

**Editor's note: Reconsideration granted by Order dated Aug. 16, 1998; Decision reaffirmed August 26, 1998, by Order at 133 IBLA 293A through G, found following this Decision .**

STATE OF ALASKA  
DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES  
(IN RE IRENE JOHNSON AND JACK CRAIG)

IBLA 91-89, 91-107

Decided August 9, 1995

Consolidated appeals from decisions of the Alaska State Office, Bureau of Land Management, holding two Native allotment applications to have been legislatively approved. AA-7770, AA-6330.

Set aside and referred to Hearings Division.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

A Native allotment application will be considered to have been pending before the Department on or before Dec. 18, 1971, as required by sec. 905(a)(1) of ANILCA where the record contains a copy of a handwritten application signed by the applicant which was date-stamped by BIA prior to that date and which is virtually identical (except for a missing land description) to a typewritten application later filed with BLM.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Alaska National Interest Lands Conservation Act: Valid Existing Rights--Rights-of-Way: Federal Highway Act

A materials site right-of-way will be considered a valid existing right within the meaning of sec. 905(a)(1) of ANILCA, and thus not subject to legislative approval, where the land was mineral- in-character during the period of use and occupancy by the Native prior to the creation of the right-of-way, and thus not available for allotment.

3. Administrative Procedure: Generally--Appeals: Generally--Rules of Practice: Appeals: Statement of Reasons

Where a decision clarifying a controlling issue of law issues during the pendency of an appeal, a party may

properly amend its statement of reasons to cite that case in support of its appeal.

4. Administrative Procedure: Generally—Appeals: Generally—Res Judicata—Rules of Practice: Appeals: Failure to Appeal

Where the State of Alaska was not served with a copy of an Administrative Law Judge's decision overturning a BLM finding that certain lands are mineral-in-character, it is not barred from challenging that finding in its appeal from a subsequent BLM decision granting a Native allotment for those lands. In these circumstances, it is appropriate to refer the matter to the Hearings Division to allow the State the opportunity to do so.

APPEARANCES: E. John Athens, Jr., Esq., Office of the Attorney General, State of Alaska, Fairbanks, Alaska, for the State of Alaska; Mark Butterfield, Esq., and Marlyn J. Twitchell, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Irene Johnson; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The State of Alaska, Department of Transportation & Public Facilities (State), has appealed from two decisions of the Alaska State Office, Bureau of Land Management (BLM), dated October 31 and November 5, 1990, holding Native allotment applications filed by Irene Johnson (AA-7770) and Jack Craig (AA-6330) to have been legislatively approved by section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), as amended, 43 U.S.C. § 1634(a)(1) (1988 and Supp. IV 1992), effective June 1, 1981.

The primary question raised by these appeals is whether the Native allotment applications should be patented subject to a State materials site right-of-way grant (AA-062220). Since both appeals raise this same legal issue in similar factual circumstances, we hereby consolidate them.

Native allotment applications were filed by Johnson and Craig in the early 1970's, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). <sup>1/</sup> Combined, the applicants sought a

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<sup>1/</sup> The Act of May 17, 1906, was repealed effective Dec. 18, 1971 (subject to allotment applications pending on that date), pursuant to section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988). The applications were filed with BLM on April 17, 1972 (Johnson) and June 7, 1971 (Craig).

total of about 186 acres of unsurveyed public land in protracted sec. 11, T. 10 N., R. 5 E., Copper River Meridian. Parcel A of the Johnson allotment, which encompasses about 26 acres of land, straddles the portion of the Glenn Highway known as the "Tok Cutoff." <sup>2/</sup> The Craig allotment, which encompasses about 160 acres of land, adjoins the Johnson allotment to the south. Indian Creek borders the Johnson allotment to the west, crosses the highway, and then runs through the western part of the Craig allotment.

The applicants claimed use and occupancy of the land beginning in 1940 (Johnson) and 1937 (Craig). Johnson stated that she lived on her allotment continuously until 1955 and used the land seasonally thereafter (from June through December of each year) for hunting, fishing, and berry-picking. Craig stated that he lived on his allotment continuously until 1948 and used the land seasonally thereafter (from December through March of each year) for hunting and trapping.

A materials site right-of-way application was filed with BLM by the State of Alaska Department of Highways on March 4, 1965, after the date claimed for the initiation of use and occupancy of their allotments by Johnson and Craig, but before the filing of their allotment applications. <sup>3/</sup> BLM granted the right-of-way (Anchorage 062220) on July 19, 1965, pursuant to the Act of August 27, 1958, 23 U.S.C. § 317 (1988), subject to "[a]ll valid rights existing on the date of the grant." The right-of-way site, which encompasses 28.29 acres of land, adjoins the Tok Cutoff to the south and overlaps the southeastern corner (0.80 acre) of the Johnson allotment and part (23.5 acres) of the northern half of the Craig allotment. Since issuance of the right-of-way, the State has extracted and removed sand and gravel from the materials site for use in its highway maintenance operations (Decision, United States v. Craig, Contest No. AA-6330, June 27, 1979, at 2).

Based on a June 1974 field examination, BLM found that Johnson had engaged in the requisite use and occupancy of her allotment and accordingly approved her application in its entirety by decision dated April 5, 1976. There is no record that the decision was ever served on the State, however.

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<sup>2/</sup> Johnson sought two parcels of land in her allotment application. This case concerns only Parcel A. Parcel B encompasses about 130 acres of land south of Parcel A along the Tok Cutoff in protracted sec. 10, T. 10 N., R. 5 E., Copper River Meridian. BLM approved Johnson's application as to Parcel B on Apr. 5, 1976. That action was confirmed in its Oct. 31, 1990, decision. See Erma M. Webster, 131 IBLA 329 (1994).

<sup>3/</sup> The record contains a copy of a "Case File Abstract" dated June 2, 1982, concerning the materials site right-of-way, and a copy of the grant has been provided by the State. The right-of-way case file has not been provided. The State asserts that it is lost (Reply to BLM Answer (Johnson), July 30, 1991, at 1).

Likewise, based on a June 1974 field examination, BLM found in an October 11, 1977, decision that Craig had engaged in the requisite use and occupancy of his allotment. However, BLM also determined on the basis of a June 22, 1973, mineral examination, that the north half of the allotment (including that portion of the State's right-of-way that overlaps the allotment) was mineral-in-character, and thus not available for allotment under the Act of May 17, 1906. 43 U.S.C. § 270-1 (1970). Accordingly, BLM held Craig's application for rejection as to that land, subject to his right to request a hearing, and approved the application as to the remainder of the land.

Craig did request a hearing, and on June 27, 1979, Administrative Law Judge Dean F. Ratzman overturned BLM's decision, finding that BLM had failed to make a prima facie case that sand and gravel from the north half of the allotment could be extracted at a profit, principally due to the absence of any evidence regarding the costs of mining. Thus, Judge Ratzman reversed the October 1977 BLM decision to the extent that it had held that the north half of the allotment was mineral-in-character. No appeal was taken from Judge Ratzman's June 1979 decision. Thereafter, on July 22, 1982, BLM issued a decision approving Craig's application as to the north half of the allotment. There is no record that the October 1977 BLM decision, Judge Ratzman's June 1979 decision, or the July 1982 BLM decision were ever served on the State.

Despite the approval of both applications by BLM, no immediate action was taken to issue a certificate of allotment to either Johnson or Craig, owing to the need to survey the land and prepare certificates of allotment. On December 2, 1980, Congress enacted ANILCA. Under section 905 of that Act, Congress generally provided that, subject to valid existing rights, Native allotment applications pending before the Department of the Interior on or before December 18, 1971, for unreserved land were legislatively approved, with certain exceptions, on the 180th day after December 2, 1980 (i.e., June 1, 1981).

In its October and November 1990 decisions, BLM confirmed its earlier approvals of the allotment applications of Johnson and Craig. In addition, BLM held both applications to have been legislatively approved in toto by section 905(a)(1) of ANILCA. <sup>4/</sup> BLM did not state that the allotments would be subject to the State's materials site right-of-way (AA-062220). The State appealed from those decisions, raising various arguments in support of its contention that the allotments should be subject to the right-of-way.

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<sup>4/</sup> The decisions also stated that the allotments would be subject to an easement for the Glenn Highway (originally an R.S. 2477 right-of-way) created by Public Land Order No. 1613 (PLO 1613) (23 FR 2376 (Apr. 11, 1958)) and transferred to the State. See Frank Sanford, 119 IBLA 147, 149 (1991). That portion of the decisions is not in dispute.

BLM's failure to hold that the allotments should be subject to the right-of-way adversely affects the State, thus affording it standing to appeal from the BLM decisions. See 43 CFR 4.410(a); Storm Master Owners, 103 IBLA 162, 177 (1988). We, therefore, deny Johnson's motion to dismiss the State's appeal for lack of standing (Johnson's Answer at 10-11).

[1] The State asserts that Johnson's allotment application was not legislatively approved by section 905(a)(1) of ANILCA since it was not pending before the Department on or before December 18, 1971, because it was not filed with BLM until April 17, 1972. A prerequisite for the legislative approval of a Native allotment application is that the application must have been "pending before the Department \* \* \* on or before December 18, 1971." 43 U.S.C. § 1634(a)(1) (1988 and Supp. IV 1992); see, e.g., Michael Gloko, 116 IBLA 145, 150 (1990). We conclude that Johnson's application was pending before the Department on or before December 18, 1971.

Admittedly, BLM's records contain no signed allotment application specifically describing the land sought by Johnson which is date-stamped by BLM or another bureau, division, or agency of the Department on or before December 18, 1971. BLM does have a typewritten application signed by Johnson on October 8, 1971, in which she applied for almost 160 acres of land, her full entitlement under the Act of May 17, 1906. While this application does not bear a date-stamp by the Bureau of Indian Affairs (BIA), it does have an April 11, 1972, certification by BIA, indicating that the application was initially held by BIA, which then submitted the application to BLM, where it was received on April 17, 1972. There is no indication on the application that it was filed with BIA on or before December 18, 1971.

However, Johnson has provided us with a copy of a handwritten application, which refers to Parcels A and B and which was evidently signed by her in October 1971. That application bears a clear date stamp indicating receipt by BIA on October 8, 1971, prior to the statutory deadline. That document was taken from BIA's files concerning Johnson's allotment application (see May 24, 1991, Affidavit of Albert Kahklen, Superintendent, Anchorage Agency, BIA, at 1; Exh. 1 attached to Motion to Sever, Apr. 17, 1991).

The handwritten application does not contain any description of the two parcels, stating only, in the case of Parcel A, that it has an "M-B Descri," presumably, a metes and bounds description. The application is substantially similar, in terms of its assertions regarding Johnson's use and occupancy, to the typewritten application contained in BLM's files. 5/

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5/ Both applications contain identical language, including the following: "Site cleared and used for temporary] shelter (tent). Original house no

Nothing in the record indicates that Johnson ever applied for any other lands. The fact that the handwritten application has no BIA certification indicates that it was reduced to typewritten form (incorporating a proper land description) and then certified by BIA and submitted to BLM. This was often the procedure, and it was not unusual for the process to extend past the December 18, 1971, deadline, especially given the "flurry" of applications submitted immediately prior to the December 18, 1971, repeal of the Act of May 17, 1906. See United States v. Melgenak, 127 IBLA 224, 227-29 (1993); Nora E. Konukpeok (On Reconsideration), 60 IBLA 394, 396 n.2 (1981); see also Aug. 5, 1992, affidavit of Audrey L. Tuck, BIA Realty Specialist.

BLM has provided a copy of a statement signed by two witnesses on September 8, 1971, attesting to the fact that "Irene Johnson has occupied, marked and posted the land applied for as a Native Allotment" (Attachment 1 to Motion for Stay, dated Mar. 18, 1991). <sup>6/</sup> The statement bears a BIA date stamp which appears to be sometime in October 1971. In addition, there is a handwritten notation that the statement was "handcarried in by [the] applicant 10/8/71." Id. There is no other identification of the Native allotment or the land encompassed by the application, but the notation refers to "10 N 5 E CRM," indicating that the statement concerns T. 10 N., R. 5 E., Copper River Meridian, which is the situs of the land sought by Johnson. This statement provides further confirmation that Johnson filed an application with BIA on October 8, 1971.

There is sufficient proof that Johnson's application was filed with BIA before December 18, 1971, and thus was pending before the Department on or before that date, in satisfaction of the pendency requirement of section 905(a)(1) of ANILCA. See United States v. Melgenak, 127 IBLA at 229-30, 237. <sup>7/</sup>

[2] We turn to the principal issue presented by the State's appeals, i.e., whether the legislative approval of the two Native allotment applications should be deemed subject to the State's materials site right-of-way. Section 905(a)(1) of ANILCA, as amended, provides that Native allotment applications are legislatively approved "[s]ubject to valid existing rights." 43 U.S.C. § 1634(a)(1) (1988 and Supp. IV 1992). The question is whether the State's right-of-way is a "valid existing right."

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fn. 5 (continued)

longer remains. Land cleared [and] now contains house trailer. \* \* \* Father had house built on land before I was born. [I] lived there for years with my parents."

<sup>6/</sup> That document was also taken from BIA's files concerning Johnson's allotment application (May 24, 1991, Affidavit of Albert Kahklen, Superintendent, Anchorage Agency, BIA, at 1).

<sup>7/</sup> The State's request for hearing on this question is denied.

A right-of-way has been found to be a "valid existing right" in other contexts. See, e.g., The Bureau of Land Management Wilderness Review and Valid Existing Rights, Solicitor's Opinion, 88 I.D. 909, 912 (1981) ("[I]f an application [for a right-of-way] is approved the applicant has a valid existing right to the extent of the rights granted"). Moreover, a conveyance of public land is properly made subject to such a right. See So. Id. Conf. Assoc. of Seventh Day Adventists v. United States, 418 F.2d 411, 413, 415 (9th Cir. 1969) (desert land entry patent issued subject to materials site right-of-way); State of Alaska v. Bryant, 129 IBLA 35, 38, 44 (1994), appeal filed, State of Alaska v. Babbitt, No. A 94-301 (D. Alaska July 5, 1994) (Native allotment application approved subject to materials site right-of-way); State of Alaska, 62 IBLA 187, 189-90, 194-95 (1982) (homestead entry patent issued subject to materials site right-of-way).

The regulation at 43 CFR 2234.1-5(b)(2) (1965) provided: "The final disposal by the United States of any tract traversed by a right-of-way shall not be construed to be a revocation of the right-of-way in whole or part, but such final disposition shall be deemed and taken to be subject to such right-of-way until it is specifically canceled." The State's right-of-way was issued subject to that regulation. See 43 CFR 2234.1-1(a) (1965).

Nevertheless, we have held that the Department's approval of a Native allotment application will not be deemed subject to a State right-of-way that was granted by BLM after the applicant had initiated qualifying use and occupancy under the Act of May 17, 1906. Golden Valley Electric Association (GVEA) (On Reconsideration), 98 IBLA 203 (1987) (vacating GVEA, 85 IBLA 363 (1985)).<sup>8/</sup> We reasoned that, upon the filing of the allotment application, a preference right formally vested in the applicant, which right related back to the date of initiation of use and occupancy, thereby defeating the intervening right-of-way. GVEA (On Reconsideration), 98 IBLA at 205, 208.

However, this rule was applied only because it had been shown that the applicant's use and occupancy was open and notorious, as required by section 3 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-3 (1970), prior to the time the State was granted its right-of-way. See GVEA (On Reconsideration), 98 IBLA at 206, 208; see also State of Alaska v. Bryant, 129 IBLA at 43; State of Alaska (Evelynn C. Foster), 125 IBLA 291, 293-94

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<sup>8/</sup> This marked a departure from the approach espoused by the Board in GVEA, supra, and other cases, holding that an allotment was subject to a right-of-way granted during the period of use and occupancy, but prior to the filing of the allotment application. See also State of Alaska v. Albert, 90 IBLA 14, 21-22 (1985).

(1993), appeal filed, State of Alaska v. Babbitt, No. F 93-38 (D. Alaska Sept. 29, 1993); State of Alaska (Lucy Williams), 125 IBLA 21, 22 (1992), appeal filed, State of Alaska v. Babbitt, No. F 93-16 (D. Alaska Apr. 22, 1993); State of Alaska Department of Transportation & Public Facilities (DOTPF), 124 IBLA 386, 391 (1992); James E. Dawson, 111 IBLA 139, 142 (1989). In the absence of such use and occupancy, there would be nothing for the vested preference right to relate back to, since the Native would not have had any protected rights under the Act of May 17, 1906, at that time. See United States v. Flynn, 53 IBLA 208, 238, 88 LD. 373, 389-90 (1981); State of Alaska (John Nusunginya), 28 IBLA 83, 86-87, 88 n.2 (1976). In the absence of use and occupancy that was open and notorious, the land would properly be considered vacant and unappropriated. See id.

Of course, rights under the Act of May 17, 1906, could properly have been initiated after the granting of the right-of-way. However, in such circumstances, any subsequent approval of the Native's later-filed allotment application would be subject to the right-of-way. See State of Alaska (John Billum, Jr.), 127 IBLA 137, 143 (1993).

In State of Alaska (GVEA), 110 IBLA 224, 229 (1989), <sup>9/</sup> we held that, as section 905(a)(1) of ANILCA was considered to have legislatively approved an allotment application, the Department was precluded by that statute from inquiring at all into whether an applicant's use and occupancy was open and notorious prior to the time conflicting rights-of-way were granted. Thus, upon the subsequent filing of the allotment application, the vested preference right that then arose related back to the date of initiation of use and occupancy (thus preempting the intervening rights-of-way), regardless of whether the use and occupancy was open and notorious when the rights-of-way were granted. We stated that the rights-of-way could not be considered valid existing rights under section 905(a)(1) of ANILCA "since they did not come into existence until long after initiation of [the] allotment." State of Alaska (GVEA), 110 IBLA at 229. On this basis, we affirmed a BLM decision holding the rights-of-way (including a materials site right-of-way) null and void to the extent that they conflicted with the allotment application. We reached this result even though the case concerned not whether the applicant had satisfied the use and occupancy requirements of the Act of May 17, 1906, but only whether the rights-of-way constituted "valid existing right[s]" to which the legislative approval was subject, under section 905(a)(1) of ANILCA. We have since modified even that holding sub silentio.

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<sup>9/</sup> The appeal to the Federal district court from State of Alaska (GVEA) was dismissed for lack of subject matter jurisdiction, and this dismissal was affirmed by the Federal circuit court. See State of Alaska v. Lujan, No. F90-006 (D. Alaska May 19, 1993), aff'd, No. 93-35684 (9th Cir. Oct. 11, 1994).

In State of Alaska (Mary Sanford), 131 IBLA 121 (1994), BLM had reversed an earlier holding that legislative approval of an allotment application was subject to a materials site right-of-way and held that right-of-way null and void to the extent that it conflicted with the application. Id. at 122, 128. We reversed BLM's decision, noting that the authority to allot Federal lands to Alaskan Natives under the Act of May 17, 1906, is limited to "vacant, unappropriated, and unreserved nonmineral land." 43 U.S.C. § 270-1 (1970) (emphasis added); 43 CFR 2561.0-3; Anne Lynn Purdy, 122 IBLA 209, 213 (1992); Ahtna, Inc., 100 IBLA 7, 15-17 (1987). As the allotment land within the right-of-way had been determined by BLM to be mineral-in-character on the basis that it was valuable for gravel used in highway construction, we ruled that the allotment was subject to the State's materials site right-of-way. State of Alaska (Mary Sanford), 131 IBLA at 127.

Our decision clearly was premised on the conclusion that the preference right that had vested in the applicant upon completion of the requisite use and occupancy and the subsequent filing of her application in early 1971 could not relate back to the date she initiated her use and occupancy in May 1965 (prior to the granting of the right-of-way in July 1966) and preempt the intervening right-of-way, because the land was mineral-in-character and thus not available for allotment at that time. Id. at 127-28. <sup>10/</sup> Therefore, we held that the 1981 legislative approval of the application was properly deemed subject to the right-of-way since it then constituted a valid existing right under section 905(a)(1) of ANILCA. See id. at 122, 128.

For purposes of deciding whether the State's right-of-way was a valid existing right under section 905(a)(1) of ANILCA, the crucial question is whether, prior to the creation of the right-of-way, the allotment

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<sup>10/</sup> We recognized that, on Dec. 2, 1980, sec. 905(a)(3) of ANILCA, 43 U.S.C. § 1634(a)(3) (1988), defined nonmineral lands under the Act of May 17, 1906, to include "land valuable for deposits of sand or gravel." See State of Alaska (Mary Sanford), 131 IBLA at 128. However, this did not affect our conclusion that, prior to the granting of the State's right-of-way in July 1966, the land was mineral-in-character, and thus not available for allotment at that time. Indeed, the Department has long independently recognized that allotment land will be deemed mineral-in-character where it is valuable for sand or gravel. See Ahtna, Inc., 100 IBLA at 16-17. While ANILCA removed this bar to approval of an allotment in 1981, it could not retroactively change the status of the land to the detriment of a third party. See, e.g., Heirs of Doreen Itta, 97 IBLA 261, 268-70 (1987) (Burski, A.J., concurring). Thus, if the land at issue herein was mineral-in-character under the laws as they existed when the State acquired its right-of-way, Native use and occupancy, even if open and notorious, would not defeat the State's grant because the inchoate right to an allotment could not attach to such land under the law at that time.

applicants established inchoate preference rights under the Act of May 17, 1906, by qualifying use and occupancy, such that, upon the subsequent filing of their applications, the vested preference right that then arose related back to the initiation of use and occupancy, thus preempting the intervening right-of-way.

An applicant will be considered not to have established inchoate rights where the land was mineral-in-character prior to the creation of the right-of-way. In State of Alaska (Mary Sanford), *supra*, we held that BLM may properly inquire into whether the land was mineral-in-character during the period of use and occupancy prior to the creation of the right-of-way. The question does not involve adjudicating the Native's entitlement under the Act of May 17, 1906, which is clearly precluded by ANILCA. See State of Alaska (GVEA), 110 IBLA at 228. Rather, it involves only determining whether the State held a valid existing right under section 905(a)(1) of ANILCA at the time of legislative approval in 1981. This requires the Department to delve into the question of the Native's inchoate rights under the Act of May 17, 1906, prior to the creation of the State's right-of-way. <sup>11/</sup> If the Native is found to have insufficient rights predating the right-of-way's creation, the result is not to defeat the legislative approval of the subsequent allotment application, but simply to make it subject to the right-of-way, since the right-of-way is a valid existing right under section 905(a)(1) of ANILCA. See State of Alaska DOTPF, 124 IBLA at 396 (Burski, A.J., concurring).

In summary, where the land applied for was mineral-in-character and thus not available for Native allotment during an asserted period of use and occupancy prior to the time the State was granted its right-of-way, a State materials site right-of-way is a "valid existing right" to which the legislative approval of an allotment application is subject under section 905(a)(1) of ANILCA.

[3] Johnson opposes the State's request that we apply the ruling in State of Alaska (Mary Sanford) here. <sup>12/</sup> She argues that the circumstances in her case are distinguishable, noting that BLM had determined that Sanford's allotment land was mineral-in-character, even though it

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<sup>11/</sup> Section 905(a)(1) of ANILCA did not resolve any questions regarding the sufficiency of the Native's use and occupancy at any time. It did not constitute a legislative finding that any Native had satisfied the use and occupancy requirements of the Act of May 17, 1906. Rather, Congress simply exercised therein its plenary authority to dispose of public land (in order to achieve finality under the Act of May 17, 1906), regardless of whether the Native had ever qualified under that Act. See State of Alaska DOTPF, 124 IBLA at 395 (Burski, A.J., concurring).

<sup>12/</sup> No opposition to the application of State of Alaska (Mary Sanford) has been filed by Craig.

decided that Sanford's allotment should not be subject to the State's right-of-way. Johnson asserts that BLM held in its October 1990 decision that the land in her Parcel A encompassed by the State's materials site right-of-way was not mineral-in-character and that that decision has become final for the Department, in the absence of any appeal by the State.

BLM admittedly concluded that the land in both allotments was "without value for minerals." The State's failure to specifically challenge that holding in its initial statement of reasons did not render that finding immune from attack. The State's appeal suspended the effect of the October 1990 decision to the extent that it determined that Johnson's application was legislatively approved and that the land could be conveyed to her without preserving the State's right to take materials from its right-of-way. Accordingly, the appeal preserved the overriding issue of whether the legislative approval should be subject to the State's right-of-way, including the question whether the right-of-way was a valid existing right under section 905(a)(1) of ANILCA because the land was not mineral-in-character prior to the creation of the right-of-way. The fact that the State did not raise its arguments regarding the mineral character of the land until after the Board decided State of Alaska (Mary Sanford) in October 1994 does not prevent it from now raising that argument.

BLM initially concluded that the land encompassed by Craig's allotment and situated within the State's right-of-way was mineral-in-character. A BLM mining engineer examined the land on June 22, 1973, to assess the mineral character of all the lands in the allotment, and a "Mineral Report" was prepared on July 3, 1973. <sup>13/</sup> At the time of BLM's June 1974

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<sup>13/</sup> The examination included the digging of 14 pits throughout the allotment (as well as one in the materials site just north of the allotment) to a depth of about 4 feet (Mineral Report at 4). The engineer noted that the entire area is underlain by thick deposits of sands, gravels and cobbles to unknown depths, left by receding glaciers (Mineral Report at 2) and that the materials were the only ones suitable for use by the State for highway construction and maintenance purposes for many miles in either direction (Mineral Report Title Page). He based this on the fact that "[m]any test holes have been drilled by the [State] Department of Highways along the highway net both easterly and westerly of this [materials] site, but none proved feasible" (Mineral Report at 4). He particularly noted that the closest alternative sites were 6 miles to the west and 13 miles to the east. Id. at 1. He stated that suitable sand and gravel was generally "scarce" (id. at 4) and noted that the State had mined sand and gravel from its materials site "for a number of years and [is] still enlarging [its] pit." Id. at 3. A map attached to the mineral report noted that a "Borrow Pit" was constructed in that portion of the State's right-of-way within the Craig allotment. According to the scale on the map, the pit was about 500 feet wide and 1,200 feet long and, together with an access road, took up a large part of the materials site. The engineer stated that the deposit had been mined to a depth of over 20 feet and was "still in

examination of Craig's allotment, the examiner noted that the "[p]otential value for gravel \* \* \* appears extremely high" in the north half of the allotment, which encompasses the State's right-of-way (Field Report (AA-6330) dated May 16, 1975, at 2).

Relying on the July 1973 mineral report, on December 10, 1975, BLM notified Craig that his allotment application was being held for rejection as to the north half of the allotment since the land was considered to be mineral-in-character due to the presence of sand and gravel, and thus not available for allotment. Craig was afforded the opportunity to submit evidence that the land was not valuable for sand and gravel, along with a petition to reclassify the land as nonmineral. On April 23, 1976, Craig petitioned for reclassification, but submitted no evidence regarding the mineral character of that land. <sup>14/</sup> Noting that the BLM mining engineer was not persuaded to change his mineral-in-character determination, the State Office, by decision dated October 11, 1977, refused to reclassify the land. Accordingly, it held Craig's allotment application for rejection as to the north half of his allotment.

[4] As noted above, Craig was afforded the opportunity to request a hearing and did so, and in June 1979 Judge Ratzman overturned BLM's October 1977 determination that the land was mineral-in-character. Although no appeal was taken from that decision, there is no evidence that the State was served with a copy. Thus, it is now entitled to pursue its own appeal regarding whether the land in Craig's allotment was mineral-in-character. See Heirs of George Martinez, 103 IBLA 375, 378 (1988); cf. State of Alaska DOTPE, 124 IBLA at 390. By invoking our decision in State of Alaska (Mary

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fn. 13 (continued)

good material." Id. at 3. He noted that the pit could be expanded "both vertically and laterally." Id. at 4.

BLM's engineer valued the sand and gravel at 25 cents per cubic yard in place, but stated that "[m]aterials possessing as good a quality as these are extremely difficult to find in this general area, and could easily demand prices far in excess of the above[-]quoted figure." Id. He concluded that the land contained "sands and gravels of excellent quality and quantity," for which there was a present and future market (Mineral Report Title Page; Mineral Report at 4). He recommended that the north half of Craig's allotment, which encompassed the State's right-of-way, be declared mineral-in-character. Id. at 1.

<sup>14/</sup> Craig submitted only a Feb. 27, 1976, letter from a consulting firm, which appears to have reviewed BLM's determination regarding the suitability of land encompassed by another allotment application (AA-5836) along the Tok Cutoff "for use as a materials source." The letter stated only that there was an "abundance of granular material throughout the general area," apparently meaning the Chistochina area, which evidently encompasses the two allotments involved here (Respondent's Exh. A; Tr. 26, 35, 48).

Sanford), the State now effectively asserts that the land was mineral-in-character prior to the receipt of its right-of-way grant.

In these circumstances, we deem it appropriate to refer this matter to an Administrative Law Judge for a hearing to allow the State an opportunity to challenge the earlier determination. 43 CFR 4.415. Inasmuch as the Department, per Judge Ratzman, has already made an initial determination that the land was not mineral-in-character, the State shall have the burden of establishing that the land was mineral-in-character as of July 19, 1965, when its right-of-way issued.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases are referred to the Hearings Division.

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David L. Hughes  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge

IBLA 91-89R, 91-107R	:	AA-7770 (Parcel A)
	:	133 IBLA 281 (1995)
	:	
STATE OF ALASKA DEPARTMENT OF	:	Native Allotment
TRANSPORTATION & PUBLIC FACILITIES	:	
(IN RE IRENE JOHNSON & JACK CRAIG)	:	Petition for Reconsideration
(ON RECONSIDERATION)	:	Granted; Decision Reaffirmed

ORDER

Irene Johnson has petitioned for reconsideration of the Board's decision in State of Alaska Department of Transportation & Public Facilities (In Re Irene Johnson and Jack Craig), 133 IBLA 281 (1995), which set aside decisions by the Alaska State Office, Bureau of Land Management (BLM), holding her Native allotment application (AA-7770) and the Native allotment application of Jack Craig (AA-6330) to be legislatively approved pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), as amended, 43 U.S.C. § 1634(a)(1) (1994). BLM's decisions were set aside to the extent they approved the conveyance of lands within a materials site right-of-way held by the State of Alaska (State).

In our decision, we held that the principal issue presented was whether legislative approval of an allotment under section 905(a)(1) of ANILCA was "subject to" the State's materials site right-of-way because that right-of-way constituted a "valid existing right" under that section when ANILCA was enacted on December 2, 1980. 133 IBLA at 286. 1/ Relying on State of Alaska DOTPF (Mary Sanford), 131 IBLA 121 (1994), we held that resolution of this question hinged on whether the land in conflict was mineral-in-character at the time Johnson and Craig initiated their allotment claims and thereafter until the right-of-way was granted in July 1965. If so, we held, the land was unavailable for allotment under the Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), 2/ during that time period. 133 IBLA at 289-90.

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1/ The right-of-way (as granted on July 19, 1965, pursuant to 23 U.S.C. § 317 (1994) encompassed 0.80 acres of land sought by Johnson and 23.5 acres of land sought by Craig.

2/ Repealed effective Dec. 18, 1971 (subject to pending applications), pursuant to sec 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1995).

In so holding, we ruled in effect that, if the land was mineral in character, any preference rights that vested under the Act of May 17, 1906, upon the filing of either application could not "relate back" to the initiation of occupancy so as to vitiate a previously-issued right-of-way grant, and that the subsequent legislative approval of their applications must therefore have been subject to that grant as a "valid existing right." 133 IBLA at 289-90. However, since the Department had never decided the question of whether the land in conflict was mineral-in-character at the relevant time in a proceeding in which the State could participate (to protect its interest), we referred the matter for a hearing and decision by an Administrative Law Judge, pursuant to 43 C.F.R. § 4.415. 133 IBLA at 292-93. Finally, we noted that the State would bear the burden of proof in further proceedings. 133 IBLA at 293.

In her petition, Johnson contends, based on section 905(a)(3) of ANILCA, 43 U.S.C. § 1634(a)(3) (1994), that sand and gravel are no longer properly considered minerals under the Native Allotment Act, so that there is no legal basis to conclude that the lands covered by the State's right-of-way for sand and gravel are mineral-in-character. (Petition at 4-6). As Johnson acknowledges, we recognized in our decision that section 905(a)(3) of ANILCA had defined nonmineral lands under the Act of May 17, 1906, to include "land valuable for deposits of sand or gravel." 133 IBLA at 289 n.10. However, we concluded that,

[w]hile ANILCA removed this bar to approval of an allotment in 1981, it could not retroactively change the status of the land to the detriment of a third party. \* \* \* Thus, if the land at issue herein was mineral-in-character under the laws as they existed when the State acquired its right-of-way, Native use and occupancy \* \* \* would not defeat the State's grant because the inchoate right to an allotment could not attach to such land under the law at that time. [Emphasis in original.]

133 IBLA at 289 n.10. Johnson seeks to rebut this conclusion, asserting that ANILCA's definition of what constitutes nonmineral land "must apply in this case because it involves a challenge, raised after its enactment, as to whether the presence of sand and gravel on [her] allotment renders it 'mineral-in-character.'" (Petition at 6.) She asserts that application of the definition in that manner is not retroactive.

Johnson's petition presents adequate grounds to justify granting her petition for reconsideration. However, we find no basis therein to alter our previous decision, which is hereby reaffirmed.

Section 905(a)(3) of ANILCA provides:

When on or before the one hundred and eightieth day following December 2, 1980, the Secretary [of the Interior] determines by notice or decision that the land described in an

allotment application may be valuable for minerals, excluding oil, gas, or coal, the allotment application shall be adjudicated pursuant to the provision of the Act of May 17, 1906, as amended, requiring that land allotted under said Act be nonmineral: Provided, That "nonmineral", as that term is used in such Act, is defined to include land valuable for deposits of sand or gravel. [Emphasis in original.]

43 U.S.C. § 1634(a)(3) (1994). This section provides that, even where the Department had determined that land sought by a Native claimant might be valuable for sand and gravel, his or her allotment application would nevertheless not be subject to adjudication under section 1 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 (1970). Instead, the application would (barring any other impediment to it) be considered legislatively approved by section 905(a)(1) of ANILCA. See Agnes S. Samuelson, 56 IBLA 242, 88 I.D. 663 (1981). However, this would still leave open whether such approval was subject to a valid existing right under section 905(a)(1) of ANILCA. Nothing in the statutory language or legislative history indicates that section 905(a)(3) of ANILCA was intended to determine what constitutes a valid existing right under section 905(a)(1) of ANILCA.

It is thus apparent that, following ANILCA, an allotment could be legislatively approved for lands valuable for sand and gravel, whereas, previously, a Native allotment could not be issued for such lands at all. See Ahtna, Inc., 100 IBLA 7, 17-18 (1987). However, that conclusion is completely apart from the question presented in this case, where the existence of the State's conflicting right-of-way creates the possibility that a valid existing right exists. The fact that Congress provided that an allotment could be legislatively approved for lands valuable for sand and gravel does not preclude the Department from inquiring into the mineral character of the land in order to determine whether that right-of-way constitutes a valid existing right under section 905(a)(1). Nor do we perceive in section 905(a)(3) a Congressional purpose to rewrite history to redefine the term "mineral-in-character" as it applied from the date of initiation of Johnson's occupancy to issuance of the State's right-of-way grant, which bears directly on the valid existing rights question.

Johnson suggests that, because the Department did not rule prior to the enactment of ANILCA that these lands were mineral-in-character, applying section 905(a)(3) would not be retroactive because it would not reopen or change an earlier decision excluding the mineral land from Johnson's allotment. (Petition at 5-6.) To hold that section 905(a)(3) of ANILCA applied to change what, as understood by the Department, constituted mineral land under the Act of May 17, 1906, at any time prior to its enactment, would undeniably constitute a retroactive application of that later statute. We can find no justification for doing so, especially when it would plainly operate to the detriment of the State, legislatively ceding the lands covered by its right-of-way grant to Johnson without

compensation. See, e.g., Friel v. Cessna Aircraft Co., 751 F.2d 1037, 1039 (9th Cir. 1985); 2 Norman J. Singer, Statutes & Statutory Construction § 41.04 (5th ed. 1993).

Johnson further contends that application of the definition of what constitutes nonmineral land under section 905(a)(3) of ANILCA would not retroactively change the "status" of the land since, "in 1979, the BLM [sic] determined that the land within the State's material[s] site right-of-way was not mineral-in-character," and that, in the absence of a timely appeal, "that decision became final" for the Department. (Petition at 6). Thus, she concludes that application of section 905(a)(3) will actually ensure that the status of the land remains unchanged. Id. The decision to which Johnson refers was the June 27, 1979, decision by a Departmental administrative law judge reversing an October 11, 1977, BLM decision holding for rejection in part a Native allotment application by Jack Craig (AA-6330) as to land adjacent to that at issue here (also largely encompassed by the State's right-of-way) since it was considered mineral-in-character. (Petition at 2.) The June 1979 decision did not constitute a determination that any of the land claimed by Johnson was not mineral-in-character. 133 IBLA at 284, 291-92. Thus, there has been no final Departmental decision to which section 905(a)(3) of ANILCA might apply.

In any event, although no appeal was taken from the decision affecting Craig, we concluded in our initial decision that it was not binding on the State since there was no evidence that it was served with a copy. 133 IBLA at 292-93. Thus, we also set aside a BLM decision similarly holding Craig's application to be legislatively approved (without determining whether it was subject to the State right-of-way) and referred the question of whether the land sought by him was mineral-in-character prior to the right-of-way grant for a hearing and decision. See 133 IBLA at 292-93. Johnson asserts that the State "did not appeal" the 1979 Departmental ALJ decision concerning whether lands within the Craig allotment covered by the State's right-of-way were properly determined to be "mineral-in-character" (Petition at 2) and that the State had the opportunity to challenge the 1979 mineral determination before Johnson's allotment was legislatively approved. (Petition at 7). However, she does not show that the State had a fair opportunity to litigate that question, and the State strenuously disputes that it had such notice or can be bound by that determination. (Opposition to Petition for Reconsideration (Opposition), generally.) The State is not barred by the doctrine of administrative finality from challenging the conclusions reached in that proceeding unless it participated in that proceeding and had an opportunity to seek administrative review of the resultant holding. The record indicates that the instant appeal presented the State with its first opportunity to adjudicate the question of the priority of its right-of-way vis-a-vis Johnson's and Craig's allotments.

Johnson contends that the Board was precluded from reopening the question of whether the lands were mineral-in-character by virtue of the legislative approval of her application. (Petition at 7.) She refers to our statement in State of Alaska (GVEA), 110 IBLA 224, 228 (1989), that "[l]egislative approval had the effect of removing the Department's general authority to \* \* \* further condition the scope of the grant" under the Act of May 17, 1906. We are not persuaded that the Department is precluded by the legislative approval effected by section 905(a)(1) of ANILCA from determining whether the land sought by Johnson was mineral-in-character prior to the right-of-way grant, and whether her vested preference right relates back to preempt that grant. As we indicated in our August 1995 decision, Sanford had effectively clarified the doctrine announced in State of Alaska (GVEA) insofar as it implied that the Department is precluded by section 905(a)(1) of ANILCA from deciding whether the land was mineral-in-character prior to a right-of-way grant for purposes of determining whether a right-of-way constitutes a "valid existing right" under that statute. <sup>3/</sup> 133 IBLA at 289-90. Of course, in State of Alaska (GVEA), the right-of-way grant was for a highway and power line, so that the question of the mineral character of the lands affected was not presented. 110 IBLA at 225. Accordingly, it did not appear in that case that the lands might not have been open to entry for a Native allotment at the time the application related back to. By contrast, in the cases of the applications of Sanford, Craig, and Johnson, the facts that rights-of-way for sand and gravel were issued to the State and that the State was apparently extracting and using material removed from the lands clearly presented the possibility that the lands were mineral-in-character as of the date the Native allotment applications related back to. If so, the lands were not open to the Native allotments; Native occupancy would not bar the State's receiving a right-of-way for those lands; and the right-of-way was a valid existing right protected from legislative approval under section 905(a)(1) of ANILCA.

Johnson spends much energy disputing whether it is true, as we stated at 133 IBLA at 288, that Sanford "modified the relation-back doctrine as articulated in Dinah Albert," 90 IBLA 14 (1985). As discussed above, factual differences surrounding the conflict between the applications of Sanford, Craig, and Johnson and the competing rights-of-way held by the State for sand and gravel (on the one hand) and cases involving competing allotment applications and rights-of-way for purposes such as power lines and highways (on the other) render these two lines of cases distinguishable. It is sufficient to state that Johnson's allotment application does not relate back to a time prior to the initiation of the State's right-of-way rights if she was barred by statute from obtaining rights to lands that

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<sup>3/</sup> Judge Burski is of the view that State of Alaska (Goodlataw), 140 IBLA 205 (1997), Stanford, and our previous decision herein have all effectively undermined the theoretical basis of the Board decision in State of Alaska (GVEA) and would expressly overrule that decision for the reasons set forth in State of Alaska, 124 IBLA 386, 393-98(1992) (Concurring opinion).

were mineral-in-character as of the date her application relates back to. It follows that, if she obtained no rights to such lands, there was no legal bar to issuance of the State's right-of-way, which became a valid existing right to which the subsequent legislative approval of her application was subject. As BLM's decision did not recognize the State's possible valid existing right, it was properly set aside pending determination whether the lands were mineral-in-character as of the relation-back date.

As the State properly summarizes:

Only if [the claimant's inchoate preference] rights existed [at the time of the grant of the State's right-of-way] could the State's grant, a valid existing right under 43 U.S.C. § 1634(a)(1), be defeated. \* \* \* [T]his necessarily involves a consideration of \* \* \* whether the land was mineral land at the time th[e] use began. \* \* \*

\* \* \* \* \*

The quid pro quo of legislative approval of allotments under ANILCA is the preservation of valid existing rights. The Board's decision [here] restores the balance intended by Congress between the allottee's rights and the rights of third parties who hold interests in the lands.

(Opposition at 9-10.)<sup>4/</sup>

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Johnson's petition for reconsideration of our decision in State of Alaska Department of

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<sup>4/</sup> At this point, it is unnecessary to consider the effect of BLM's determination in 1976 that Johnson met the Allotment Act's use and occupancy requirements as to the lands covered by the right-of-way. If those lands were mineral-in-character at the time Johnson initiated use and occupancy, she could not gain title to them under the Allotment Act. Nor, as discussed at length above, could she gain unfettered title under the legislative approval provisions of ANILCA. Accordingly, we do not reconsider our decision to the extent that it comments on whether the allotment applicants' use was "open and notorious." 133 IBLA at 287-88, 290.

Transportation & Public Facilities (In Re Irene Johnson and Jack Craig), 133 IBLA 281, is granted, and that decision is reaffirmed.

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David L. Hughes  
Administrative Judge

I concur.

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James L. Burski  
Administrative Judge

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