

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

STATE OF ALASKA,)
DEPARTMENT OF NATURAL)
RESOURCES,)
)
Plaintiff,)
)
v.)
)
GORDON FRANKE, GREGORY)
SCHUMACHER, JOHN FROST, and)
CAMPBELL LAKE OWNERS, INC.)
)
Defendants.)

Case No. 3AN-23-_____ CI

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff State of Alaska, Department of Natural Resources (jointly referred to as DNR, unless the context requires otherwise), by and through the Office of the Attorney General, for its complaint alleges and states as follows:

INTRODUCTION

1. In accordance with AS 22.10.020(g), DNR seeks declaratory relief to quiet title to a section line easement that provides public access across some of the defendants' private properties to Campbell Lake in Anchorage (hereinafter "the Campbell Lake SLE," or "the SLE").

2. In accordance with AS 22.10.020(g), DNR also seeks declaratory relief to quiet title to the streambed of Campbell Creek where the streambed lies beneath Campbell Lake, an artificial lake.

3. In accordance with AS 22.10.020(g), DNR also seeks declaratory relief to confirm that Campbell Lake, an artificial lake, is a navigable or other public water¹ (hereinafter “public water”) and not a private lake.

4. In accordance with AS 22.10.020(c), DNR seeks injunctive relief to stop defendants from preventing or otherwise inhibiting public access to Campbell Lake via the Campbell Lake SLE, and to stop defendants from preventing or otherwise inhibiting public use of Campbell Lake. DNR will separately file a motion for injunctive relief.

5. This lawsuit is necessary because the defendants’ a) denial of the existence of the Campbell Lake SLE, b) denial of Campbell Lake’s status as a public water, and c) efforts to inhibit reasonable public use of and access to Campbell Lake via the SLE, have interfered with DNR’s management of state property interests and public access to public waters, to the public’s detriment.

6. DNR anticipates that court rulings quieting DNR’s title to the SLE and the streambed, and confirming Campbell Lake’s status as a public water, will convince defendants to agree to reasonable public access and reasonable lake use that respects riparian rights.

PARTIES, JURISDICTION, AND VENUE

7. The State of Alaska and the Alaska Department of Natural Resources, a Department within the state’s executive branch, are individually and collectively qualified to bring this action.

¹ AS 38.05.965(14), AS 38.05.965(21).

8. Defendants Messrs. Franke, Schumacher, and Frost are residents of Anchorage, Alaska who own property adjacent to and abutting Campbell Lake, an artificial lake. The Campbell Lake SLE runs through their properties, intersecting with Campbell Lake.

9. Defendant Campbell Lake Owners, Inc. (CLO) is a non-profit corporation in good standing that serves as a homeowners' association for property owners at Campbell Lake.

10. CLO purports to own Campbell Lake on its own behalf and on behalf of its members.

11. Upon information and belief defendants Franke, Schumacher, and Frost are members of CLO along with other Campbell Lake riparian/littoral property owners.

12. Defendants are in all ways qualified to respond to and participate in this action.

13. The Court has jurisdiction over the parties pursuant to AS 09.15.015, and over the subject matter pursuant to AS 22.10.020 including subsections (c) and (g). Venue is proper.

BACKGROUND

14. Congress passed the Mining Act of 1866 as a means of providing public access across unreserved public domain lands. Later codified as 43 U.S.C. § 932, Revised Statute 2477 (RS 2477) states:

[t]he right-of-way for the construction of highways over public lands not reserved for public uses, is hereby granted.²

15. The Alaska Territorial Legislature accepted the RS 2477 offer of public lands for highway purposes when it enacted 19 SLA 1923, section 1, which provides:

A tract of four rods wide between each section of land in the Territory of Alaska is hereby dedicated for use as public highways, the section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part of the original survey.

16. A 1917 survey plat prepared by the U.S. Surveyor General’s Office (hereinafter “1917 survey”) depicts a section line running north-south across land intersecting with Campbell Creek. Exhibit A.

17. The fact that the surveyor did not meander Campbell Creek in 1917 does not negate the Creek’s in fact navigability or susceptibility to tidal influence.³

18. The Government Land Office (GLO) accepted the 1917 survey in 1918. Exhibit A. This was five years before the Alaska Territorial Legislature’s enactment of 19 SLA 1923, which accepted RS 2477 SLEs in Alaska, creating the Campbell Lake SLE.

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² Congress repealed RS 2477 in 1976, but left existing rights of way intact. *Ahtna, Inc. v. State, Dept. of Natural Resources*, 520 P.3d 131, 134 (Alaska 2022).

³ *State of Oklahoma v. Texas*, 584 U.S. 574, 585 (1922) (inference of navigability based on a surveyor’s meander line is “of little significance”).

19. In *Brice v. State, Div. of Forest, Land, and Water Mgmt.*, the Alaska Supreme Court held that the 1949 repeal of 19 SLA 1923 did not vacate RS 2477 SLEs created by the 1923 enactment.⁴

20. In 1951, the U.S. Government, in accordance with the Homestead Act of 1862, patented certain lands (hereinafter the “patented lands”) adjacent to Campbell Creek in the vicinity of the Campbell Lake SLE to homesteader David Alm. Exhibit B. The patent document described 120 acres “according to the Official Plat of the survey of said Land, on file in the Bureau of Land Management.” *Id.* The referenced survey plat was the 1917 survey, Exhibit A.

21. The 1951 patent reserved a right of way for “roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under the authority of the United States or of any State created out of the Territory of Alaska . . . ” Exhibit B.

22. At the time of the 1951 patent Campbell Creek was navigable in fact and/or tidally influenced in the vicinity of the patented lands and the Campbell Lake SLE. Exhibit C & D, (aerial photographs, 1950 & 1953, respectively).

23. The 1951 patent did not convey, and could not have *lawfully* conveyed, submerged lands beneath Campbell Creek to Mr. Alm.⁵ It did not declare or make plain any such conveyance. Moreover, such lands had been reserved under the Alaska Right

⁴ 669 P.2d 1311, 1315-16 (Alaska 1983).

⁵ See Submerged Land Act of 1953, 43 U.S.C. § 1301(f), which prevents states from taking to title to submerged lands that were *lawfully* patented to others.

of Way Act of 1898, 30 Stat. 409, attached as Exhibit E, which extended the Homestead Act of 1862, 12 Sta. 93, to Alaska subject to specified conditions.⁶

24. Upon statehood, title to the submerged lands beneath Campbell Creek in the vicinity of the patented lands vested in the State of Alaska under the equal footing doctrine and the Submerged Lands Act.

25. In 1958, Campbell Creek was dammed in the vicinity of the patented lands, the Campbell Lake SLE, and the section line depicted in the 1917 survey.

Exhibit F (1963 aerial photograph). This created Campbell Lake, an artificial lake, overlying the navigable and/or tidally influenced Campbell Creek channel, and obstructing the Campbell Lake SLE. Exhibit G (1971 subdivision plat).

26. At all times prior to being dammed, Campbell Creek remained navigable in fact and/or tidally influenced in the vicinity of the dam, the patented land, and the SLE.

27. At all times subsequent to the damming of Campbell Creek and until statehood, Campbell Lake, an artificial lake (fed by Campbell Creek), was a navigable or other pre-statehood public water.

28. At all times since statehood, Campbell Lake (fed by Campbell Creek) has been and has remained a public water.

⁶ See Alaska Right of Way Act, Exhibit E, at 1: “[N]othing in this Act contained shall be construed as impairing in any degree the title of any state to tidelands and beds of any of its navigable waters...”

29. Pursuant to the Alaska Water Use Act, including but not limited to AS 46.15.040, the right to appropriate the “water of the state” is contingent upon application for and (if the application is approved) the issuance of a certification of appropriation.

30. The water that fills and comprises Campbell Lake (fed by Campbell Creek) is water of the state.

31. Defendant CLO, which owns the dam and purports to own the lake, has not been issued a certificate of appropriation with respect to a) the damming and impounding of Campbell Creek for the creation and maintenance of Campbell Lake, or b) modifications to the damming and impounding of Campbell Creek for the maintenance of Campbell Lake.

32. The damming and impounding of Campbell Creek for the creation and maintenance of Campbell Lake, and modifications to such damming and impounding, all without a certificate of appropriation, constitute an unauthorized appropriation of water of the state.⁷

CAMPBELL LAKE SLE BOUNDARIES

33. Defendant Mr. Franke owns and possesses real property located at 3900 Northpoint Drive in Anchorage. His property, located adjacent to and immediately north of Campbell Lake, is depicted as “Lot 1” in Exhibit H, a survey drawing stamped by a Registered Professional Surveyor.

⁷ AS 46.15.040. *See also* definitional terms in 46.15.260(2), (9).

34. Defendant Mr. Schumacher owns and possesses real property located at 3910 Northpoint Drive in Anchorage. His property, located adjacent to and immediately north of Campbell Lake, is depicted as “Lot 2” in Exhibit H, a survey drawing stamped by a Registered Professional Surveyor.

35. Defendant Mr. Frost owns and possesses real property located at 3823 W. 100th Avenue in Anchorage. His property, located adjacent to and immediately south of Campbell Lake, is depicted as “Lot 37” in Exhibit I. Mr. Frost’s property is also depicted as “Lot 37” on Exhibit J, a survey drawing stamped by a Registered Professional Surveyor.

36. As shown in Exhibit H, there is a section line, running north-south, that crosses Mr. Franke’s property. The section line separates Sections 14 and 15, Township 12 North, Range 4 West Seward Meridian. The Campbell Lake SLE extends 33 feet from each side of the section line, impacting both Mr. Frank’s property and Mr. Schumacher’s property. It is shaded blue in Exhibit H.

37. As shown in Exhibit I, the same section line, running north-south, crosses Mr. Frost’s property. The Campbell Lake SLE extends 33 feet from each side of the section line, except where DNR partially vacated the SLE in or about 2007 in exchange for a negotiated public access easement across private property adjacent to Mr. Frost’s property. The non-vacated SLE is shaded blue in Exhibit I. The green shading in Exhibit I delineates the negotiated public access easement. The same lines are depicted in Exhibit J, without color shading.

38. The section line giving rise to the Campbell Lake SLE is the same as that depicted in the 1917 survey, Exhibit A, and in the 1971 subdivision plat, Exhibit G.

39. The fact that DNR, in 2007, partially vacated a portion of the Campbell Lake SLE at the request of the landowner adjacent to defendant Mr. Frost (as explained above) without any objection from defendants on the grounds that there was no SLE to vacate, attests to the SLE's existence and defendants' knowledge thereof. Exhibits K and L (preliminary and final decisions to vacate).

DISPUTE

40. Upon information and belief, all defendants contend that Campbell Lake is a private lake, and not a public water. This is reflected in an August 19, 2020 letter from the CLO to DNR. Exhibit M.

41. Upon information and belief, all defendants contend that the Campbell Lake SLE is invalid or otherwise does not exist. *Id.*

42. In Alaska, RS 2477 rights of way such as the Campbell Lake SLE provide a means of public access across private (and other) property to state lands and waters⁸ by modes of transportation commonly employed, including travel by foot.⁹

43. Despite the existence and validity of the Campbell Lake SLE, the defendants, acting individually or in concert, have in the past engaged in and/or are now

⁸ See *Lake Colleen Enters., Inc. v. Estate of Mark*, 951 P.2d 427, 430 n.3 (Alaska 1997).

⁹ *Ahtna, Inc.*, 520 P.3d at 139-141.

engaged in efforts to prevent or otherwise inhibit public access to Campbell Lake by means of the Campbell Lake SLE.

44. Under the “public trust doctrine” DNR manages natural resources, including public waters, for the common good.¹⁰ Under the “common use clause”¹¹ DNR protects public access to natural resources, including navigable or other public waters of the state.¹²

45. Despite the fact that Campbell Lake is a public water, the defendants, acting individually or in concert, have in the past or are now engaged in efforts to prevent or otherwise inhibit public use of Campbell Lake.

46. Defendants’ actions described herein have disrupted and interfered with DNR’s legitimate performance of its obligation to manage state easements and access to public waters for the public’s benefit, harming DNR and the public at large.

47. Defendants’ actions described herein would divest the state of unique property interests inextricably tied to state sovereignty.

48. Some or all of Defendants’ actions described herein constitute a trespass.

49. Some or all of Defendants’ actions described herein constitute a public nuisance.

¹⁰ *Kanuk ex rel. Kanuk v. State, Dept. of Natural Resources*, 335 P.3d 1088, 1099 – 1100 (Alaska 2014); *see also* AS 38.05.126(a).

¹¹ Alaska Const. art. VIII § 3.

¹² *Owsichek v. State, Guide Licensing and Control Bd.*, 763 P.2d 488, 492 (Alaska 1988).

COUNT I
Declaratory Relief

50. DNR restates and incorporates herein by reference all prior allegations.

51. In light of defendants' actions and conduct described herein, there is an actual case or controversy regarding matters on which DNR is entitled to declaratory relief pursuant to AS 22.10.020(g).

52. There is an actual case or controversy regarding DNR's title to the Campbell Creek streambed beneath Campbell Lake. DNR seeks declaratory judgment in the form of a quiet title order in its favor on this issue.

53. There is an actual case or controversy regarding whether Campbell Lake is a public water and public lake. DNR seeks declaratory judgment in its favor on this issue.

54. There is an actual case or controversy regarding the lawfulness of defendants' efforts to prevent or otherwise inhibit public use of Campbell Lake. DNR seeks declaratory judgment in its favor on this issue.

55. There is an actual case or controversy regarding the defendants' unauthorized appropriation and use of state waters by a) damming and impounding Campbell Creek (including modifications the dam/impoundment) to create and maintain Campbell Lake, an artificial lake, without a water appropriation certificate, and b) using the waters of Campbell Lake for personal, recreational, and other purposes, to the exclusion of others, without a water appropriation certificate, all in violation of the Alaska Water Act, AS 46.15 et seq. DNR seeks declaratory judgment in its favor on this issue.

56. There is an actual case or controversy regarding the existence and validity of the Campbell Lake SLE. DNR seeks declaratory judgment in the form of a quiet title order in its favor on this issue.

57. There is an actual case or controversy regarding the effect of the 1951 patent's reservation of highway rights of way as it relates to the Campbell Lake SLE. DNR seeks declaratory judgment in the form of a quiet title order in its favor on this issue.

58. There is an actual case or controversy regarding DNR's authority to enforce the SLE and the 1951 patent's reservation as means of public access across defendants Franke, Frost, and Schumacher's property, to Campbell Lake and across Campbell Lake. DNR seeks declaratory judgment in its favor on this issue.

59. There is an actual case or controversy regarding the lawfulness of defendants' efforts to prevent or otherwise inhibit public access to Campbell Lake by means of the Campbell Lake SLE. DNR seeks declaratory judgment in its favor on this issue.

60. There is an actual case or controversy regarding whether some or all of defendants' actions described herein constitute a trespass. DNR seeks declaratory judgment in its favor on this issue.

61. There is an actual case or controversy regarding whether some or all of defendants' actions described herein constitute a public nuisance. DNR seeks declaratory judgment in its favor on this issue.

COUNT II
Injunctive Relief

62. DNR restates and incorporates by reference all prior allegations.

63. In light of defendants' actions and conduct described herein, DNR is entitled to injunctive relief pursuant to AS 22.10.020(c).

64. DNR seeks injunctive relief (to be further specified in a proposed order which DNR will submit after service of this complaint) consisting of:

a. An order requiring defendants to immediately cease, and thereafter refrain from, all efforts to prevent or otherwise inhibit public access to Campbell Lake by means of the Campbell Lake SLE.

b. An order requiring defendants to immediately cease, and thereafter refrain from, all efforts to prevent or otherwise inhibit public use of Campbell Lake.

PRAYER FOR RELIEF

WHEREFORE, DNR prays as follows:

1. That the court confer declaratory relief in favor of DNR on each issue described herein;
2. That the court issue an order quieting DNR's title to the Campbell Lake SLE;
3. That the court issue an order quieting DNR's title the streambed of Campbell Creek in the vicinity of the dam, the Campbell Lake SLE, and Campbell Lake;
4. That the court issue an order declaring Campbell Lake to be a public water, and a water of the state per AS 46.15.

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5. That the court, upon DNR's filing of a proposed injunctive order, confer injunctive relief in favor of DNR;

6. For an award of damages and incurred by DNR resulting from defendants' actions described herein;

7. For an award of attorney fees and costs;

8. For such other relief as this court deems just and equitable.

DATED October 30, 2023.

TREG TAYLOR
ATTORNEY GENERAL

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