man, looking grumpy, said “whatever,” so Mr. MacDowell kept walking down

the Trail. He testified that he did not know if the man was a landowner but believed he was associated with the land in some way.

As time went on, Mr. MacDowell observed that use of the Trail had increased and that it was getting “busy.” He testified that, perhaps around 2010, it became unusual for him to use the Trail without seeing another person on it.

Mr. MacDowell never spoke with a member of the Schoff or Miller families about use of the Trail, and he never met Mrs. Stewart. He learned that the Pughs had purchased land on the Trail when he ran into Mr. Pugh on the Trail one day. During that encounter, Mr. MacDowell asked if he could keep using the Trail, and Mr. Pugh confirmed that he could, saying that he wanted to keep the Trail open for the neighbors. Mr. MacDowell signed a document with Mr. Pugh in about 2016 that allowed him to continue using the Trail running across the Pughs’ property. That was the first and only time Mr. MacDowell signed a document allowing use of the Trail.

*Rusty Becker.* Mr. Becker is an accountant who lives in Anchorage. He purchased a house on Steamboat Drive in 1997; later, he moved into a different house on Steamboat Drive.

Before purchasing the first house, Mr. Becker talked with the sellers about the Trail. The sellers described the location of the Trail and communicated that landowners allowed the public to use the Trail for hiking.

After purchasing the first house, Mr. Becker would use the Trail several times a week. Generally, he would mountain bike and walk on the Trail; one time, he used his snow machine and another time he used his ATV.

One time, possibly in 1999, he and his wife encountered Mrs. Stewart in a vehicle being drive by another person while the Beckers were taking a walk on the Trail. Mr. Becker thanked Mrs. Stewart for use of the Trail, who indicated that she would continue to allow the public to use the Trail, and that the purpose of the gate was to keep “partiers” out, but hikers were welcome. Mr. Becker testified that, based on this contact, he continued to use the Trail; he acknowledged, however, that Mrs. Stewart could not have given him permission to use another landowner’s property.

Mr. Becker never personally talked with Mrs. Miller or her son, Jim Miller, about use of the Trail. Similarly, Mr. Becker has never talked with a member of the Schoff family or Mr. Waddell about the Trail. He discussed and received verbal permission from Mr. Pugh to use the Trail.

A couple of years after purchasing the first house, the Beckers had children. As a result, Mr. Becker’s use of the Trail slowed down somewhat to perhaps twice a week. When using the Trail, he would occasionally see other people; most were walkers, although occasionally he would see a biker.

When Mr. Becker moved, the new home was just two houses from the red gate. Mr. Becker saw more use of the Trail as time went by, as evidenced by more cars parked by his home starting around 2013.

*Charles Barnwell.* Mr. Barnwell moved to Alaska in 1963 when he was nine years old. After going to college in the lower 48, he returned to Alaska and lived in Anchorage until 2013.

Mr. Barnwell and his family built a house on Snowcrest Lane in 1982; the house was about a quarter of a mile from the red gate. According to Mr. Barnwell, he used the Trail pretty much every day until he moved except when he and his family were on vacations. He used the Trail for walking, hiking, skiing, telemarking, and mountain bike riding. When using the Trail, Mr. Barnwell would sometimes see other people, including neighbors. He would also see evidence of others, including footprints. Mr. Barnwell's family, including his wife, two daughters, mother, and mother-in-law, also used the Trail.

At trial, Mr. Barnwell testified that he never asked a landowner for permission to use the Trail. However, on cross-examination, Mr. Barnwell was pointed to his deposition transcript, where he had testified differently. Specifically, at his deposition, Mr. Barnwell testified as follows: (1) at some point, perhaps in the late 1980s, he talked with the Stewarts and asked if he could use the Trail – they expressed that it was fine to do so; (2) he had the same conversation with the Miller family in the late 1980s; and (3) Mr. Barnwell had the same conversation with the Schoff family, again in the late 1980s. The deposition testimony was consistent with his affidavit, which stated: “In the 1980’s, I asked Oro Stewart, the Miller (Bob) family and the Schoff family about using the Stewart Trail for recreation and access. They did not want motorized vehicles but were fine with us biking, walking and skiing.”

During trial, Mr. Barnwell tried to explain that he did not really intend to ask landowners for permission to the use Trail; rather, the conversations were more of a sign of respect to confirm with landowners that he was welcome on the Trail. But viewed objectively, Mr. Barnwell's conversations with the landowners are evidence that he used the Trail on property now owned by the Pughs and Mattanaw with permission from their predecessors, the Schoffs and the Millers.

*James Rogers.* Mr. Rogers has lived in Anchorage since 1972; he was seven years old when he moved to Alaska from Virginia. His parents homesteaded in what is currently Mountainside Village in the 1950s; his parents could only access their home by using the "Homestead Road" at that time. When looking at Exhibit 1010, the Rogers's property is located just north of the red route.

The Rogers moved to their homesteaded property in the late 1970s and lived there full-time until approximately 1986. Mr. Rogers recalls that the Trail was there from the early 1970s. Mr. Rogers and his family would use the Trail to travel – by walking, hiking, or driving – to the Stewart property. After reaching the Stewart property, they would go up the mountain and loop around to their own property.

In the late 1970s or early 1980s, Mr. Rogers's parents built a road from their property to the Trail. They allowed members of the public to use their "driveway" as long as they did so respectfully. Mr. Rogers's parents posted "no trespassing" signs on the driveway. According to Mr. Rogers, people who bought lots in the neighborhood were

regular users of the driveway. Permission to use it was “a bit implied.” The Rogers would see people using the driveway and would smile and wave.

Mr. Rogers and his brother, Dan Rogers, attended Service High School; he would see other students from school using the Trail, like Nancy Pease. He would also see other neighbors from Keynote Hills; they would chat together on the Trail. At times he would see Charles Barnwell.

As for his own use of the Trail, Mr. Rogers believed it implicitly permitted, which made sense to him because people used his family’s road without express permission, but his family allowed it. He noted that, once the red gate went up, his family stopped driving up to the Stewarts’ property, but they still walked the Trail.

When asked to describe the location of the Trail, Mr. Rogers stated that the Trail started at the red gate and ended at the Stewarts’ houseboat. He noted that there were switchbacks on the Trail, including one that a person named Tex Johnson built from the Trail to the airstrip near his parents’ land. Mr. Rogers explained that, from his perspective, the Trail was really a road used to access property, not a trail.

In 1986, Mr. Rogers moved out of his family’s home. Thereafter, he spent less time on the Trail, but he still used it about 10 times per year. Then, in 2011, Mr. Rogers built a home in Keynote Hills, so his use of the Trail increased. Mr. Rogers testified that public use of his family’s driveway fell off during the 1986 to 2011 time period because the subdivision was developed, and public access was created. During this timeframe, Mr. Rogers would see others on the Trail infrequently.



When Mr. Rogers moved back to the area in 2011, he observed an increase in use of the Trail, at least double compared to earlier years. He used the Trail about every week until the Pughs reinforced the gate, and he would see another user perhaps every third or fourth time. On nice summer nights, there might be 10 cars parked at the red gate.

With the exception of Mr. Pugh, Mr. Rogers never talked with a landowner about his use of the Trail, and he doesn't recall ever seeing a landowner on the Trail. He specifically testified that he never spoke with Jim Schoff, Dan Schoff, Lettie Miller, Jim Miller, or the Stewarts. As to Mr. Pugh, Mr. Rogers would see him on the Trail fairly often, and perhaps three times asked Mr. Pugh if it was acceptable to walk on his property – Mr. Pugh gave him verbal permission to do so.

## *2. Past landowners*

*Lettie Miller.* Mrs. Miller and her husband, John Miller, started homesteading in Potter Valley in the early 1960s.<sup>67</sup> They accessed their property by driving about three miles down a homestead road. The Trail is located on a portion of that road.

In 1964 or 1965, the Millers moved from their homestead to Anchorage.<sup>68</sup> They returned to it in 1968. Then, in 1971, the Millers again moved to Anchorage where they lived until 2000, when they moved to Big Lake.

The Millers were not involved in constructing the homestead road – it existed when they started homesteading, and it went back to the Stewarts' property beyond the Millers'

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<sup>67</sup> Mr. Miller has passed away.

<sup>68</sup> Several witnesses referred to Anchorage as a separate location from the area at issue, although it is also located in the Anchorage area.

property. Mrs. Miller's understanding was that the road was put in so that the Stewarts could reach their property, i.e., that the road was constructed to serve a private purpose; it was not built to serve the public, or to provide access to Chugach State Park, which did not exist until 1970.

Over the years, the Millers used the Trail for various activities, including walking, skiing, and hiking. Their use was more frequent when they lived on their property. Occasionally, they would see other people on the Trail. Mrs. Miller could not recall expressly giving anyone permission to use the Trail, but the Millers never "kicked anyone off" the property.<sup>69</sup>

When the Millers lived in Anchorage from 1971 to 1999, they would visit their homestead property about once a month to walk or have a picnic. Occasionally, they saw others using the Trail.<sup>70</sup> Once they moved to Big Lake, the Millers visited their property several times; they had a key or combination to the red gate and would drive their car down the Trail. Mrs. Miller recalled that her last time on the Trail was in 2011, and before that, probably 2006 or so. Although they visited the Trail several times after moving to Big

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<sup>69</sup> Mrs. Miller testified slightly differently on this topic at other points in her testimony. Once, she stated that the Millers would see people and tell them it was fine to respectfully use the property. Another time, she said that when the Millers would see other people, they would rarely ask if it was okay to use the Trail, but if they did, the Millers would say it was fine to use it. The court finds it more credible that the Millers did not give express permission to Trail users.

<sup>70</sup> According to Mrs. Miller, during the 1960s, 1970s, and 1980s, the Trail was not heavily used.

Lake, Mrs. Miller conceded that she did not have firsthand knowledge regarding use of the Trail by others or its general condition after 2000.<sup>71</sup>

On cross-examination, Mrs. Miller reiterated that the Trail is located on a homestead road that was built for private use, and that the public should not be allowed access to it. According to Mrs. Miller, she would talk with Mr. Schoff (the prior owner of the Pughs' parcel), and he also considered the Trail to be a private road not designated to service the public. Mrs. Miller acknowledged that, when they owned their property, the Millers never told people to leave the Trail, and they never communicated that the Trail was closed to public use (such as by placing an article in the paper or by posting signs on the Trail).

### *3. Current landowners*

*Donald Waddell.* Mr. Waddell purchased a 160-acre parcel in Potter Valley from Harold Rogers and Bruce Rogers in 2001. At the time of purchase, Mr. Waddell lived in Washington, and he continues to live there. The Trail runs across his property. His property is the third from the red gate: the Schoff property (now the Pughs' property) is next to the red gate, then the Millers' property (now Mattanaw's property), and then Mr. Waddell's property.

When he purchased the property, Mr. Waddell believed the Trail was a private road from Steamboat Drive to his property and that the public could only use it with permission.

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<sup>71</sup> Mrs. Miller testified that Bob Miller, her brother-in-law, owned property near to the Millers' property. After the Millers moved to Big Lake, he had the Millers' authority to authorize use of the Trail. To Mrs. Miller's knowledge, Bob never refused use to anyone.

It was Mr. Waddell's understanding that the public used the Trail with landowners' permission. He also permitted the public to use the Trail for recreational purposes. Mr. Waddell still owns the property, and he continues to believe that the Trail is a private road, not a public trail.

After purchasing his property, Mr. Waddell would come to Alaska in the summer. Generally, he would come up at the end of May and leave in August. In 2002, Mr. Waddell made improvements to his property by widening the road, putting in ditches, clearing areas, and hydroseeding steep slopes. He also built a pad on his property for a possible future cabin. Mr. Waddell stayed in a camper just inside the red gate while working on the improvements.

Mr. Waddell continued with his project on-and-off, and ultimately finished in 2005. While he was staying in the camper, Mr. Waddell would see people using the road/the Trail. A few people asked if they could travel along the road/the Trail; Mr. Waddell would say "sure" unless he doing active construction work. If people did not ask whether they could use the Trail during this time, Mr. Waddell never told them their activities were not allowed. He does not recall ever telling anyone to get off his property

From 2005 forward, Mr. Waddell would typically spend a day or so at his property in the summer. He was last on his property sometime in 2020.

*Franklin Pugh.* Mr. Pugh and his wife purchased the property adjacent to the red gate in 2012. They have never lived on the property, but live nearby. At the time of purchase, there was a "no parking" sign on the red gate, but no other signage. The Pughs

closed on the property in September 2012; both before and after finalizing the purchase, Mr. Pugh would take his family out to walk around the property. Things were quiet on the property – they would occasionally run into a neighbor, but nothing seemed unusual to Mr. Pugh.

When the Pughs purchased the land, it was raw/unimproved property, and it remains so to this day. The Pughs bought the property for personal use and enjoyment; Mr. Pugh goes to the property frequently. Mr. Pugh testified that, prior to the purchase, he had no knowledge of the Trail. He never met the Schoffs, who sold the property to the Pughs, and he has never talked with them.

After purchasing the property, Mr. Pugh would introduce himself to others as a property owner. He put up some “private property” signs. This prompted some people to ask questions about using the Trail, and Mr. Pugh would respond that he was merely signaling that the property was private but did not intend to stop neighbors’ use of it.

In December 2012, Mr. Pugh was transferred to Baku, Azerbaijan. He lived there until early 2015 and then returned to Anchorage. While living in Baku, Mr. Pugh would come back to Anchorage and spend time on the property. He observed it to be a “quiet place.”

While in Baku, Mr. Pugh received an email from Mr. Becker in about 2014 saying that parking near the gate was getting crowded. This prompted Mr. Pugh to coordinate the posting of a “no public access” sign.

After returning from Baku, Mr. Pugh had a negative interaction with a person on his property. He was unsatisfied with the response from the Anchorage Police Department, so Mr. Pugh decided to reinforce the red gate to help keep others off his property. While working on the reinforcement, Mr. Pugh learned to recognize those living in the neighborhood – he did not mind having neighbors use the property.

Eventually, Mr. Pugh required most users of the Trail on his property to sign permission slips. He estimated that about 100 people have signed written agreements allowing use of the Pughs' property. The majority of those with written permission to use the Trail are people living in Paradise Valley, Keynote Hills, and Mountainside Village. Mr. Pugh has also given groups and agencies permission to access his land. When he deems it necessary, Mr. Pugh also retracts permission.

*Mattanaw.* Mattanaw grew up in Maryland. He first lived in Anchorage in 2009; he now lives in Anchorage part-time and is a resident of Alaska, but spends significant time in other places. Mattanaw has a variety of degrees. He considers himself semi-retired, but does work as a management consultant and, at times, a software architect.

Mattanaw purchased Lettie Miller's property in 2017. Prior to doing so, Mattanaw asked Mr. Pugh for permission to travel across his land to reach the Miller property, and Mr. Pugh kindly and immediately granted him access. Mattanaw loved the property and could see that it would be easy to place his RV on it.

Prior to buying the property, Mattanaw became aware from Mr. Pugh that some members of the public wanted to access the area, and thus there were issues related to

trespass. Mattanaw, however, was not dissuaded from purchasing because he knew that he would be fine with people being on his property as long as they didn't present a safety threat.

When describing his property, Mattanaw noted there are numerous trails on the property, none of which are marked. As for the Trail, Mattanaw characterized it as more of a primitive roadway as opposed to a trail. After buying the property, Mattanaw placed about 35 signs around the property indicating that the property is privately owned. Sometimes, people remove his signs.

Mattanaw testified there are multiple deficiencies with Friends' case, including: (1) the "evidence collection" is untimely because the witnesses are describing their activities many years after purportedly using the Trail;<sup>72</sup> (2) the witnesses have exaggerated the frequency of use, such as saying they have used the Trail a thousand times; (3) there are numerous trails in the area, and thus use cannot be considered to always be on the Trail; (4) only a few witnesses testified, and the number is insufficient to establish an aggregate public use; (5) Friends failed to identify a 10-year period as required by law, which left Mattanaw defending against "an unknown;" and (6) there is overlap in terms of usage, time-wise, but there are different periods of use, which further reduces the number of Trail users at a particular time. The court has attempted to address Mattanaw's testimony/concerns below.

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<sup>72</sup> Friends asked the court to admit affidavits from Trail users who did not testify at trial, but the court did not admit them.

#### *IV. Conclusions of Law*

Plaintiff seeks a public prescriptive easement over Defendants' properties. Although the entire Trail stretches across four parcels of the land, the purported easement in this case, if proven, will begin at Steamboat Drive, cross over the Pugh tract, cross over the Mattanaw tract, and end at the Waddell tract.

##### **A. Plaintiff satisfied the elements of a public prescriptive easement along the Stewart Trail over Defendants' properties by clear and convincing evidence**

The court concludes that Plaintiff demonstrated by clear and convincing evidence that the public's use of the Trail was continuous for at least ten years, open and notorious for at least ten years, and hostile, where the public acted without permission from the landowners.

##### *1. Continuous use*

Plaintiff presented clear and convincing evidence establishing that the public continuously used the Trail for at least 10 years between 1986 and 2012, with use increasing significantly over time. Some members of the public, in particular, that testified at trial used the Trail hundreds of times.<sup>73</sup>

The public's use of trail began as early as 1975 when Ms. Pease was training for marathons during her teenage years. In the mid-to-late 1970s, James Rogers and Dan

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<sup>73</sup> The following witnesses indicated that they used the Trail on a weekly basis for several years: Mr. Lewanski; Ms. Fredston; Ms. Phelps; Mr. Riley; Ms. Glenn; James Rogers; Mr. MacDowell; Mr. Becker; and Mr. Barnwell. Other witnesses used the Trail on a monthly basis for several years, including Mr. Crimp; Ms. Pease; and Ms. Leykom, while others used the Trail a few times per year for several years: Ms. Basinger; Ms. Caminer; Ms. Holmes; and Roger Marks.



Rogers saw Ms. Pease on the Trail as well as other individuals from their high school. Dan Rogers also testified that, prior to 1980, there was significant motorized use by the public.<sup>74</sup>

By the mid-1980s, it is evident that public use of the Trail was beginning to increase. A vast majority of the public trail users indicated that they used the Trail on a weekly or monthly basis continuously, ranging from about one to three decades, throughout 1986 to 2016.<sup>75</sup> Some witnesses used the Trail less frequently, i.e. a few times per year.<sup>76</sup>

Moreover, nearly all witnesses who possessed first-hand knowledge of the Trail's use and conditions between 1986 and 2012 testified that they saw other people using it. Almost every member of the public at trial who testified indicated that they also saw some evidence of other trail users, such as footprints, dog tracks, ski tracks, snowshoe tracks, and bike tracks.

Witnesses acknowledged that they technically could not attribute the tracks to public users over landowners. However, this evidence of Trail use cannot be reasonably attributed

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<sup>74</sup> No members of the public who testified at trial used motorized vehicles on the Trail, except for Mr. Becker who indicated that he used a snow machine and ATV once.

<sup>75</sup> Specifically: Mr. Lewanski continuously and frequently used the Trail in his professional and personal capacity from 1986 to 2015; Ms. Pease used the Trail 50 to 80 times per year from 1997 to 2010; Ms. Fredston used the Trail all the time from 1986 to 2007; Ms. Phelps used the Trail once every weekend from 2004 to 2012; Mr. Riley used the Trail on a weekly basis from 1985 to 2012; Ms. Glenn used the Trail two to three times per week from 1992 to 2010; Ms. Judd frequently used the Trail between 1992 and 2016; Mr. MacDowell would use the Trail two to three times per week every summer between 1991 and 2016; Mr. Crimp used the Trail from 1994 to 2015 about 30 times per year; Ms. Spencer used the Trail three to four times per week from 1996 to 2006; and Mr. Barnwell used the Trail almost every day from 1982 to 2013.

<sup>76</sup> Specifically: Ms. Basinger hiked the Trail with a group from 1997 to 2009; Ms. Caminer used the Trail in a group or alone from 1997 to 2015; Ms. Holmes used the Trail from the 1990s to 2015; and Roger Marks used the Trail from 2000 to 2015.

to landowners, i.e. the Schoffs, the Millers, the Stewarts, or Mr. Waddell. The Schoffs did not live on their property. The Millers moved from their property in 1971 and visited it less as time went. The Stewarts did not live on the property after they perfected their homestead but would occasionally visit their land. Mr. Waddell lived in Washington, with the exception of the time when he widened the road in the early 2000s. Therefore, the evidence of trail use – which is vividly depicted in several of the photographs discussed above – is more reasonably attributed to public users rather than landowners.

Additionally, gaps in an individual's trail use among the witnesses do not demonstrate an interruption or lack of use as to the general public's continuous use. Put differently, the evidence does not support the conclusion that the public's continuous use of the Trail ceased for an extensive period between 1986 and 2012. There is also no evidence that landowners of the Trail acted to interrupt or halt the public's recreational use between 1986 and 2012.

The red gate, and any signage that may have been placed on the Trail prior to at least 2012, did not prevent the public from using the Trail. Virtually all members of the public testified that they understood that the gate was meant to prevent vehicular traffic and that they merely walked around it to use the Trail. At some point, a "no parking" sign was added to the gate. This did not stop people from recreating along the Trail. Some cars ignored the no parking sign and still parked by the gate, especially as public usage of the Trail increased over time. Members of the public used the Trail at their discretion until at least 2012 when Mr. Pugh began placing signage on his property.

Thus, Plaintiff established the continuous use element.

*2. Open and notorious use*

There is clear and convincing evidence that the public's use was open and notorious for at least 10 years between 1986 and 2012. Plaintiff demonstrated that the public's use was readily apparent to the landowners of the relevant parcels at issue, i.e. the Schoffs or the Millers. A majority of public users testified that: they believed the Trail was public; they never hid their use; and they saw other people using the Trail. The photographic evidence presented at trial established that public's recreational use of the Trail was readily apparent, especially in the winter from ski tracks, snowshoe tracks, and footprints.

Use of the Trail was sufficiently open that it was included in the first edition of 55 Ways to the Wilderness, a book that individuals use to look up hikes in Alaska. It was also included in the Chugach State Park Access Inventory in 2002 as pedestrian corridor and access point to McHugh Peak; this supports a finding of open and continuous use.

Thus, Plaintiff clearly and convincingly proved that the public's use was open and notorious.

*3. Hostile Use*

This case turns on hostility. The court concludes that there is clear and convincing evidence that the public's use of the Trail was hostile. The public's initial use of Trail was nonpermissive. Therefore, the presumption of permissive use may be successfully rebutted by a showing of owner acquiescence. Plaintiff successfully met its burden to rebut the

presumption by demonstrating that the public used the Trail without express or formal permission, meaning that the landowners merely acquiesced in the public's use of the Trail.

For the purpose of the hostility analysis, the court only considers whether the prior landowners of the Pugh tract and the Mattanaw tract, i.e., the Schoffs and Millers, granted permission to the public to use their properties. Mrs. Stewart only had the legal authority to give the public permission to use her own property. The same is true of Mr. Waddell.

*a. The public's initial use of the Trail was nonpermissive*

The threshold issue for the hostility analysis is addressing whether the public's initial use of the Trail was permissive. This is a crucial fact because it determines Plaintiff's appropriate burden to rebut the presumption of permissive use. The relevant inquiry for the establishment of a public prescriptive easement is whether the *public's use* began permissively. Use by members of the public is distinguishable from use by homesteaders, i.e. adjoining property owners.

At its inception, the Trail was created for the purpose of allowing homesteaders to reach their properties. Testimony regarding homesteader use of the Trail demonstrates that use was rooted in permission: each landowner allowed other homesteaders to cross their own property to reach their homestead.

However, homesteader use cannot be attributed to, or tacked on to, the general public's initial use of the Trail. During trial, the evidence demonstrated that nearly all initial use by members of the public was nonpermissive. The permissive and interdependent nature between the homesteaders' uses of each other's properties to reach their own

property does not exist between the homesteaders, i.e. landowners along the Trail, and the public.

The public's initial use of the Trail began as early as the mid-1970s. Credible witness testimony indicates that members of the public did not use the Trail with a permissive purpose in mind. Specifically, witnesses felt that the Trail was public and that their presence was not contingent upon permission from any landowners.

Almost all members of the public began using the Trail in an unpermitted manner that was inconsistent with the concept of permission. Unlike in *City of Dillingham* and *Dault*, the landowners' interests and public's interests do not align. Here, members of the public contemplated unrestricted future access to the Trail not subject to landowner permission.<sup>77</sup> Virtually all of the witnesses who were members of the public testified that they did not believe their recreational use was contingent upon permission of landowners.

Moreover, there is no evidence that the Trail was created for the purpose of allowing the public to recreate in a permissive manner in addition to allowing homesteaders to reach their properties. Indeed, Mrs. Miller testified that she believed the road was not built to serve the public.

Thus, because the public's initial use of the Trail was nonpermissive, Plaintiff must rebut the presumption of permissive use by demonstrating that the public used the land

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<sup>77</sup> This case is similar to *Dickson*, even though the Court did not discuss the presumption of permissive use. In that case, the public's purported permissive use of a homestead road was undercut by several witnesses testifying that they used the road without permission. The same is true here.

without permission of the landowners, which may be established by a showing of owner acquiescence.

*b. Plaintiff successfully rebutted the presumption of permissive use*

There is clear and convincing evidence that Plaintiff established hostile use by rebutting the presumption of permissive use through owner acquiescence. Rather than giving permission, the landowners acquiesced to the public's use of the Trail for a variety of recreational purposes including hiking, running, walking, skijoring, skiing, and snowshoeing. There is no evidence, with the exception of one witness, that the public ever sought or obtained permission from the Millers or the Schoffs to use the Trail between 1986 and 2012. In addition to evidence of landowner acquiescence, the public's acts of trail maintenance, such as picking up litter and trimming the alders, support the conclusion that the public acted as if the land was their own.

All members of the public, with the exception of Mr. Barnwell, occupied the land at issue through owner acquiescence, i.e. without express permission from the Schoffs or the Millers; and virtually all witnesses who testified as public users believed they had a right to use the Trail because it was public. James Rogers, Mr. MacDowell, and Mr. Becker believed that the Trail was private and that their use stemmed from "implied permission." However, they all conceded that they never received express or formal permission from the Schoffs or the Millers to use the Trail. There is no evidence, apart from Mr. Barnwell's testimony, that members of the public ever acknowledged that their uses of the Schoff

parcel and Miller parcel were “in subordination to” the landowners’ titles by receiving express permission.

The Schoffs acquiesced to the public’s use of the Trail on their property between 1986 and 2012. With the exception of Mr. Barnwell’s purported grant of permission from the Schoffs, there is no evidence that any public Trail users interacted with the Schoffs; that any public Trail users discussed permission with the Schoffs; that the Schoffs communicated that the public required permission to use the Trail; or that the Schoffs attempted to limit or prevent public use.

The Millers also acquiesced to the public’s use of the Trail on their property between 1986 and 2012. With the exception of Mr. Barnwell’s purported grant of permission from the Millers, there is no evidence that any public Trail users interacted with or discussed permission with the Millers. Mrs. Miller testified that she believed that the Trail was not built for public use. She would occasionally see people on the Trail but never recalled giving anyone express permission. Mrs. Miller never removed anyone from her property. The Millers never acted in a way to impose conditions of permissive use upon the public. They never put up any signage, nor did they take any other actions to inform the public of the Trail’s private nature. From 1971 to 1999, the Millers moved from their homestead to Anchorage and only visited their homestead property about once a month. Therefore, for most of the time between 1971 and 2000, the Millers were not present to grant members of the public permission to use their property. From 2000 to 2011, the Millers’ visitation to

their homestead increased, but Mrs. Miller conceded that she did not have firsthand knowledge regarding the public's use of the Trail during this time.

Mr. Barnwell's testimony at trial regarding his encounters with landowners differed from his deposition. Despite the inconsistency, Mr. Barnwell's testimony overall strongly indicates that he used the land at issue with permission from the Schoffs and the Millers. However, the purported verbal grants of permission Mr. Barnwell received from the Schoffs and the Millers were the exception, not the rule. Aside from Mr. Barnwell, no other members of the public that testified encountered the Millers or the Schoffs, and thus, the vast majority of the public never could have received formal permission to use those properties.

Between 1986 and 2012, a few witnesses encountered other landowners. For example, Ms. Fredston, Ms. Glenn, and Ms. Judd each encountered Mrs. Stewart. Each witness described their encounter as friendly and casual involving discussions about nature or flowers off of the Trail. They did not discuss permission. In any event, Mrs. Stewart could not have granted permission to use the Schoff or Miller properties.

Mr. Becker recalled that he received express permission from Mrs. Stewart to use the Trail in 1999. As previously discussed, this purported grant of permission has no bearing on whether the Schoffs or Millers granted permission.

In the early 2000s, Mr. MacDowell encountered a man he believed to be "associated with the land in some way" who did not identify himself as a landowner. Mr. MacDowell asked if he could use the Trail and the man waved him on. The evidence suggests that it



was likely Mr. Waddell, who was widening the road in about 2002: Mr. Waddell testified that, while he was working on his project, some people asked him if they could use the Trail. As explained above, even if Mr. Waddell did give a few members of the public permission to use the Trail, it does not affect the analysis because he lacks legal authority to grant permission over the land at issue.

Moreover, Defendants' attempt to use *55 Ways to the Wilderness* as proof that the public's use was permissive is misplaced. The book contained language that hikers are welcome to use the Trail if they "respect private property." *55 Ways to the Wilderness* does not operate as a grant of express permission. Rather, at best, it alerts individuals that the Trail crosses private property or that the land surrounding the Trail is private. Witnesses did not find anything inconsistent with their belief that the Trail was public and that they needed to respect private property—the two were not mutually exclusive in their minds.

The nature, extent, and volume of the public's use of the Trail demonstrates that the public's use was hostile under a claim of right, rather than with permission. Thus, Plaintiff successfully rebutted the presumption of permissive use.

#### **B. Mattanaw's positions**

Mattanaw testified that there are multiple deficiencies with Plaintiff's case. The court disagrees and addresses each purported deficiency below.

##### *1. Plaintiff's "evidence collection" is not untimely*

Mattanaw argues that Plaintiff's evidence is untimely because the witnesses are describing their activities many years after their purported use of the Trail. However,

witnesses can, and often do, testify about events that occurred many years before. The fact finder determines the credibility of witnesses and “may discount all or part of a witness’s testimony.”<sup>78</sup> In this case, the court is the fact finder, and therefore, it determines the credibility of witnesses. The court determined witness testimony pertaining to the public’s Trail use to be credible. Witnesses testified in detail about their specific types of uses, identified specific time periods and frequency of use, and some witnesses provided photographic evidence of their trail use.

*2. It is within the fact finder’s discretion to determine whether witnesses exaggerated their frequency of use*

Mattanaw argues that the witnesses have exaggerated the frequency of their use by testifying that they have used the Trail thousands of times. Again, the court is the fact finder and has the authority to accept or discount witness testimony. The court determined witness testimony pertaining to the public’s frequency of Trail use was credible.

*3. The evidence sufficiently demonstrates that the public did in fact use the portion of the Trail at issue*

Mattanaw argues that there are numerous other trails and offshoots in the area, and therefore, the public’s use cannot be considered to always have been on the Trail. The court disagrees. The evidence sufficiently demonstrates that the public used the land at issue, i.e. the segment of the Trail crossing the Pugh and Mattanaw tracts, when describing their use because: witnesses testified in detail about their descriptions of the location of the Trail;

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<sup>78</sup> *Gavora, Inc. v. City of Fairbanks*, 502 P.3d 410, 418 (Alaska 2021) (internal citations omitted).

witnesses demonstrated their geographic knowledge of the trail; witnesses distinguished between offshoot trails and the Trail; and there is photographic evidence of members of the public on the Trail.

*4. The evidence sufficiently establishes that the “public at large” used the Trail*

Mattanaw argues that the small number of witnesses is insufficient to establish an aggregate to qualify as public use. From the testimony presented at trial, public use of the Trail amounts to hundreds or thousands of times, in the aggregate, for recreational purposes among several members of the public between 1986 and 2012. Many witnesses also testified about using the Trail with others—family, friends, or hiking groups—in addition to their personal use. They also observed evidence of others using the Trail.

*5. Plaintiff’s lack of identification of an explicit 10-year period is not fatal to a public prescriptive easement claim*

Mattanaw argues that Plaintiff failed to identify a specific 10-year period for establishing a public prescriptive easement as required by law, which prejudiced Mattanaw by leaving him to defend against “an unknown.” This argument fails. There is no indication that Alaska law requires the statutory period of 10 years to be explicitly identified in the context of litigating the existence of a public prescriptive easement: rather, the proponent of the easement must show at least 10 years of consecutive use – in this case, Plaintiff established more than 10 years of such use.

6. *The public's use of the Trail between 1986 and 2012 was continuous, open, and notorious for at least 10 years*

Mattanaw takes the position that the testified use by witnesses is insufficient to establish enough users for a given 10-year period. Specifically, he argues that while there are some extended periods of usage from 1975 to 2015, the periods never accumulate to continuous, open, and notorious use for 10 years when spread over time. The court disagrees.

As explained above, there is ample evidence that the general public continuously used the Trail from 1986 to 2012, with an increase in usage over time, in an open and notorious manner. There is no evidence that the public's use of the Trail ceased for an extensive period of time. Some short gaps in an individual's continuous use is insufficient to show that the public abandoned its claim.

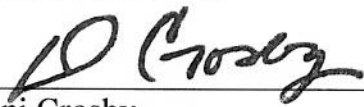
In sum, Plaintiff's case is not deficient, and Plaintiff has proven all the elements necessary to establish a public prescriptive easement by clear and convincing evidence.

***V. Conclusion***

For the foregoing reasons, Plaintiff is entitled to a declaratory judgment that a public prescriptive easement exists across Defendants' properties.

IT IS SO ORDERED.

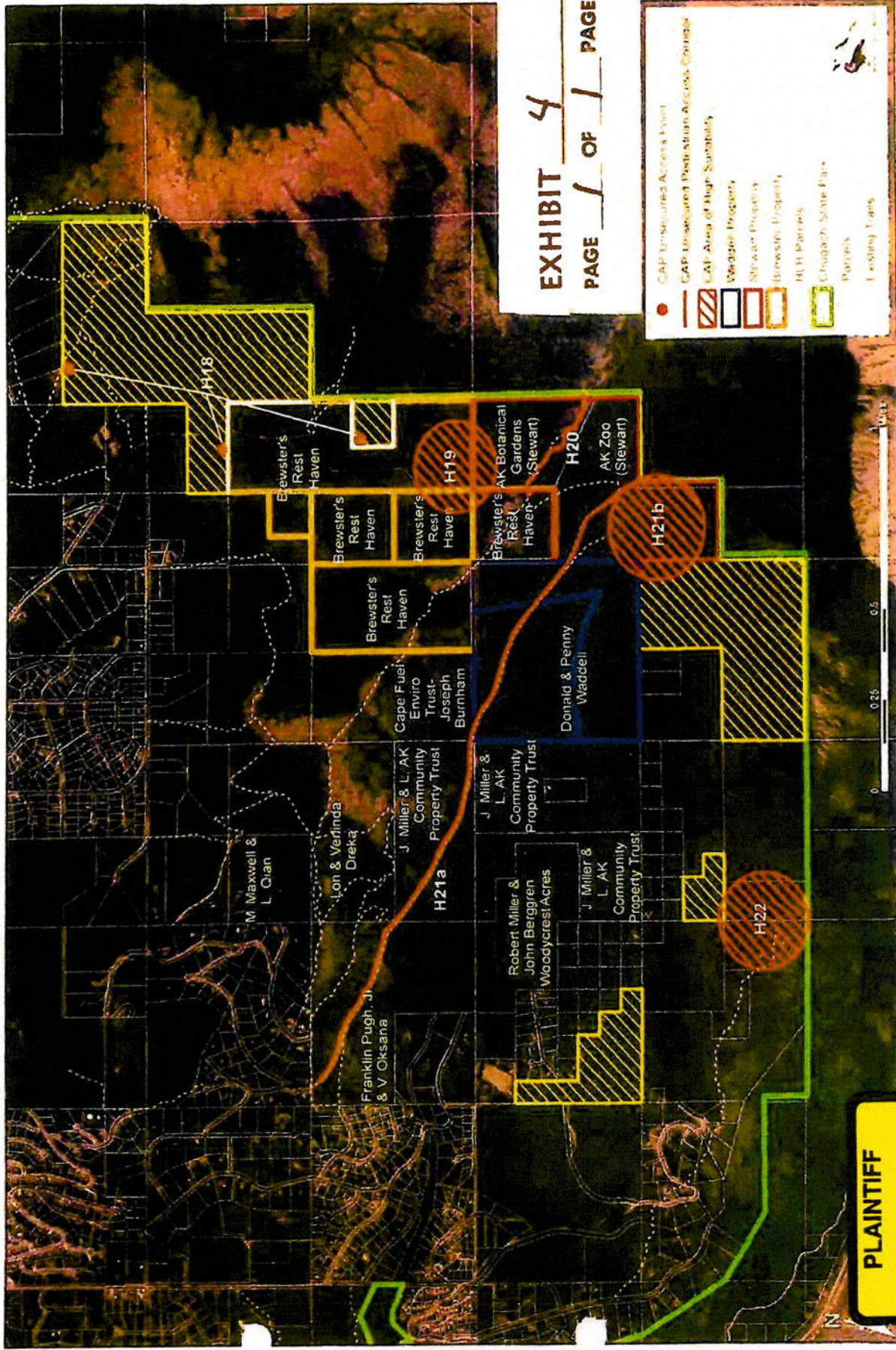
DATED at Anchorage, Alaska this 1 September 2022.

  
\_\_\_\_\_  
Dani Crosby  
Superior Court Judge

I certify that on 9.1.22 a copy  
of the above was mailed to each of the  
following at their address of record:

CCA W. Falsey, D. Gross, T. Meacham  
Judicial Assistant Mattanaw, K. Fitzgerald

**Waddell, Stewart, Brewster, and HLB Property in Potter Valley**



**EXHIBIT 4**  
**PAGE 1 OF 1 PAGES**

**PLAINTIFF**  
 EXHIBIT NO. 1010  
 ADMITTED   
 3AN-A-5746 CJ  
 (CASE NUMBER)