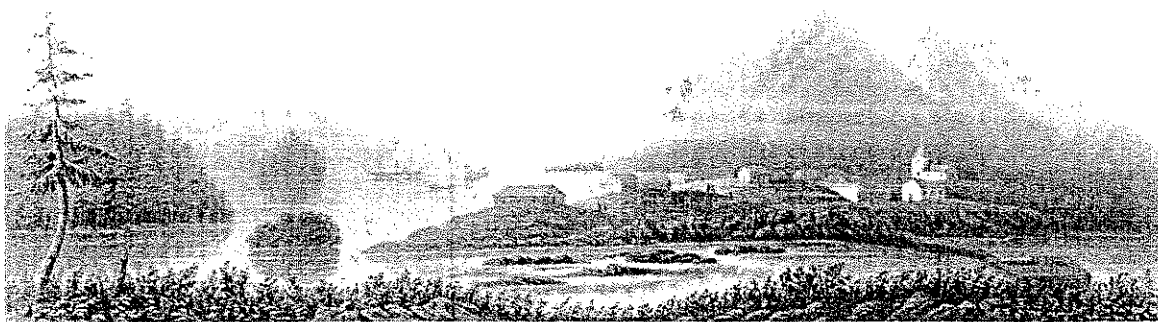


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**U.S. Dept. of the Interior
Bureau of Land Management**

Sheldon Jackson College	:	AA-93227
c/o Christianson & Spraker	:	Color of Title Application
911 West 8th Avenue, #201	:	
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:	:	
Sealaska Corporation	:	AA10495
c/o Simpson Tillinghast & Sorenson, PC	:	Cemetery and Historic Site
One Sealaska Plaza, Suite 300	:	Selection
Juneau, AK 99801	:	
:	:	
USDA Forest Service	:	Tongass National Forest
Regional Forester	:	
709 West 9th Street	:	SHELDON JACKSON COLLEGE'S
PO Box 21628	:	EVIDENCE AND ARGUMENT
Juneau, AK 99802-1628	:	IN SUPPORT OF
		COLOR OF TITLE APPLICATION

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BLM AK 50 954
ANCHORAGE, AK



Ozerskoi Redoubt, 1861

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I. FACTUAL BACKGROUND

A. Description of the property and surrounding area

Sheldon Jackson College ["SJC" or "the College"] has applied under the Color of Title Act, 43 U.S.C. 1068, for patent to 160 acres at the outlet of Redoubt Lake, about 12 miles south of Sitka, Alaska.

Formerly called "Glubokoye" or Deep Lake, Redoubt Lake is a nine-mile long and one-mile wide lake that runs northeast to southwest on Baranof Island. On the northwestern shore of the lake there is a small cove, and out of the west side of that cove the lake water spills about 15-30 vertical feet, depending upon the tide, in a short, steep braided stream into the head of a long, narrow inlet. The inlet is located in Redoubt Bay which is part of Sitka Sound, on the west coast of Baranof Island. The stream is called Redoubt Falls.

The 160 acre parcel claimed by SJC encompasses Redoubt Falls, together with the two peninsulas, one to the north and the other to the south of the falls, that lie between the lake and the sea. The parcel is bounded on the north by the steep slopes of Mt. Dranishnikov: this terrain consists of dense forest, brush, and small cliffs, and is largely impenetrable to all but the most determined hiker. The parcel is bounded on the south by a wooded peninsula that separates the head of Redoubt Bay into two coves. No roads or trails exist except for a small network of trails in the immediate area of Redoubt Falls. Travel to the site is only possible by water.

Redoubt Lake is one of the most productive sockeye salmon producers in Southeast Alaska. In summer, the waters at the outlet teem with salmon returning from the ocean. When the salmon reach the head of the inlet, they school up in the cove below the falls, swimming and resting, until a current or the ebb or flow of the tide is right and they begin their ascent of Redoubt Falls. To ascend Redoubt Falls to the lake, the fish swim upstream through the braided streams against the swift current, and hurtle themselves over boulders and through the onslaught of rapids. The widest of the braids is perhaps only 50 feet across, so the fish are accessible for harvesting as they work their way upstream from the sea to the lake.

Throughout July and into early August, hundreds of Sitkans with subsistence permits show up at Redoubt, along with the sockeye. The fishermen angle for a spot on the banks, or in the river, from which to dipnet for the prized sockeye, as the fish dart through the rapids. At the top of the falls, an overhead wire marks the boundary of the fishing area, and a short distance east of that wire, towards the lake, there is a weir that runs from a point on the lake shore north of the falls, to another point on the lake shore south of the falls. The weir is essentially an underwater fence that the Forest Service utilizes to count and control fish that swim into the lake proper. The daily limit for this sockeye subsistence fishery (August 2012) is

currently 25 fish per day or 100 fish per year.¹ Many Sitkans depend upon this subsistence fishery to fill their freezers, or to stock their pantries, with fish caught at Redoubt. Besides simply providing a food source, the Redoubt fishery is a tangible reminder of the importance of salmon in the history and culture of the Pacific Northwest, and the Tongass in particular. It is a concrete example of how, with proper care, the natural bounty of the land can be preserved.

B. Preservation of the USFS's Redoubt Lake Fisheries Enhancement Program, and Protection of Public Use of Redoubt Falls Area.

At the top of Redoubt Falls, the U. S. Forest Service maintains a fisheries enhancement program which was started in the early 1980's and is the crown jewel of fisheries program on the Sitka Ranger District.² **If the College's application for patent is granted, the College desires that this USFS fisheries enhancement program be continued. The College supports – indeed, the College affirmatively requests – that the patent contain whatever easements, restrictions or reservations the USFS would deem appropriate to continue the**

¹ The number of returning fish are monitored at the weir on essentially a real-time basis, and harvest limits are set and adjusted as necessary by the Alaska Department of Fish & Game (ADF&G) to achieve a target escapement of salmon.

² The USFS Sitka Ranger District website (2008) states :

“Redoubt Lake is the crown jewel of our fisheries program on the Sitka Ranger District . . . The Sitka Ranger District monitors the outlet of Redoubt Lake to count numbers of returning adult sockeye salmon. Monitoring has been conducted at Redoubt Lake yearly since 1982. Every year, we construct and maintain the fish weir at Redoubt Lake from mid June through mid September. What is a weir you ask? The fish weir is basically a fence built across the outflow of Redoubt Lake that controls where the fish are allowed to pass so they can be counted. Some fish are captured to determine sex, length, and weight data and then released. Fish scales are collected to determine ages of adult fish returning to Redoubt Lake. Information collected at the weir is then used to determine annual sockeye returns so ADF&G can set or adjust allowable subsistence, sport and commercial harvests (as adopted in the Redoubt Bay Sockeye Management Plan). In years of high returns, harvest levels can be increased while in years of low returns, harvest levels can be lowered to ensure long term health of the sockeye salmon runs in this system.”

Sockeye escapement (adult spawners returning) have ranged from 456 in 1982 to nearly 104,000 in 2006.

http://www.fs.fed.us/r10/tongass/districts/sitka/fwwbs/redoubt_lake/redoubt_lake.shtml

2012 has turned out to be a good year. Escapement of over 40,000 sockeye is expected.

program, and to protect the cabins, weir, and other improvements currently used in connection with the fisheries enhancement effort.³

Hand in hand with the U.S. Forest Service's ability to access the property to continue its fisheries enhancement program, is the need for the public to access the property, for subsistence dip-netting for salmon, as well as for sport fishing, hunting, hiking, and other recreational activities. If the College's application for patent is granted, the College desires that the public's access to, and use of, the property be unaffected by the transfer. **The College therefore affirmatively requests that if its application for patent is granted, the patent contain whatever easements, restrictions or reservations that BLM or the Forest Service deem best to protect unrestricted and perpetual public access to and across the parcel for recreation, hunting, and fishing purposes. If donation of a conservation easement by the College is the best method to guarantee public access in perpetuity, the College is prepared to give one.**

C. Early History of the Property

At the beginning of the 19th Century, the Russians founded a settlement and saltery at the outlet of Redoubt Lake to take advantage of the abundance of salmon there. It was often referred to as simply "the Redoubt," or sometimes "Ozerskoi Redoubt" ("osero" means "lake" in Russian). A "redoubt" in Russian American was a "fort with a walled enclosure or palisade."

The property the College has applied for was the site of this important Russian-American settlement and fort. Throughout the Russians' tenure in Alaska, provisioning the colonies was a constant challenge for the Russian American Company. Ozerskoi Redoubt produced many goods that Sitka, as the capitol of Russian-America, needed— including salmon, flour, sawn wood, and shoes.

Salmon and bread were the staples of the Russians' diet in Alaska. By the 1850's, the Russians' catch at Redoubt averaged 70,000 fish per year, and in some years it reached 100,000 fish.

The Russian American Company operated and managed Ozerskoi Redoubt as an industrial establishment for the production of goods, along with a defense station against Native incursions. Ozerskoi Redoubt was a convenient and valuable asset to the capitol of Russian America, both in terms of proximity and abundance.

Kyryl Khlebnikov was the accountant of the Russian American Company in charge of the counting house at Sitka from 1818 to 1832, and he was a thorough and prolific chronicler of life and finances of the Russian American colonies during his

³ As described below, there already is a recorded perpetual *Easement* running from the College to the Forest Service. This instrument may be sufficient to accomplish the protections urged by the College, but it could benefit by being updated.

stay. His writings⁴ provide a snapshot of Ozerkoi Redoubt in the 1820's. According to Khlebnikov, fishing was the main reason for building the settlement at Redoubt. He states they built a "zapor," or fish trap, in the stream at Redoubt that took sixty thousand fish each year. A *zapor* was an upriver permanent stone trap, which greatly inhibited, if not precluded, the movement of salmon up a stream to their spawning grounds. Salmon traps were also set directly in Redoubt Lake by the Russians. Khlebnikov states that as the summer progressed, and the catch of fresh fish and transport of it to Sitka increased, more fish were salted and dried for winter consumption. In late summer, nets, instead of traps, were used for catching fish-- dog salmon and silver salmon (coho).

Khlebnikov noted that "Capital goods" at Lake Redoubt amounted to approximately 25,160 rubles in 1825, and approximately 29,484 rubles in 1826. He stated that there were always between 25 and 30 men at the Redoubt. He listed the following structures at the Redoubt at that time 1) a home for administrator and barracks for associated men, surrounded by a stockade for defense, protected by a small tower with eight weapons; 2) special barracks for promyshlennicks, outside the fort, with six rooms; 3) a flour mill, built initially with one wheel, with an oak crusher; another flour mill, built in 1825 with two stones, plus inside storage bins which could hold up to 1,500 fangas wheat; 4) a tanner to make leather uppers and soles for boots (tanned from 100-150 hides per year from California steers); a fish building, with weir and fish pond where the fish come in. Khlebnikov stated that access from Sitka and the sea was difficult due to the entry being blocked by rocks, and that it was hard for a sailing vessel to navigate at the Redoubt--the bay was narrow, there was no good anchorage, the water was deep everywhere, and it had a rocky bottom. In fact, it would have been very difficult to turn a large ship at the head of the inlet, and there is no beach to pull small boats up on.

In 1833, under the tenure of Chief Manager Baron Wrangel, a sawmill was also established at Ozerskoi Redoubt, utilizing the hydropower from the falls. It was the second sawmill to be built on the Pacific Coast. Wrangel stated "[i]ts profitable situation affords it a position of prime importance."⁵ Wood from it was sent as far as the Sandwich Islands (Hawaii).

Thus, Ozerski Redoubt's natural features---an abundance of fish easily

⁴Exhibit 18, *Colonial Russian America, Kyrill T. Klebnikov's Reports, 1817-1832*.

⁵ Wrangell, F.P., *Russian America-- Statistical and Ethnographic Information (1839)*, The Limestone Press (1980), pp 6-7; Pierce, Richard A., *Builders of Alaska*, p. 14. The Russian Captain Fedor Petrovich Litke who surveyed the coast and conducted scientific studies tin Alaska, discussed the need for timber for repair and use of ships in Sitka, and recommended construction of a sawmill at Redoubt to produce wooden beams and planks. The sawmill was built in 1833 by Wrangel about 5 years later. Litke, Frederic, *A Voyage Around the World 1826-1829*, The Limestone Press, 1987, pp. 64-68.

accessible for harvesting, and the hydropower to run millstones-- made the site important to Sitka's success.

In 1834, Chief Manager Wrangell expressed his pride in Redoubt, stating:

"hardly anywhere on the globe is such a small area put to such essential and important uses as our Redoubt, where every year more than 40,000 fish are processed, logs are sawed into planks and blocks sufficient for whole ship cargoes and enough flour is milled to feed 700 people."

Sir George Simpson, manager of the Hudson's Bay Company, visited Ozerskoi Redoubt in 1842, while travelling up the coast of Baranof Island to Sitka from the hot springs which are located to the south of Redoubt. He reported that when he visited there were about 20 men working at Ozerskoi Redoubt under the command of an "old soldier." He said that there were mills of various kinds which operated from the water from the falls, and that salmon were caught in weirs "as they leap upwards." According to him, eighty to one hundred thousand salmon were caught there every season. He described the topography—the steepness of the mountains surrounding the site, the lack of land, and its inaccessibility. There was a prisoner of Simpson's at the Redoubt at the time Simpson visited. Apparently the site was also used as a jail. Simpson explained the prisoner could not escape despite not being in fetters and manacles, because of the location and difficulty of escape from the site.⁶

In Tikhmenev's *History of the Russian- American Company*, written in 1861 and published in St. Petersburg in two volumes in 1861-63, the author describes Ozerskoi Redoubt at the beginning of the 1860's:

"Ozerskoi redoubt is situated fifteen versts southeast of New Archangel. It was built for protection against attacks by the Kolosh, on a small lake in which fish abound [the "small" lake Tikhmenev must mean the freshwater cove between the falls and the 9-mile long Deep Lake (also called Redoubt Lake).] At present the main purpose of this establishment is to supply New Archangel with fish. About forty persons, counting women and children, live in this fort."⁷

The lithograph which appears on the first page of this document depicts Ozerskoi Redoubt during this era. The drawing was executed in 1861, and appeared on the cover of the Russian American Company's Annual Report in 1862. By the 1860's, the mills had shut down, having been replaced by mills in Sitka, and the Russians used Ozerskoi Redoubt primarily for salmon. The Russians were harvesting and salting enough salmon by then, that a significant amount of salted salmon was sold to California in addition to provisioning the Russian colonies. The

⁶ Exhibit 35.

⁷ Exhibit 19.

Russians also sent some of their old or infirm to Ozerskoi Redoubt during the 1860's, and used it as a sort-of jail or place to keep people with mental problems, due to its inaccessibility.

Captain Pavel Golovin, in his personal correspondence from his trip to Russian America, described his visit to the Redoubt in March of 1861, and notes that there were "seven workers and two women," much lower than Tikhmenev's estimate from 1861. However, in March, when Golovin visited, the salmon would not have been running, thus the number of workers were likely significantly less than at other times of year. Golovin states:

"[W]e returned to the ship and set out for the Ozersk Redoubt, which had been designated for catching and salting fish, and is somewhat protected from the danger of attack by the Kolosh. The entire garrison consists of seven workers and two women, and an Arab belonging to Prince Menshikov who for some unknown reason has been sent to Sitka to be reformed. And, in fact, the Ozersk Redoubt in spite of its beautiful location, is an excellent place of exile: impermeable backwoods, far away from the entire world, with no way to buy even vodka."⁸

In his official report on the Russian Colonies to the Imperial Russian Government, Captain Golovin stated that by 1860 Russian America was catching some 558,000 fish annually (64,000 fresh, 114,000 salted, and 380,000 dried fish); a good part of this catch was probably procured at Lake Redoubt, though the harvest at Redoubt appeared to have fallen off at the end of Russian tenure in Alaska.⁹

Alaskan historian Pat Roppel gives the following description of fishing in the 1860's at Redoubt Falls:¹⁰

six large traps were in use at these rapids. Men stood on platforms supported by cribs, ballasted with stone, and dipped fish into boxes set upon the land beside the traps. Near the larger rapid was a fish house used to salt the majority of the fish for winter food for the residents of Sitka. Some fresh fish were transported by small sailboat to Sitka.

By 1867, Ozerskoi Redoubt had been purchased by J. Mora Moss and Charles

⁸ Golovin, Pavel N., *Civil and Savage Encounters*, trans. Basil Dmytryshyn and E.A.P.Crownhart-Vaughn [Portland: Oregon Historical Society, 1983, p.124.

⁹ Golovin, Pavel N., *The End of Russian America: Captain P. N. Golovin's Last Report 1862*, trans. Basil Dmytryshyn and E. A. P. Crownhart-Vaughan (Portland: Oregon Historical Society, 1979), pp. 82, 83.

¹⁰ Roppel, Pat, *Southeast History: The Russian Redoubt Saltery*, Capitol City Weekly, May 11, 2011.

Baum, San Francisco businessmen. Governor and Chief Manager of Russian America Prince Dmitrii Maksoutoff in a written declaration dated October 2, 1867 (discussed in more detail *infra*) certified that Moss and Baum had become the owners of Ozerskoi Redoubt and continued to own it as of that date, and that no other persons had any right, title or interest in the property. Historians have also confirmed that there was a sale of Ozerskoi Redoubt to Moss and Baum, in 1867 for \$15,000. The sale most likely occurred in June of that year.

Moss and Baum were no strangers to Sitka. They had been active since the early 1850's in Russian America in many aspects of business and politics. They incorporated the American Russian Commercial Company in 1853 in San Francisco to conduct business in Sitka, primarily in ice. San Francisco was in need of ice, and selling ice in California was a lucrative business; though Sitka was far away, it was closer than the east coast. Over the next 15 years, the company entered various agreements with the Russian American Company to cut and transport and sell ice from Sitka and Kodiak in San Francisco, and to construct facilities to store it prior to shipment. After the purchase of Redoubt, the company also harvested ice from the lake there, as an adjunct to the ice the Company procured from Swan Lake in Sitka which was variable in quality, depending on the year. In addition, the company provided the Russian America Company in Sitka with goods from San Francisco, on the back haul, which was especially important during the Crimean War, during which Russian ships were vulnerable to attack from the British and French.

When George Davidson and his crew visited Redoubt on October 8, 1867, on their survey cruise of the Alaska Coast for the United States Coast Survey, General N.J.T. Dana, as the Sitka agent for Moss and Baum and their company, the American Russian Commercial Company (also known as the "Ice Company"), accompanied Davidson and his crew on their official trip to Redoubt. Davidson had a crew capable in the fields of astronomy, botany, geology, surveying, hydrography, natural history, mining, and tidal observations. On the crew was William Hamel, a draughtsman and "assistant in making local surveying and taking views." When Davidson, Dana and most of the crew returned to Sitka, they left Hamel behind at Redoubt for a few extra days to sketch the "entrance," along with a sailor and the expedition's geologist, Theodore Blake, who stayed to investigate the "bold gorge in which the lake lies." On the 12th of October, a pilot was sent to pick up Hamel, Blake and the sailor.¹¹ The drawing, dated October 12, 1867, was the "entrance" sketched by Hamel. In his November 1867 Report to the Superintendent of the U.S. Coast Survey, Davidson stated:

"I forward you a sketch at the outlet of Gloubokoe, or Deep Lake, on the south side of Sitka sound, where the Russian American

¹¹ *Report of Assistant George Davidson relative to the coast, features, and resources of Alaska Territory*, November 30, 1867, published in *Russian America*, pp. 219-30, 254-55, Exhibit 35.

Company have built dams, traps, foot-bridges, houses, &c., in the most substantial manner. The dams and traps lie across the upper part of the rapids, which have a fall of nine feet over rocks. The traps are large rectangular spaces made with stakes placed perpendicularly and near enough to each other to allow a free flow of water, and yet prevent salmon from passing between them. The side of the trap towards the decent has an opening like the entrance to an ordinary rat-trap on a large scale. The fish rushes up the rapids and passes through this opening to the staked enclosure, where it remains swimming against the moderately strong current. When several salmon have entered they are lifted out by a kind of wicker basket, and placed in large boxes lying between the traps, of which there are six, with means of adding many more. The last year's catch that was packed for market amounted to 520 barrels, containing from eighteen to twenty-five salmon each. As high as one thousand salmon have been taken in one day."

The sketch on the following page of this brief appears as illustration No. 25 in the Coast Pilot of Alaska published in 1869 by the United States Coast Survey, which was based on Davidson's investigations of the Alaskan Coast. By the time Hamel made his sketch, the Redoubt belonged to Moss and Baum.

The country, and especially San Francisco, developed an interest in happenings in Sitka with the purchase of Alaska. Stories from Sitka, including some involving Redoubt, were reported in the newspaper in San Francisco. The Daily Alta California had a correspondent in Sitka, who reported, on October 25, 1867:

The Ice Business

"The American Russian Company [owned by Moss and Baum and other San Francisco businessmen] was organized fourteen years ago. Their leading purpose was to procure ice from some available point on the North Pacific Coast . . . The agent [of the Company] Gen. Dana, is making extensive preparations at Redutsky Lake [Ozerskoi Redoubt], fifteen miles east of here, for procuring a part of the annual supply [of ice]. A dam has been built giving a flowage of ten feet, and affording, at its fall, an excellent chance for catching salmon. As the prevailing winter wind sweeps the lake longitudinally, the ice will be obtained from an artificial basin of eight to ten acres at the head of the dam, the waters of which cannot be disturbed by the winds. The Company hereafter expects to transport 20,000 tons of ice annually, and have now in store stock sufficient for two years."¹²

The Special Correspondent for the Alta California Newspaper reported on November 2, 1867:

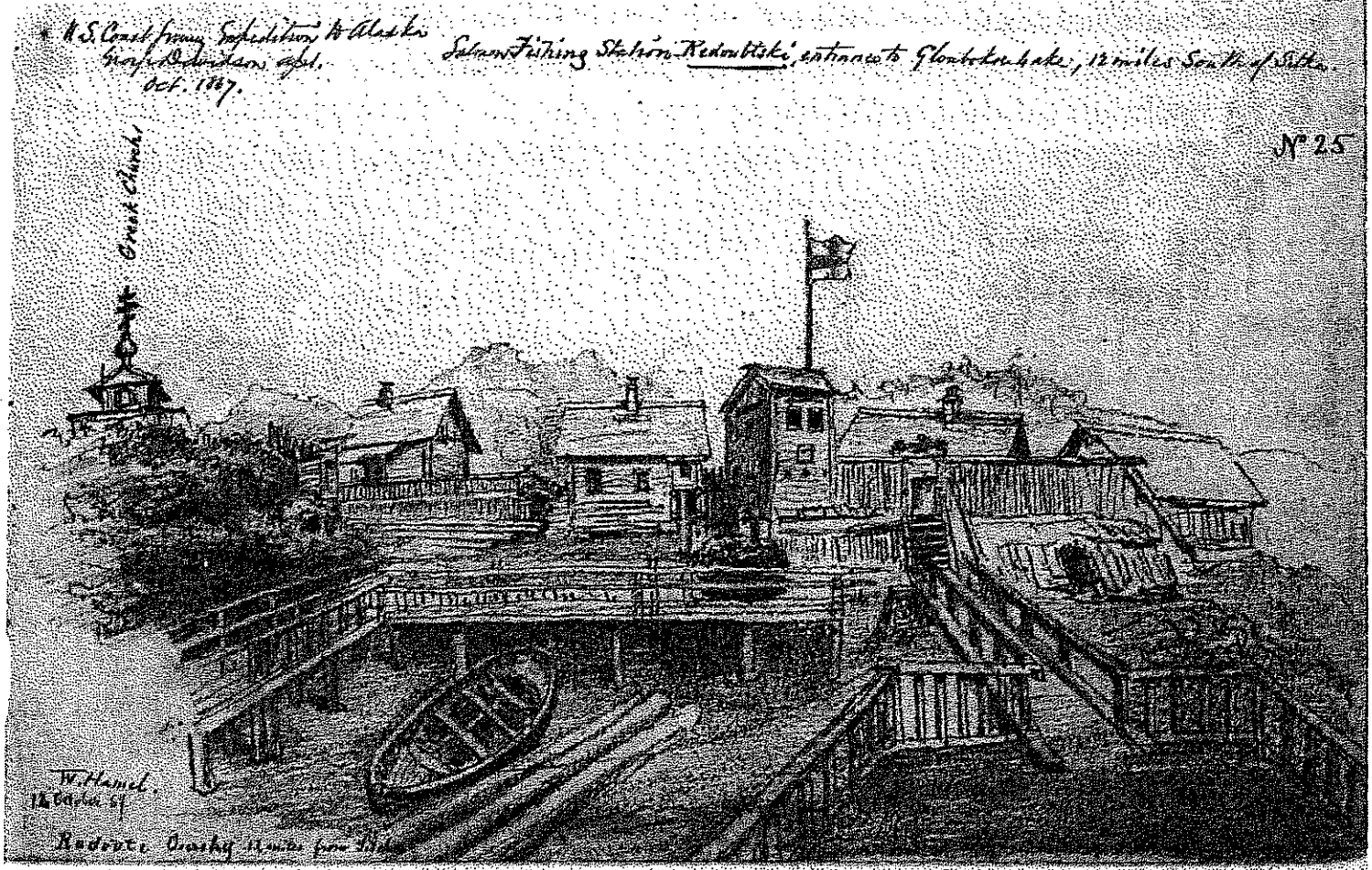
¹² Exhibit 21.

U.S. Coast Survey Expedition to Alaska
George Davidson capt.
Oct. 1867.

Salmon Fishing Station Redoubtski, entrance to Gloubokuhake, 12 miles South of Sitka.

N^o 25

Great Church



W. Hamel
1867

Redoubt, Ouzeski, Alaska from N.W.

OZERSKOI REDOUBT

Lithograph From U.S. Coast Survey Expedition Oct. 1867
Looking South from feature 3

There are four distinct species of the salmon, the most numerous of which have the plumpness, small head and red flesh of the genuine "Kennebec," so much prized by the gourmands of Boston and New York. At the dam of the artificial ice pond, at the head of Redutsky Lake [Ozerskoi Redoubt], two thousand barrels can be caught at each spring "run", although the stream is a comparatively shallow one.¹³

On July 24, 1869, the Special Correspondent for the Alta California had this to report about Sitka, and Redoubt in particular:

Salmon Fishing

Salmon fishing is carried on extensively . . . The Ice Company [Moss and Baum's company] are doing very well at their depot, at the redoubt of Ozersky, and take them [salmon] in steadily, with every prospect of a success this year.

Marine Matters

Last week the [army supply ship] Newbern made an excursion trip to Ozersky, with a gay party on board. Pretty nearly every one went, and all who did enjoyed the day exceedingly. There was music and dancing on the way down and back; and while there the party witnessed the feat of seining and catching salmon in the traps, and tried hooks and lines a little, picked berries and flowers, and passed the day only too quickly. Ozersky is about fifteen miles below here, and is described as being beautifully situated.¹⁴

The new territory was administered by the military, as Congress had made no provision for a civil government. The citizens of Sitka anxious for order and a code of civil conduct, decided to organize their own local government, though not authorized by law. William Sumner Dodge, Customs Collector at the Port of Sitka, and F.F. Dana (agent for Moss, Baum and associates), were elected on November 11, 1867 to draw up a Charter for Sitka and an Organic Act, which was accepted by the citizens on November 14. General Jefferson C. Davis, military commander in Alaska, accepted the government, saying he did not want to interfere.

R. N. DeArmond reported in his *Sitka Chronology*, that in 1869 John A. Fuller was appointed postmaster, and "represented the American Russian Commercial Company which had a store in Sitka and a salmon saltery at the redoubt."¹⁵

On March 8, 1871, the Secretary of War submitted to the House of Representatives two reports regarding the state of affairs in Alaska, prepared by

¹³ Exhibit 21.

¹⁴ Exhibit 21.

¹⁵ DeArmond, R.N., *A Sitka Chronology*, Sitka Historical Society, 1993, p.3.

military leaders involved in Alaska in 1870.¹⁶ Major John Tidball, commander at Sitka, and Maj. E. H. Ludington, of the Department of the Columbia, each stated in his report that fishing was one of the important commercial resources of Alaska, and each referenced the fishery at Redoubt, their reports differing in their estimate of annual harvest, eleven hundred barrels versus two thousand. Tidball noted that the fishing station at Redoubt used to be operated by the Russian American Company to feed its employees, but that it was "now owned and carried on the American Russian Commercial Company of San Francisco." Ludington reported the Ozerskoi fishery had been established about three years.

The traps and weirs and nets used to catch the fish were simply too efficient. By the end of the century the fish population at Redoubt had declined dramatically.

D. History of Sheldon Jackson College

In 1878, Governor John G. Brady started the Sitka Industrial and Training School as a school to teach Alaska Native boys. The school burned in 1882 and nearly closed, until Presbyterian missionary Sheldon Jackson arrived in Sitka, raised funds through a national campaign, and built a new school building on the site of the present campus. Sheldon Jackson died in 1910, at which time the school was renamed in his honor.

SJC added a boarding high school in 1917, and a junior college program in 1944. In 1945, the college admitted Caucasian students for the first time. The junior college program was accredited in 1966, and in 1997 the college became a four year program issuing bachelor's degrees. The college's educational program featured a fully operational fish hatchery on the campus, and an on-site child care center which complemented the college's education and childhood development instructional program.

The college - then by far the oldest educational institution in Alaska - was forced to close its instructional program in May, 2007 due to financial problems. SJC was able, however, to convey important elements of the campus to locally controlled nonprofit corporations: the fish hatchery operation was conveyed to the Sitka Sound Science Center (www.sitkasoundsciencecenter.org), and the day center center was conveyed to Sheldon Jackson Child Care Center, a local organization. In 2011, the bulk of the campus was conveyed to the Sitka Fine Arts Camp (www.fineartscamp.org). In seeking patent to the Redoubt property, the College continues its desire to benefit the public, even though the college itself no longer operates: SJC is motivated by a desire to protect the existing fisheries enhancement program and to protect the public's right of access to the property.

¹⁶ Exhibit 40.

II. COLOR OF TITLE APPLICATION

The Color of Title application submitted by Sheldon Jackson College (SJC) should be approved, and patent should issue, because it meets applicable standards for a Class 1 application, which are described in more detail below. See 43 U.S.C. 1068; 43 CFR 2540.0-5(b).

A. SJC HAS COLOR OF TITLE REQUIRED BY THE ACT.

To succeed under the Color of Title Act, 43 U.S.C. 1068, a claimant must satisfy the requirement of the Act that the land applied for has been

held . . . by a claimant, his ancestors, or grantors under claim or color of title for more than 20 years . . .

“Color of title” requires a written instrument which purports to convey title of the land in question to the applicant or his predecessors. *Pacific Coast Co. v. James*, 5 Alaska 180, *aff’d*, 234 F. 595 (9th Cir. 1916) (“One cannot make his own title”).

For land to be possessed under “color of title,” an applicant must claim ownership of the land based on a document such as a deed or other written instrument 1) purporting on its face to convey title and 2) describing the land. *Delfino J. and Clara M. Borrego*, 113 IBLA 209, 212 (1990). In *Margaret C. More*, 5 IBLA 252, 254 (1972), the IBLA described, in the context of reviewing an application under the Color of Title Act, 43 U.S.C. 1068, what is meant by “color of title”: “Color of title is the appearance, semblance or simalucrum of title which has the appearance on its face of supporting a claim of present title, but which, for some defect, in reality falls short of establishing it. Black’s Law Dictionary, 332 (4th edition 1951).”

As detailed below, there is an unbroken chain of title from Prince Maksoutff to Sheldon Jackson College. Those deeds, and other events relevant to this Color of Title application, are as follows:

- Treaty of Cession [written agreement under which Russia agreed to sell Alaska to the United States] dated March 30, 1867
- June 20, 1867, Exchange of Ratifications of the Treaty by Russia and the United States—Effective date of the Treaty of Cession
- October 2, 1867, Declaration of Prince Maksoutoff confirming ownership by Moss and Baum

- October 18, 1867: formal transfer of Alaska from Russia to the United States
- 1883 deed to Lynde and Hough [San Francisco businessmen involved in a variety of fishing and cannery operations throughout Pacific including Alaska]
- 1884: Organic Act establishes first civil law in Alaska
- 1889 deed to Baranoff Packing
- 1900 deed to John G. Brady
- 1909: Proclamation by President Roosevelt expanding the Tongass National Forest to include Redoubt Area
- Deeds (1918-1924) within the Brady family
- 1981 deeds (five of them) from the Brady family members to Sheldon Jackson College;
- 1981: College formally notifies BLM of its claim of ownership;
- 1982: U. S. Forest Service begins its salmon enhancement program at Redoubt Lake
- 1984: perpetual easement from College to U. S. Forest Service
- 1990: BLM letter giving SJC its first notice of governmental claim of ownership to the property
- 2012: SJC files its Color of Title application

1. 1867: Treaty of Cession

A discussion of ownership of the property starts with an analysis of the Treaty of Cession, Exhibit 1, the document under which Russia agreed to sell Alaska to the United States. Secretary of State William H. Seward, and Russian Ambassador Edward Stoeckl, negotiated the sale terms, and signed the Treaty at 4 a.m. on March 30, 1867. On that date, President Johnson sent the treaty to the Senate for its consideration with a view to ratification. Per Article IV of the Treaty, the cession was effective on the date of the exchange of ratifications, which occurred on June 20,

1867.¹⁷ On that date, President Andrew Johnson issued a proclamation on that date stating the exchange had occurred.

Thus, June 20, 1867, is the effective date of the Treaty of Cession, not the March 30, 1867 date that the Treaty was signed.

Article II of the Treaty provides that the property transferred did not include “private individual property,”¹⁸ and Article VI provided that the transfer was free of the claims of any parties, except those of “merely private individual property holders.”¹⁹

¹⁷ Article IV of the Treaty provides: “His Majesty the Emperor of all the Russias shall appoint, with convenient despatch, an agent or agents for the purpose of formally delivering to a similar agent or agents appointed on behalf of the United States, the territory, dominion, property, dependencies and appurtenances which are ceded as above, and for doing any other act which may be necessary in regard thereto. But the cession, with the right of immediate possession, is nevertheless to be deemed complete and absolute on the exchange of ratifications, without waiting for such formal delivery.”

¹⁸ Article II provides in full: “In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property. It is, however, understood and agreed, that the churches which have been built in the ceded territory by the Russian government, shall remain the property of such members of the Greek Oriental Church resident in the territory, as may choose to worship therein. Any government archives, papers, and documents relative to the territory and dominion aforesaid, which may be now existing there, will be left in the possession of the agent of the United States; but an authenticated copy of such of them as may be required, will be, at all times, given by the United States to the Russian government, or to such Russian officers or subjects as they may apply for.”

¹⁹ Article VI provides in full: “In consideration of the cession aforesaid, the United States agree to pay at the treasury in Washington, within ten months after the exchange of the ratifications of this convention, to the diplomatic representative or other agent of his Majesty the Emperor of all the Russias, duly authorized to receive the same, seven million two hundred thousand dollars in gold. The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made, conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto.”

2. Declaration of Prince Maksoutoff confirming ownership by Moss and Baum.

The chain of title itself to Redoubt starts with Exhibit 2, the written declaration by the Governor of Russian America, Prince D. Maksoutoff, on October 2, 1867 that Charles Baum and J. Mora Moss. The declaration

Whereas it is understood that the country known as the Russian possessions in America have been disposed of by treaty between his majesty the Emperor of all the Russias and the United States and that commissioners on the part of both governments will at an early date arrive to formally deliver said possessions, **Now therefore for the purpose of and in order to enable private individuals to obtain proper legalized certificates and proofs of title to properties which belong to them, these presents declare and certify to whom it may concern that J. Mora Moss and Charles Baum** citizens of the United States residing at San Francisco California for themselves and their associates **have heretofore owned and possessed and still own and possess in their own right** the following described pieces or parcels property, to-wit:

... [here, Prince Maksoutoff lists 5 properties, Redoubt being the Fourth, and then he continues]

... and I further certify the above named persons [Moss, Baum and associates] have acquired the above described properties by purchase or improvements or construction and that they have conducted a valuable and important business in ice in the possessions for many years past and still do carry on the same. And I further declare that no other individual or individuals, company or companies, corporate or incorporate have any right-title interest control or possession in the above described properties or in any part thereof.

(emphasis added).

Prince Maksoutoff executed this document 16 days in advance of the transfer of Alaska to the United States. His intent is apparent on the face of the declaration--it was to certify to all the world, and remove any doubts, in advance of the transfer, that the 5 properties described (including the Redoubt property) were "private individual property" belonging to Moss and Baum, and were such for purposes of the Treaty of Cession, and that they were **not** government property subject to cession to the United States.

Appended to the October 2, 1867 declaration is a metes and bounds description of the Redoubt property:

Commencing at a point on the border of Lake Redutsky or Osero Osersky marked by a cross about a foot long roughly made a hammer on the first cliff

projecting into the lake about twelve hundred North North East of the North point of the outlet to the lake;

thence North six hundred (600) feet;

thence South 75 West two thousand five hundred and thirty (2,530) feet;

thence South four hundred and ninety one (491) feet to a point on the Northern bank Ossiarsky Bay marked also by the same kind of a cross on a triangular boulder of about four foot sides lying at the foot of a white dead tree about thirty (30) feet high and six (6) feet diameter;

thence South 57° 50' West eleven hundred and forty (1,140) feet across Ossiarsky Bay to a point on the Southern bank thereof marked by the same kind of a cross on a flat topped rock at the water's edge about 3 feet above high water where a large overhanging tree is blazed for three or four feet for a guide mark;

thence South 45° West six hundred feet;

thence South 45° East fourteen hundred eighty (1,480) feet;

thence North 85° East sixteen hundred and ninety (1,690) feet to the Western border of Lake Ossiarsky marked by a large white dead tree lying on the rocky shore and projecting about forty feet into the water about eleven hundred (1,100) feet South South Eastward from the South point of the outlet to the lake;

thence North 23 ½ East two thousand six hundred and eighteen (2,618) feet to the point of beginning, containing one hundred sixty (160) acres more or less.

The purchase of Redoubt prior to the October 2 declaration by the Moss group has been confirmed by historians. For example, Richard A. Pierce, one the world's foremost scholars on Russian America, reports that "a 160 acre tract" at Redoubt was sold for \$15,000 to the American Russian Commercial Company headed by financier J. Mora Moss.²⁰ He describes the transaction in time as being one of the very first to occur once it became known that Russia and the United

²⁰ In *Builders of Alaska, The Russian Governors, 1818-1867*, Exhibit 20, Richard A. Pierce states:

Maksutov sold a hundred-and-sixty acre tract near Sitka, the Ozerkoi Redoubt, to the American-Russian Commercial Company of San Francisco for fifteen thousand dollars. The firm was probably interested in the red salmon fishery there, and may have intended to ship ice from what is now known as Redoubt Lake to San Francisco. The firm was headed by financier J. Mora Moss.

States had signed the Treaty. From his discussion it appears that it is likely the transaction was consummated prior to the effective date of the treaty, June 20, 1867. In addition, N. Bolkhovitev, a distinguished Russian authority on the history of Russo-American relations, states that on June 5, 1867, Baum purchased by "formal agreement" for "up to 20,000 rubles" "ice houses and everything connected with the procurement of ice" from the Chief Manager of Russian America, D.P.Maksutov. Bolkhovitev references a letter from Pestouroff to Stoeckl in September 1867, as the source of this information; At that point, Pestouroff would have likely have recently arrived in San Francisco, and was awaiting departure for Sitka with Commissioner Rousseau. Ibid. at 278-79, n.35. Thus, according to Bolkhovitev, this transaction occurred over two weeks before the Treaty of Cession became effective. It is likely the same transaction as the Redoubt purchase, since the Americans also intended (and, in fact, did) use Redoubt for ice production, and it fits within the time frames discussed by Pierce.

Although the October 2nd declaration makes no exception or diminution of Moss and Buam's title, the Commissioners, after the fact of the transfer, did. On October 26, 1867 (24 days after Maksoutoff's declaration and 8 days after the delivery of Alaska on to the United States), Commissioners Petroshouff and Rousseau approved the Maksoutoff declaration, but qualified their approval by stating that it was only intended to convey full ownership to buildings and right of possession to the real property involved.

Lovell H. Rousseau, a Brevet Major General in the U.S. Army, had been appointed by President Andrew Johnson as Commissioner to take delivery in Alaska on behalf of the United States of the territory ceded under the Treaty from a similar officer appointed on behalf of the Imperial government of Russia. The Russian officer was Captain Alexis Pestouroff of the Russian Imperial Navy. On August 7, 1867, Secretary of State Seward transmitted to Rousseau his formal appointment by the President, along with written instructions to guide him in taking delivery of the territory ceded to the United States.²¹ The instructions directed Rousseau to

²¹ Exhibit 1. Seward to Rousseau, August 7, 1867, H. Ex. Doc. 125, 40th Cong., 2d Sess., pp. 1, 2. On August 13, 1867, six days later, Stoeckl, the Russian minister who had been instrumental and worked closely with Seward in negotiating the Treaty on behalf of Russia, forwarded to Seward a translation of a copy of similar instructions from the Russian government to Captain Pestouroff, regarding the delivery of the Russian American colonies to the government of the United States. The similarity in the respective sets of instructions indicated they must have been worked out by Seward and Stoeckel acting together. On the issue of distinguishing between property which would go to the United States or be retained by individuals, the Russian instructions stated that :

"5. All the houses and stores forming private property will remain to be disposed of by their proprietors. To this same category belong smiths, joiners, coopers, tanners, and other similar shops, as well as ice-houses, flour and saw mills, and any small barracks

communicate with Pestchouroff who was also then in Washington, D.C., and make arrangements to proceed together with him to Sitka.

With respect to distinguishing what properties were to be transferred to the United States, retained by private individuals, or left for the Russian American Company to dispose of, Seward's instructions to Rousseau recited the distinction from the Treaty that all forts and military posts; public buildings such as the governor's house and those used for government purposes; dockyards, barracks, hospitals, and schools; all public lands; and all ungranted lots of ground at Sitka and Kodiak were to be transferred. Private dwellings and warehouses, blacksmiths, joiners, coopers, tanners, and other similar shops, icehouses, flour and sawmills, and any small barracks on the islands were subject to the control of their owners and were not to be included in the transfer. The Russian American Company was to be given sufficient time to dispose of its large stores of goods, furs and other items. The instructions further instructed Rousseau that the commissioners, after distinguishing between government property to be transferred, and private property to be retained in individual ownership, were to draw up and sign full inventories in duplicate. Individuals who produced the proper documentary or other proof of ownership were to be furnished a certificate "of their right to hold or to dispose of said property."

Similar instructions were provided to Captain Pestchouroff by Stoeckl, the Russian minister who had negotiated the Treaty on behalf of Russia and worked closely with Seward. Neither the American nor Russian instructions raised the issue or directed the commissioners to distinguish and allocate among the category of properties to be retained by private individual properties fee simple to some, and possessory ownership to others.

Following the ceremony of transfer (which was held the same afternoon they arrived by ship at Sitka) Rousseau and Pestchouroff got together and made a map of Sitka with numbers and Letters to identify houses and other buildings. This map was part of the "Protocol" the Commissioners produced. In it, they inventoried the properties into different categories.

The Commissioners distinguished between private and government property, per the language of the treaty; whether they applied the distinction correctly in the case of particular properties is another question. The

that may exist on the islands.

6. The two commissioners, after making the division between the property to be transferred to the American government and that left to individual proprietors, will draw up a protocol, and the American commissioner, on the documents furnished by the local Russian authorities, will deliver legalized certificates to the owners of the said property in order to enable them to possess that property if they remain in the country, or to dispose of it."

Commissioners further divided the category of “private, individual properties” into two sub-categories--- private property which was to be conveyed in fee, and private property in which full title could be conveyed to buildings, but only possessory rights would be conveyed to real property associated with the buildings. These subcategories find no support in the Treaty. They appear to be based on the Commissioners understanding of the authority of the Russian American Company to convey land.

As previously mentioned, SJC’s evidence of title starts with the October 2, 1867 certificate that was issued by Prince Maksoutoff before Alaska was acquired by the United States. The curious October 26, 1867 statement by the two commissioners is on its face a reservation of rights, and does not purport to be a judicial finding – nor could it be.

It is important to appreciate the commissioners’ views are not gospel. In *Kinhead v. United States*, 150 U.S. 483 (1893), a case involving title to a parcel of land in Sitka, the United States Supreme Court stated:

It is quite clear, however, that it was never intended to invest the commissioners with judicial power to determine the title to property in Sitka, or to pass finally upon the question whether a particular building passed under the treaty or not. If, for instance, the commissioners had inventoried a certain house as the property of A., when in fact it was the property of B., no one would seriously claim that such act would transfer the property from B. to A.; or, if they had assumed to list the property of an individual landowner as the property of the government, or the Russian-American Company, that it would in any manner change the title to such property, or estop the real owner to assert his title thereto in a court of justice.

...
The truth is, the powers of the commissioners were simply ministerial, and the making of inventories simply a matter of convenience, and a method of determining prima facie what property the government should appropriate to itself for the time being, and what should be left to the individual proprietors. **To treat this inventory as binding, either upon the government or individuals, would be to acknowledge that the commissioners were invested with judicial powers to determine the title to property. Clearly, they had no power to depart from the plain language of the treaty, and no power to bind the government by an assumption that government property was private property, and thus settle questions of title or ownership.**

150 U.S. at 494-495 (emphasis added).

3. 1883 Deed to Lynde and Hough.

In 1883, the American Russian Commercial Company deeded the property to William C. Lynde and Howard M. Hough. Exhibit 4. The deed is absolute on its face, and conveys the property utilizing the same metes and bounds description as the October 2, 1867 certificate issued by Prince Maksoutoff. The deed recites that the consideration the conveyance was "nineteen hundred dollars in gold coin of the United States."

The 1883 deed to Lynde and Hough is the earliest deed in the chain of title which was executed after the transfer of Alaska to the United States.

Lynde and Hough were San Francisco businessmen who were involved in a variety of fishing ventures throughout the Pacific. Lynde & Hough was an important factor in the codfish fishery in the Pacific, including Alaska. Lynde and Hough were also involved in the development of Alaska's first salmon cannery at Klawock in 1878, and they distributed its pack on the West Coast.²² Their purchase of American Russian Commercial Company's salmon saltery at Redoubt occurred not long after the Klawock cannery began operation. They also had extensive holdings in the San Francisco area, including a large warehouse for storing fish located at the base of what is now Telegraph Hill.

When the United States purchased Alaska in 1867 it did not see fit to enact civil law in the newly acquired territory. That changed in 1884, when the United States Congress enacted the Organic Act of Alaska, May 17, 1884, 23 Stat. 26. The Organic Act authorized the establishment by United States of civil government in Alaska, and further, protected the rights of those possessing land in Section 8, which states:

"Provided, That the Indians and other persons in said district shall not be disturbed in the possession of any lands actually in their use and occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

Because the 1883 deed to Lynde and Hough predated the 1884 Organic Act, Lynde and Hough's right to possession of the land was protecting by this savings clause in the Organic Act.

The 1883 deed to Lynde and Hough on its face satisfies the test for "color of title" for purposes of SJC's application under the Color of Title Act. The 1) purports to convey full fee title to 160 acres at Redoubt, and 2) describes the property by

²² Southeast History: Alaska's first salmon cannery, by Pat Roppel, Capital City Weekly, July 13, 2011, Exhibit 36.

metes and bounds. Thus, it satisfies the “color of title” requirements for purposes of SJC’s application. At least with respect to the issue of “color of title,” it is not necessary to delve into the history, albeit fascinating, of the purchase of Redoubt by Moss and Baum, or to examine the available documents surrounding that transaction to determine if they provide “color of title.”

The very fact that the tract described in the 1883 deed was measured in acres (“160 acres”), rather than a description of the buildings involved, reflects that the fee to the real property was intended to be conveyed. Likewise, the fact that metes and bounds described the boundaries of the property, not with respect to buildings at all, but solely in terms of natural markings, indicates that it was intended that the parcel delineated by the metes and bounds was intended to be conveyed. Surely, there would have been no reason to have a complicated legal description based on natural markers if only the land related to the settlement had been subject to conveyance, and possessory rights at that. Moreover, the consideration Lynde and Hough paid for the property was substantial---nineteen hundred dollars in gold coin, Lynde and Hough were extremely sophisticated buyers. They were major players in the fish business, were involved in many commercial transactions involving marketing and sale of fish as well as land based fishing establishments up and down the Pacific Coast. They would not have bought Redoubt and paid a handsome sum without due diligence, or what they thought were meaningless terms in the deed, i.e. they would not have paid for a 160 acre tract if they believed that they just got the buildings.

4. 1889 Deed to Baranoff Packing Company

By deed dated January 23, 1889, Exhibit 5, Lynde and Hough sold the Redoubt land to Baranoff Packing Company, which built one of the first fish canneries in Alaska. The deed utilizes the same metes and bounds description as the 1867 certificate and the 1883 deed.²³

5. 1900 Deed to John G. Brady

On November 15, 1900 Baranoff Packing Company issued a deed to Territorial Governor John G. Brady. Exhibit 6. The deed contains the same metes and bounds description as the 1889 deed.

²³ With one exception: one of the legs in the legal description – “South 45 [degrees] West for a distance of 600 feet” – was inadvertently dropped. This omission carried through all subsequent legal descriptions, including SJC’s initial Color of Title application. Shortly after the application was filed, it was discovered that the metes and bounds description did not close, and SJC thereafter submitted a revised legal description that includes the missing leg. Dropping this leg of the metes and bounds description is a scrivener’s error that does not affect the merits of SJC’s Color of Title application.

6. Deeds (1918-1924) within the Brady family following John G. Brady's death.

Between 1918 and 1924, there is a series of quitclaim deeds, and a probate order, conveying the property between members of the Brady family. Exhibits 7, 8, 9, and 10. The sequence and logic of the conveyances is not entirely clear, but the details are not important for purposes of this application because in 1981, all the Brady heirs quitclaimed their interests to the college.

7. The Bennett native allotment application

While the Brady family was in title to the property, Thomas Bennett, a Sitka Tlingit Indian, filed an allotment application on August 24, 1909. The application was initially approved, but following a field study of the property which showed that Bennett did not live on the property, the approval was revoked and the application rejected in 1923. Mr. Bennett died in 1930. In 1981, fifty eight years after the application rejection, BLM reinstated the application pending further determination of status, since the original denial had been based – without a hearing - upon lack of evidence supporting use and occupancy. Eleven years later, in September, 1991, a contest application was filed, and a hearing on the application was held in June, 1993. The legal standard at the hearing was whether there was “substantially continuous use and occupancy of the land” 43 U.S. S. 270-3 (1970). The applicable federal regulations 43 CFR 2561.0-5(a), interpreted this standard to require “substantial actual possession and use of the land, at least potentially exclusive of others, and not mere intermittent use.” The relevant time period, for purposes of the allotment hearing, was whether Bennett occupied the land between 1900 and February 16, 1909.²⁴

After the hearing, the Administrative Law Judge found for Bennett, based entirely upon the legal proposition that the Secretary lacked the authority to revoke the application in 1923. On appeal, the Interior Board of Land Appeals, in *United States v. Heirs of Thomas Bennett*, 144 IBLA 371 (1968) reversed this legal conclusion, then reviewed the evidence on the merits, and found that Bennett's evidence of occupancy was insufficient to support an allotment claim.²⁵ The IBLA

²⁴ This paragraph's description of events is taken from the government's post-hearing brief, Exhibit 22. It should be noted that the College was not a party to that action or a participant in that hearing, and the College does not subscribe to all the comments of the government in that brief.

²⁵ “Structures erected on the land prior to 1910 were constructed by settlers at the Russian settlement, the fish processing firms which occupied the site subsequent to acquisition of Alaska from Russia, or the former Territorial Governor.” 144 IBLA 383-384.

decision recounts that Governor Brady built a cabin on the site in 1901, and that the family spent summers there until about 1910. 144 IBLA at 380.²⁶

8. 1981 Deeds from the Brady family members to Sheldon Jackson College.

In 1981, all the Brady heirs quitclaimed their interests to SJC. Exhibits 11 through 15. As with all deeds since 1883, the conveyances on their face conveyed fee interest in the property.

9. SJC's application satisfies the legal requirements of color of title for purposes of the Act.

Since the chain of title to the Redoubt parcel is based on documents beginning in 1883 up through the most recent deeds in 1981 which on their face purport to convey title to the claimed land and describe the land, the chain of title provides the necessary "color of title" to satisfy the Act. Jerome L. Kolstad, 93 IBLA 119, 121 (1986). Benton C. Cavin, 41 IBLA 268, 270 (1979).

B. SJC's predecessors held the property, while it was public land, in good faith and in peaceful, adverse possession for more than twenty years.

The Color of Title of Act requires, among other things, that "a tract of public land have been held in good faith and in peaceful adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years ..." This standard (1) applies only to "public land;" (2) requires "good faith," a term of art in the Color of Title context, (3) requires "peaceful, adverse possession, and (4) requires that the preceding three requirements co-exist for more than twenty years.

1. The "public land" requirement.

These requirements of the Color of Title Act apply only to "public land." After 1909, the Redoubt area was not public land because it was withdrawn by President Theodore Roosevelt's expansion of the Tongass National Forest to include the Redoubt area. Withdrawn land is not public land. *Beaver v. United States*, 350 F.2d 4, 10 (9th Cir., 1965 ("withdrawn land is not subject to the Color of Title Act because it is already appropriated for other purposes."), *Frank w. Sharp* 35 IBLA 257, 260 (1978) ("Land

²⁶ Evidence of activity on the parcel after 1910 was irrelevant for purposes of the Bennett application, because the Tongas National Forest was expanded in 1909 to include the Redoubt area.

withdrawn for national forest purposes [in this case, the Tongass National Forest] is not “public land” subject to the operation of the public land laws ...”), *Ben J. Boschetto* 21 IBLA 193 (1975).

Even though the Redoubt area is no longer public land due to the expansion of the Tongass National Forest, SJC’s application satisfies the public land requirement, for the reason that SJC’s predecessors in title satisfied the color of title, adverse possession, and good faith requirements of the Color of Title Act while the land was still public land. It is well established that if a color of title claim arises before a withdrawal of lands, the withdrawal will not preclude the perfection of the claims under the Color of Title Act. *Asa v. Perkes*, 9 IBLA 363 (1973), *Clement Vincent Tillion, Jr.* (unpublished IBLA decision) No. A-29277 (April 12, 1963). If a color of title claim that arises before a withdrawal of lands may be perfected during the period of withdrawal, then it necessarily follows that an application that arises before, and is perfected before, the withdrawal occurs is also valid.

As discussed herein, SJC’s predecessors in title had fully satisfied the twenty year requirements by 1909: SJC’s chain of title started in 1883 at the very latest, more than twenty years prior to the property being included within the Tongass National Forest. Thus, SJC’s application satisfies the public land requirement.

2. Good faith.

Knowledge of federal ownership of land negates the good faith required for a successful Color of Title application. The regulations at 43 C.F.R. § 2540.0-5(b) provide:

A claim is not held in good faith where held with the knowledge that the land is owned by the United States. ²⁷

It is clear that applicants who know, at the time they take title to the land, that the government owns that land do not have good faith. *Hal M. Memmott* 77 IBLA 399 (1983) (applicant occupied property for 20+ years, then learned that BLM owned the land, then acquired a deed to the property from the previous occupant).

²⁷ This definition can present a conundrum. A color of title claim necessarily involves defective title. Yet, “good faith” belief in that title by the applicant is also a pre-requisite. Once a claimant believes a Governmental claim of ownership, or “knows” that he does not own the land, good faith is a legal impossibility. This necessarily means that it is impossible for a claimant to have “good faith,” of the type required by the Act, at the time of filing an application. Yet, any such application is precipitated by the “knowing” that the Government owns the land, which in turn negates good faith.

Clement Vincent Tillion, Jr. (unpublished IBLA decision) No. A-29277 (April 12, 1963).²⁸

Good faith for purposes of the Color of Title Act requires that a person believes he owns the land in question. In *Lawrence E. Willmorth*, 32 IBLA 378, 381 (1977), the Board held that “in determining whether the claimant honestly believed that there was no defect in his title, the Department may consider whether his **belief was unreasonable** in light of the facts then actually known to him.” (emphasis added) See *Cripple Creek Gold Production Corp.*, 53 IBLA 188 (1981)

The College acquired its deeds to the property in 1981. At that time, and for at least several years thereafter, both the College and the government believed that the College was the owner of the property. The College had no reason to doubt the veracity or adequacy of the deeds which had been given them by the Brady family. The Brady family had been closely associated with the College for many years; indeed, one of John G. Brady’s children in the chain of title was named Sheldon Jackson Brady.

About 1980, the Forest Service, ADF&G and the Regional Aquaculture Association had become interested in restoring the sockeye run at Redoubt by developing a monitoring and enhancement program in the vicinity of the Falls. Their ultimate intent was to develop a subsistence sockeye fishery at Redoubt, as well as a sport fishery. Their plans included use of the area around the Falls for monitoring and sampling activities, and the development of necessary infrastructure such as a tram, staff housing, mooring buoy, weir, boardwalks, a sampling box, boats, etc. Access would also be required for the fishermen to harvest the fish in the subsistence fishery, which meant access to the banks and the stream for dip-netting. In addition, a survey of the land for archeological resources would be required before the development could proceed. In short, the Forest Service was hoping to make use of the lands at the outlet of the lake, and thus it was attentive when the College announced it owned the land.

On July 15, 1981, shortly after the College acquired title to the property, Dr. Hugh H. Holloway, president of SJC, wrote to William Gee, of the U. S. Forest Service. The letter not only gives the Forest Service formal notice of SJC’s claim to the land, but explains the College’s goals and intentions with respect to use of the property:

This letter is in response to a personal discussion between you and me concerning the future of Ozorsky Redoubt as it is being transferred to Sheldon Jackson College.

²⁸ In the *Tillion* case, Engstrom obtained title in 1922, and his estate passed title to Moss in 1947; Moss deeded the property to Tillion in either 1950, 1951 or 1958; Moss and his predecessors may have had 20 years peaceable possession of the property, but Tillion knew in 1949 that title to the property was not clear, so Tillion lacked good faith.

I am sure you are aware that until recently the Brady Family has held ownership of the 160 acres of land in the vicinity of the outlet from Redoubt Lake. The members of the Brady Family have recently relinquished their interests in the land to Sheldon Jackson College. Sheldon Jackson is currently perfecting the deed and expects to formally notify the U.S. Forest Service of the claim.

The purpose of this letter is to advise you of the pending action in a formal way. Also, it is well to clarify the position of the college with respect to its intent to cooperate with the Forest Service and all other agencies.

I must first stipulate that this letter is not an official statement of policy for Sheldon Jackson College. It is a statement of current practice of the college in the absence of formalized policy.

The Board of Trustees of Sheldon Jackson College will be stipulating formal policies with respect to the Ozorsky Redoubt Policy sometime in the future. Until you are further notified the practices stipulated in this letter will be effective under my authorization as President of the College.

It is the plan of Sheldon Jackson College to cooperate with the Forest Service and the Alaska Department of Fish and Game in the improvement of the Redoubt Lake Salmon Fishery. The exact nature of the development of these cooperative efforts will have to be worked out together. We intend to give both parties reasonable access to the key outlet land for monitoring and fish population survey. Weirs and other counting devices of a temporary nature should be perfectly acceptable.

I see no reason why Sheldon Jackson should not continue to allow traditional public access for recreational purposes.

Until the Board has established more formal policies I would not be in a position to authorize any excavations or removal of artifacts or of other materials from the property.

It is the intent of Sheldon Jackson College to preserve all of the historical aspects of the Ozorsky Redoubt and to work with all appropriate agencies in developing a long range plan that will fit in for the best purposes of the State of Alaska with respect to historical aspects of the land, with respect to the fisheries aspects of the area, with respect to the Forestry possibilities of the area, and with respect to recreational activities that may be conducted in that area.

I trust this letter gives you sufficient freedom to proceed with activities of a reasonable nature. We would hope to be kept advised of any activities that you are planning so that our appropriate personnel can either participate or observe for the interests of and on behalf of Sheldon Jackson College.

Exhibit 23.

The government did not object to the premise that the College owned the Redoubt property. In an August 12, 1981 letter from H. Drew Bellon, Recreation and Lands Staff Officer, to the Regional Forester, Exhibit 24, the author states:

After a extensive review of the Bureau of Indian Affairs Section 14 (L) (I) case report, "Redoubt Lake Village," BLM #AA-10495, we recommend that this property not be conveyed at this time.

The question of historic native use at Ozerskoi Redoubt (Redoubt Lake Village) has been researched both through the literature and by an on-the-ground investigation. No evidence was discovered that indicated the site had been occupied by a native village.

Accordingly, in our opinion, the site does not meet the definition as outlined in 43CFR 2653.05 (b), or the criteria as outlined in 43CFR 2653.05 for a significant native site.

During the investigation, it was also discovered that the property in question had been sold by the Russian American Company to an American concern in 1867. According to the records, the property was resold and acquired by the Brady family about 1900.

We are in receipt of a letter from Hugh Holloway, president of Sheldon Jackson College (enclosed), stating their acquisition of the property from the Brady family. This claim of ownership must be settled before any consideration can be made on the 14 (L) (I) selection [sic]. We will forward any additional information or claims submitted by Sheldon Jackson.

There appears to be no question but that, during this time frame, the government recognized SJC's claim of ownership. The best example of this is an *Easement*, dated April 9, 1984, recorded April 10, 1984 in Book 64 Page 602 in the Sitka Recording District, Exhibit 16, showing Sheldon Jackson College as Grantor, and the United States of America as Grantee. The *Easement* was considered necessary by all concerned for the fisheries enhancement program to go forward. The *Easement* conveys a **"perpetual easement for ingress and egress along and across a strip of land, hereinafter defined as the 'premises,' over and across the following lands..."** (emphasis added) followed by exactly the same metes and bounds description as the deeds in the College's chain of title. A sketch attached to the *Easement* shows the approximate outline of the College's property. The "premises" themselves is 40 foot wide strip of land along the centerline of the existing tram or more if necessary to accommodate cuts and fills."

The *Easement* permits the Grantee "...to use the premises without cost for all purposes deemed necessary or desirable by Grantee in connection with the protection, administration, management, and utilization of Grantee's land or resources, now or hereafter owned or controlled..." The *Easement* also provides that the "Grantee alone may extend rights and privileges for use of the premises to other Government departments and agencies, States and local subdivisions thereof, and to other users including members of the public."

The *Easement* provides that it may be terminated for five year's nonuse, or if the Regional Forester determines that the easement is not necessary, and that "[i]n the event of such nonuse or determination by the Regional Forester, the Regional Forester shall furnish to the Grantor a statement in recordable form evidencing termination."

The College has not received any statement from the Forest Service that the Forest Service desires to terminate the *Easement*.

Further evidence of the government's belief of ownership is contained in a letter dated January 10, 1985 from James A. Calvin, U. S. Forest Service Director of Lands, Minerals and Watershed Management, to Harold E. Wolverton, of the Alaska State Office of BLM, Exhibit 25, which states that "This site [the Sealaska land selection, No. AA-10495] lies within private land owned by Sheldon Jackson College." (underline in original).

Another example of the government's belief – and the College's belief – that the College owned the property, is a letter dated February 20, 1985 from James A. Calvin to Michael E. Penfold, BLM, Exhibit 26, that

A recent proposed 14(h)(1) site (AA-10495) by Sealaska has been found to be in private ownership.

The parcel in question goes back to land acquired as part of the territory purchase. Enclosed for your review is a complete copy of title to present as acquired from the Sitka Recording Office. Present owner is Sheldon Jackson College, Sitka, Alaska.

The facts of this case are the exact opposite of the typical Color of Title Act case. Many such cases focus on whether the applicant held a lease or application with the government that necessarily conceded government ownership of the land, such as a grazing lease. In this case, however, while there was a lease, the College was the lessor and the government was the lessee. In this case the government itself has acknowledged in a recorded instrument the superior ownership of the applicant.

On January 23, 1990, BLM wrote Michael E. Kaelke, President of SJC, Exhibit 27, and advised him that BLM had concluded that fee title to the property rests with the United States rather than the College. The letter states that the College could make a Color of Title claim to the land, although the letter also outlined a number of factors which, in BLM's view, needed to be overcome. For example, the letter states that "some of the documents previously provided suggest that the College may have been aware of a title problem prior to receiving conveyance from the Brady family," and the letter enclosed the *Tillion* case previously discussed. SJC is unaware of

what documents the letter refer to, and after diligent search of its files, nothing in SJC's files indicates any document or reference to information held by the College that the Bradys were not conveying good title to the College. The January 23, 1990 letter also suggested other alternatives for the College to pursue, including encouraging the State of Alaska to select the land, which could thereafter convey or lease the property to the College.

On September 21, 1990, John H. Smith, Vice President of Administrative Services for SJC, wrote to BLM, Exhibit 28, and stated that "After reviewing everything you have sent to us and everything that we have in our files, we have concluded that it would be fruitless for Sheldon Jackson College to continue to seek fee simple title of the Lake Redoubt area. It is clear to us that the documents **currently** available to us do not establish clear title and that future action on our part would not be cost effective." (emphasis added) In effect, Smith was stating that the College desired to do more research and would have to, before it could "clear" title. Clearly he was daunted. He was not a lawyer. He did not have the training or perspective to evaluate the BLM letter, let alone form a professional opinion on whether SJC actually needed more documents to assert a claim of title. In any event, the letter does not indicate an intention to abandon a claim of ownership, rather it evidences an awareness that obtaining title would require substantial effort by the college, and would need to be bolstered by additional documentation and evidence. In addition, the IBLA case referenced in the BLM's letter, *Pan American Fisheries, Inc.*, 74 IBLA 295 (1983), supported the College's desire to do more research, for it holds supports the proposition that if the College could show that Redoubt had passed into private ownership prior to the Treaty of Cession that the College would not have a title problem.

A BLM memo dated March 27, 1991, Exhibit 29, from Lynda Ehrhart, shows that, six months later, neither BLM nor SJC regarded the College's claim to Redoubt as being foreclosed. The memo states that Ehrhart "called Sheldon Jackson College (John Smith) and asked if the College planned to pursue the property at Redoubt Lake any further. John Smith told me Sheldon Jackson College approached the State of Alaska once. The State did not seem interested in the property. If the State does decide to select this property, that would be fine with Sheldon Jackson College - but the College will not push the State to do so." This memo demonstrates that BLM was uncertain, in March of 1991, whether and how the College intended to move forward regarding the Redoubt property, and it also demonstrates that the College was still considering its options.

Six years later, Sealaska referenced the SJC claim to Redoubt, stating Sealaska regarded SJC as having an interest in the land. In a letter dated April 15, 1997, from Richard P. Harris, Vice President of Resource Planning & Administration for Sealaska Corporation, addressed to Mr. Terry Hassett of the BLM Alaska State Office, Exhibit 30, Mr. Harris states, with respect to Sealaska's selection of land at the outlet of Redoubt Lake:

I want to thank you, Pat Baker, Pat Underwood, and Jerry Sansome for meeting with Sealaska to discuss the status of 14(h)(8) and 14(h)(1) conveyances. The purpose of this memorandum is to summarize our discussions and to provide a record of the current status of the land conveyances.

[the letter then summarizes the status of the selections at Chilkoot River, Lutak, Lost River Village in Yakutat, Sumdum Village]

Redoubt Lake

Number: AA 10495

Status: The site has not been conveyed to Sealaska due to a prior interest by Sheldon Jackson College. BLM has sent a letter to SJ requesting their non-objection, however no response has been received.

Next Steps: Ernie Hillman will contact SJ within the next 30 days and begin the process to solicit their statement of non-interest of the site. Concurrently we will contact the Forest Service to determine their interest and to find a resolution of any competing claims.

[the letter then summarizes the status of the selections at Kaxnuwu Village (Ground Hog Bay), Sinitsin Cove, Jamboree Bay, Soda Bay, Klawak, and Kasaan]

From this letter, it is apparent that the referenced meeting between Sealaska and BLM was substantive and comprehensive: the most knowledgeable government officials responsible for ANCSA conveyances in the Sealaska region were present.²⁹ Sealaska had its top people there. Sealaska wrote the letter to confirm its what happened at the meeting and summarize their discussions with BLM. The letter, one must assume, would have been written in the light most favorable to Sealaska, for its for its own benefit. Yet the letter acknowledges that Sheldon Jackson had "a prior interest" and reflects that the matter was not settled. The letter demonstrates that seven years after the 1990 letter, neither BLM nor Sealaska regarded the College's claim at Redoubt to be waived, abandoned, or insubstantial.

The College continued its efforts to locate evidence of fee ownership. Exhibit 33 is a January 23, 2003 letter from attorney James Powell, a member of the SJC Board of Trustees, to Richard Pierce, author of *Builders of Alaska, The Russian Governors, 1818-1767* (Exhibit 20) explaining that he, Powell, had reviewed the National Archives files in Anchorage, and inquired what documentation Pierce had regarding the 1867 transfer by Prince Maksoutov. Pierce responded by letter dated July 3, 2004, Exhibit 34, with more questions than answers.

The College's continuing intention to prove and assert ownership of the property is evidenced by an October 6, 2005 memo from Scott G. Fitzwilliams, a

²⁹ For example, Pat Underwood was a Land Law Examiner from the ANCSA Adjudication Banch, BLM, Alaska.

Forest Service Recreation, Lands, Minerals Staff Officer, which states that

Within the past few months, we have again received inquiries regarding SJC's ownership of land at Redoubt Lake. Reportedly, certain members of the Board of Directors of SJC are considering pursuing a title claim to land at Redoubt Lake.

Exhibit 31.

The relevant test for good faith is essentially whether there is a reasonable basis for the applicants' belief in its title. Even today, a professional title report shows title vested in the College, with no reference to an ownership interest of the United States. See Exhibit 17, a title report prepared February 27, 2012 by First American Title Insurance Agency.

The legal, factual and historical issues presented by the issues of SJC's title are extraordinarily complex. Even the government would have to agree that if a pre-Transfer instrument of conveyance were to be found for Redoubt, SJC's title would be clear. In any event, SJC still has possessory title. It has not been unreasonable for SJC to continue to search for a deed.

A review in early 2011 of the MTP for the Redoubt area by the College's representative indicated that Sealaska had a pending ANCSA 14(h)(1) claim for two parcels of about 5 acres each, on each of the outside banks of the outside channels of the outlet at Redoubt Lake. These parcels would fall within, and conflict with, the College's 160 acre claim. Although the MTP indicated the parcels were right at the Falls, Sealaska's claim did not appear from the MTP that it would encompass most of the lands used for the fisheries program, nor that the selection would completely block existing the current subsistence fishing and recreational use of the Falls area that the College supports. Furthermore, an online check of the BLM summary of the Sealaska file Serial No. AA-010495, contained a notation that a Decision to Convey this selection was expected to be elevated to the Secretarial level within DOI, which meant discretion would be exercised.

Subsequently, the College examined the Department of Interior files in Anchorage regarding the two claims that conflicted with the College's claim to the Redoubt property---1) Files pertaining to Sealaska's ANCSA 14(h)(1) selection at Redoubt Falls, Serial No. AA-010495, available at the BLM Public Room, and 2) Files pertaining to the Allotment claim of Thomas Bennett, Serial No. A-0842, United States v. Bennett (case closed), available at the National Archives. The College, in April, 2011, also contacted the Office of General Counsel for the U.S. Department of Agriculture, to find out what files they might have regarding the Thomas Bennett IBLA case, and history they might have of the Brady and SJC claim, the Sealaska claim and of the area at Redoubt. As the Forest Service does not maintain a Public Room, Forest Service files were eventually requested via FOIA. A copy of a letter regarding the College's FOIA request is Exhibit 32 hereto.

Initially, it appeared to the College that a number of steps remained in the Sealaska 14(h)(1) conveyance process, and that some of them would involve public input, and exercise of agency discretion that could result in review of the BIA certification, modification of the selection, or rejection of it, particularly if the Secretary were involved. However, upon further inquiry of DOI and USFS personnel, the College determined that the agencies appear to interpret their regulatory responsibilities regarding the steps left in the conveyance process as ministerial, or as not inapplicable and not requiring action, and that public interest considerations are not part of the conveyance process as it actually exists. Thus, a conveyance by BLM without public or Forest Service input as to public easements is highly likely; furthermore, the agencies appear to have no intention of conducting the fisheries effects or alternative sites review contemplated by 43 CFR 2653.5(b) for 14(h)(1) selections on Forest Service lands. Also, the College discovered from reading the public file that the survey that BLM ordered of "the selection" differed significantly, in terms of the configuration and location of lands involved, from the lands which had been designated as Sealaska's "selection" on the MTP for the last 30 years. That the lands designated as the selection on the MTP for the last 30 years were switched for different lands is significant because Sealaska's selection as now reconfigured covers the entire area of the Falls, and blocks public access for fishing as well as to lands needed for the fisheries enhancement program, in contravention of the College's mission and intention with respect to the Redoubt site.

Thus, the College has realized the Sealaska selection is proceeding full steam ahead without public input, and without Forest Service input, regardless of fisheries or any other public interests. The intent of the federal government to convey the land surrounding the Falls to Sealaska, in such a manner that public recreational use will be foreclosed, as will the fisheries enhancement program, is tantamount to a Notice to Quit or Ejectment in terms of the cutting off of the College's authorized "uses" and intentions regarding the land at the Falls. Conveying the land to a third party is a tangible and clear sign by the federal government that in its view the College does not have an interest in the property. Until now, the government programs on the property were consistent with the College's intention. Indeed, the government has never terminated the lease "in perpetuity" which it signed with the College in 1984. The terms discussed for use of the site in the 1980s by the College and the agencies in charge of the enhancement program turned out to be spot-on; they have furthered the college's mission, and resulted in the site being used in a way the College desired ---with the advantage of avoiding out-of pocket costs for the College. If the lands designated on the survey completed in Fall 2012 are conveyed to Sealaska, the College will lose the heart of the lands it claims at Redoubt Falls and the programs it embraces will end.

Even now, the College believes that the government erred in finding that the title recognized by Maksoutoff was limited to improvements and possession of the land, and it believes that its fee title should be recognized. The College realizes it cannot assert its fee interest in this proceeding and must concede defective title for purposes of the application. However, the College has not stopped its research for a

conveyance instrument which would meet the terms specified by government counsel in *Pan American*, i.e. a conveyance of the property before the Treaty of Cession, which the government conceded in *Pan American* would cure the defect BLM complains of with respect to Redoubt. That such an instrument has not been brought forward does not mean that it does not exist, or that it did not, and circumstantial evidence and historical reports exist which points to its existence. The College continues to come up with additional historical facts that support the existence of such a conveyance instrument, as more records become available from Russia. On the other hand, many of the greatest experts on Russian America have passed away in the last decade. Unfortunately, however, finding a factual and, or legal record almost 150 years old, from another country, in another language, is like looking for a needle in the haystack.

Thus, although the College has not abandoned its "hope" of finding the deed that will demonstrate its fee title, it decided that it should not chase that hope at the cost of losing Redoubt Falls in light of the pending conveyance to Sealaska. The College must file this Color of Title Action to confirm its title to Redoubt, in light of the apparent intent of the government to convey to Sealaska the land which was surveyed at Redoubt in the Fall of 2012, which conveyance would be in direct contradiction to the College's interest.

That Sealaska's selection may become final in the very near future--- and that it will likely occur without public input in the process; without public access; and, without any alternative sites analysis or review of fisheries effects ---was an important factor in the College deciding it no longer had time to look for additional evidence to support its belief in its claim to fee title of Redoubt. The College does not have time now to find that extra document which might convince the government or court what it believed was true---i.e., that it had superior fee title to Redoubt. In most Color of Title cases, the applicant at some point crosses swords with the government over the use of the land involved, and the individual applicant's use conflicts with the government's and a notice to quit or the like is served. This has not been the case here, until now.

SJC's attitude and use of the subject property is dramatically different from that of the typical Color of Title Applicant, and the good faith standard therefore must be applied in a considerably different manner. In the vast majority of Color of Title cases, the applicant desires to use the property as a residence, ranch, or other use inconsistent with the government's intended use of the property.³⁰ In all or substantially all of the remaining Color of Title Act cases, the issue is who is entitled to proceeds of oil, gas, or minerals from the property. As evidenced, however, by Dr. Holloway's July 15, 1981 letter to the government, and by the 1984 recorded *Easement* to the Forest Service, and as also evidenced by the length of time between the college's being told, in 1990, that the government claimed fee ownership of the

³⁰ For example, some Color of Title applications are precipitated by an effort by the government to evict persons from their homes.

land, and the 2012 Color of Title application being filed the college was entirely comfortable with the government's ongoing use of the property.

For the foregoing reasons, SJC's Color of Title Application satisfies the Act's requirement of good faith.

3. Peaceful, adverse possession

The Color of Title Act requires "peaceful, adverse possession," but the Act is not an adverse possession statute.³¹ As described in more detail in Section I of this brief, the Russian American Company used the property as a sawmill, flour mill, tannery, and fish saltery in the early to mid 1800's. Starting in 1867, by which time Moss and Baum had acquired the property, and thereafter until about 1990 no other person or entity claimed ownership of the property. Even after 1990, when BLM formally notified the College of the title problem, federal use of the land was completely consistent with the College's claims to the property. It should therefore be undisputed that the College's application satisfies the requirement of peaceful, adverse possession requirement of the Act.

4. More than twenty years

As has already been stated several times, the twenty year requirement in the Act requires that three elements coexist for twenty years: that property in question be public land, that the lands be held in good faith, and that the owner of the property hold the lands in peaceful, adverse possession. Those requirements were all satisfied, between 1883 at the latest, through to 1909 when the property lost its status as public land.

C. Valuable improvements have been placed upon the land within the meaning of the Act.

The Color of Title Act requires, in addition to requirement that public land be held in good faith for twenty years in peaceful, adverse possession, that "valuable improvements have been placed on such land or some part thereof." The statute does not say when, or by whom, the valuable improvements need to be placed, but case law requires that the improvements be on the property at the time the application is filed. *John F. and Helen S. Montoya*, 113 IBLA 8 (1990) ("Any valuable improvements claimed by the applicant must exist at the time the application was filed and enhance the value of the land").

Currently, there is a cabin which occupied continuously through the summer by the Forest Service employees in connection with fisheries enhancement program; there is also an unoccupied building on one of the islands between the two main streams;

³¹ *Lipscomb v United States*, 906 F.2d 545, 549 (11th Cir., 1990) states that "Section 1068 is not an adverse possession statute; one cannot acquire public lands through adverse possession...Rather, section 1068 is a sale statute. It commands or permits the Secretary to sell parcels of public lands on the fulfillment by the applicant of certain conditions."

there is a mooring buoy in the Redoubt Bay portion of the property which utilized by the Forest Service's boats and occasionally by the public; there is a sturdy set of stairs facilitating access between the beach near the mooring buoy and the north peninsula, and a set of trails throughout the immediate area of the falls;³² there is the fish weir³³ and associated fisheries enhancement improvements in and around the falls and lake. All of these improvements have been installed and maintained by the U. S. Forest Service with the express written permission of the College pursuant to the recorded *Easement*. Thus, the requirement of valuable improvements is amply met.

D. Reservation of Rights.

In submitting this Color of Title Act application, the College does not waive any other legal theories under which it might have the right of ownership or possession to the property in question, or any part thereof. The College reserves, two theories in particular. First, in the event that the College is able to locate a deed, instrument or other document that evidences a transfer of fee ownership or possession from the Russian American Company, or the Russian government, then the College reserves the right to assert a right of ownership based upon that document and does not concede that title is vested in the United States.³⁴ Second, even if BLM were to determine that the College is not, under the Color of Title Act, entitled to patent to the property, the College still reserves its rights to possession of the property. Put another way, even if the Color of Title Act had never been passed, it is still the case that the 1884 Organic Act guarantees persons the continued right of possession,³⁵ Accordingly, even if SJC were found not to be entitled

³² Trails do not, by themselves, constitute a qualified improvement to the property, but if they are used in connection with activities on the land in question, they constitute improvements. *Louis S. Scalise* 129 IBLA 334 (1994).

³³ The fish weir is a substantial underwater "fence" stretching across the outlet of the lake at the top of the falls consisting of hundreds of long metal rods that are individually raised and lowered to control fish access. The rods are held in place by frames that are themselves secured in place by sand bags and presumably other fasteners of various kinds. The weir is sturdy: not only do the Forest Service employees spend much of their work day standing or walking on the weir, but brown bear weighing many hundreds of pounds routinely walk on the weir from end to end.

³⁴ In *Clement Vincent Tillion, Jr.* (unpublished IBLA decision) No. A-29277 (April 12, 1963) supports the notion that an applicant may re-apply for patent if he can develop additional information. In that case, BLM denied the Tillion's application, but stated "However, this decision should not be interpreted as precluding the appellant from filing another color of title application with adequate evidence showing a chain of title from Engstrom to Moss to him and that at the time of the conveyance to him he was without knowledge of the superior title to the land in the United States."

³⁵ Section 8 of the Organic Act provides: "Provided, That the Indians and other persons in said district shall not be disturbed in the possession of any lands actually in their use and occupation or now claimed by them

to patent under the Color of Title Act, SJC would still have its rights of possession to the property, and any subsequent conveyance (e.g., to Sealaska) would be subject to that right of possession.

III. Conclusion

The Color of Title Act is remedial and to be liberally construed. *Asa V. Perkes*, 9 IBLA 363, 366 (1973).³⁶ For the foregoing reasons, Sheldon Jackson College requests that its Color of Title application be granted.

Dated August 6, 2012.

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Attorneys for Sheldon Jackson College

By 

Robert Christianson

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but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.” (emphasis added)

³⁶ In that case, the applicant received title through a 1937 tax deed. The applicant first learned in 1969 that he did not have good title to the land. In 1942 the land was conveyed from the U.S. government to the state of Idaho, and in 1950 Idaho reconveyed the land back to the U.S. The case holds that even though a color of title claim could not have been initiated between 1942 and 1950 because they were not then public lands, those intervening years do not defeat the color of title claim.