Editor's note: Reconsideration denied by Order dated March 8, 1993

STATE OF ALASKA
DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

IBLA 90-176, 90-230 Decided December 10, 1992

Appeals from decisions of the Glennallen District Manager, Bureau of Land Management, declaring rights-of-way A-067753 and A-067759 null and void as to lands within Native allotments A-062349 and A-062755.

Affirmed.

1. Alaska: Native Allotments -- Rights-of-Way: Nature of Interest Granted

Where, after a Native initiates use and occupancy of certain lands and files an allotment application but prior to the completion of 5 years' use and occupancy, rights-of-way are sought and granted by BLM across such lands, subject to valid existing rights, the completion of the requisite 5 years vests the inchoate preference right arising from use and occupancy. That right relates back to the initiation of use and occupancy, thereby taking precedence over the intervening rights-of-way, which are properly declared null and void.

APPEARANCES: E. John Athens, Jr., Esq., Assistant Attorney General, State of Alaska, Fairbanks, Alaska, for appellant; 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 KELLY

The State of Alaska Department of Transportation and Public Utilities (State) has appealed decisions dated December 13, 1989 (IBLA 90-176), and January 9, 1990, 1/ (IBLA 90-230) by the Glennallen District Manager, Bureau of Land Management (BLM), declaring rights-of-way A-067753 and A-067759 null and void as to lands within Native allotment A-062349, and right-of-way A-067759 null and void as to land included within Native allotment A-062755,

1/ The copy of the decision in the case file contains the handwritten date "1/9/90."

respectively. Because the two appeals raise substantially similar legal issues, we have consolidated them for review

Native Allotment A-062349

On April 13, 1965, the Bureau of Indian Affairs (BIA) filed Native allotment application A-062349 on behalf of Alex H. Sinyon, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (Native Allotment Act), repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C.§ 1617(a) (1988), subject to applications then pending. Sinyon claimed use and occupancy of approximately 160 acres within secs. 30 and 31, T. 8 N., R. 3 E., Copper River Meridian, commencing in April 1965.

On June 1 and 3, 1966, the State filed applications for rights-of-way A-067753 and A-067759, respectively, for realignment of the Tok Cutoff pursuant to the Federal Highway Act of August 27, 1958, 23 U.S.C.§ 317 (1988). By quitclaim deed dated July 13, 1966, Sinyon conveyed to the State his interest in the lands within his allotment which were included in the right-of-way applications. BLM granted right-of-way A-067753 on July 26, 1966, and right-of-way A-067759 on July 14, 1966. Both rights-of-way were issued subject to all valid rights existing on the dates of the grants.

BLM examined Sinyon's allotment and concluded that he had satisfied the requirements of the Native Allotment Act and the implementing regulations. BLM approved the allotment on January 31, 1979.

On June 1, 1981, pursuant to section 905(a)(5) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C.§ 1634(a)(5) (1988), the State protested Sinyon's Native allotment application, thus precluding legislative approval and requiring adjudication of the application. The State withdrew its protest on October 19, 1981, and on November 27, 1981, BLM summarily dismissed the State's protest of Sinyon's allotment application.

By decision of September 20, 1989, BLM's Alaska State Office confirmed approval of Sinyon's allotment application. The State filed a notice of appeal from this decision, and by order dated March 15, 1990 (IBLA 90-83), the Board dismissed the State's appeal based on untimely filing of the notice of appeal. In our order we also denied the State's motion to consolidate IBLA 90-83 with IBLA 90-176. By order of August 6, 1990, we denied the State's petition for reconsideration of our March 15, 1990, order dismissing the appeal in IBLA 90-83.

By decision dated December 13, 1989, BLM declared rights-of-way A-067753 and A-067759 null and void to the extent they crossed Sinyon's allotment. BLM indicated that, based on its adjudication of Sinyon's allotment application, it had concluded that Sinyon had satisfied the requirements of the Native Allotment Act and had approved the application. BLM noted that the express terms of the State's right-of-way grants provided that the grants were subject to all valid rights existing as of the effective date of the grants. Because Sinyon's use and

occupancy began in April 1965, before the right-of-way applications were filed, and since the right-of-way grants were subject to valid existing rights, BLM determined that the grants were null and void as to those lands within Sinyon's Native allotment A-062349.

Native Allotment A-062755

On July 1, 1965, BIA filed Native allotment application A-062755, embracing approximately 80 acres within sec. 31, T. 8 N., R. 3 E., and sec. 36, T. 8 N., R. 2 E., Copper River Meridian, on behalf of Olga M. Mohamad (then Olga M. Rice). Mohamad claimed use and occupancy of this land since May 7, 1965. 2/

On June 3, 1966, the State filed its application for right-of-way A-067759 pursuant to the Federal Highway Act of August 27, 1958, 23 U.S.C. § 317 (1988). By quitclaim deed dated July 9, 1966, Mohamad conveyed to the State her interest in the lands within her allotment which were included in the right-of-way application. BLM issued right-of-way A-067759 on July 14, 1966, subject to all valid rights existing on the effective date of the grant.

BLM examined the allotment in August 1980. In a field report dated January 8, 1981, the BLM reality specialist opined that the allotment was subject to legislative approval in accordance with section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988), and concluded that, even if legislative approval were not applicable, Mohamad had satisfied the use and occupancy requirements of the Native Allotment Act and implementing regulations. On June 29, 1989, BLM issued a decision finding that Mohamad's allotment application had been legislatively approved.

In its January 9, 1990, decision, BLM declared right-of-way grant A-067759 null and void in part. BLM stated that, based on its adjudication of Mohamad's allotment application, it had concluded that she had satisfied the requirements of the Native Allotment Act, and noted that the application subsequently had been approved. Because Mohamad's use and occupancy had begun in May 1965, before the State filed its right-of-way application, and the State's right-of-way grant was expressly issued subject to valid existing rights as of its July 14, 1966, effective date, BLM determined that right-of-way A-067759 was null and void to the extent it included lands within Mohamad's Native allotment A-062755.

Issues on Appeal

On appeal the State first challenges BLM's approval of the allotments on procedural grounds. The State argues that, even though it withdrew its

2/ Mohamad amended her application on Nov. 4, 1966, to include an additional 40 acres located within sec. 31, T. 8 N., R. 3 E., Copper River Meridian, asserting use and occupancy of this parcel from May 25, 1965. None of the land included in the State's right-of-way lies within this parcel.

protest against Sinyon's Native allotment application, BLM was nevertheless required to adjudicate the application which, the State claims, BLM failed to do. The State also insists that legislative approval of Mohamad's allotment application does not preclude BLM from examining the sufficiency of her use and occupancy of the allotment. According to the State, BLM should have initiated government contests challenging both allotment applications because conflicting evidence existed concerning the sufficiency of Sinyon's and Mohamad's use and occupancy of the allotments. In the absence of a government contest, the State asserts that it should have been afforded an opportunity to contest the adequacy of the allottees' use and occupancy, arguing that BLM's refusal to allow the State a contest period effectively denied the State a chance to be heard on the question of the allottees' use and occupancy where the allotments conflict with the rights-of-way.

The State also disputes the merits of BLM's decisions holding rights-of-way A-067753 and A-067759 null and void in part, arguing that the right-of-way grants are valid existing rights to which Sinyon's and Mohamad's allotments must be made subject. The State acknowledges that its rights-of-way are subject to valid rights existing on the dates of the grants, but contends that neither Sinyon nor Mohamad had a valid existing right as of July 1966. Even assuming that Sinyon and Mohamad had initiated use and occupancy prior to issuance of the grants, the State argues that their claims were inchoate and nonvested at this critical time because they had not yet completed the requisite 5 years' use and occupancy. According to the State, a mere preference right to their allotments did not afford any protection against grants by the United States for public purposes.

The State insists that a basis for cancellation of the grants would exist only if the grants had been contingent upon the lands being vacant and unappropriated and if the State knew (or should have known) that the lands were not vacant and unappropriated. Even then, the State asserts, such facts would have to be proven at an appropriate hearing prior to cancellation. In any event, the State contends, there was no requirement that the lands requested for its rights-of-way be vacant and unappropriated.

The State also charges that Sinyon, Mohamad, and BLM are all estopped to deny the validity of the rights-of-way, and that BLM's failure to consider the public need for the highway rights-of-way constitutes an abuse of discretion. The State finally argues that 43 U.S.C.§ 1166 (1988), which limits the time in which a suit to annul a patent may be brought, bars BLM from voiding the rights-of-way.

In response, BLM argues that the Board's decision in State of Alaska, Golden Valley Electric Association (State of Alaska, GVEA), 110 IBLA 224 (1989), stipulation for dismissal filed, State of Alaska v. Lujan, Civ. No. F90-006 (D. Alaska June 22, 1992), effectively addresses the issues raised in these appeals. Specifically, BLM contends that the State acquired no interest superior to that of the allottees because when the allottees' rights to the allotments vested upon completion of the requisite 5 years' use and occupancy, their preference rights related back to the time of commencement of use and occupancy and preempted

conflicting applications filed after that time. BLM also asserts that Sinyon's Native allotment application has already been adjudicated pursuant to the Native Allotment Act, that the doctrine of equitable estoppel does not apply, and that 43 U.S.C.§ 1166 (1988) has no relevance here because a right-of-way is not a patent.

As an initial matter, we reject the State's procedural arguments. Contrary to the State's assertion, the record indicates that BLM did adjudicate Sinyon's Native allotment application, determined that he had satisfied the requirements of the Native Allotment Act and implementing regulations, and approved the allotment. BLM confirmed this adjudication-based approval in its September 20, 1989, decision. Because the State failed to timely appeal this approval decision, that decision became final for the Department. The doctrine of administrative finality, the administrative equivalent of res judicata, precludes consideration of the same issues in a later appeal. See, e.g., Virgil V. Peterson, 66 IBLA 156, 158 (1982). Thus, the validity of Sinyon's Native allotment has been conclusively determined for the Department, and the State is barred from contesting the sufficiency of Sinyon's use and occupancy of the allotment. 3/

The legislative approval of Mohamad's allotment application similarly prevents the State from now disputing the sufficiency of her use and occupancy of the allotment. See State of Alaska, GVEA, 110 IBLA at 228. Legislative approval, in essence, removed the Department's general authority to reexamine the question of entitlement to the allotment. Id.; see also Eugene Witt, 90 IBLA 265, 270 (1986). Therefore, whether Sinyon's and Mohamad's use and occupancy of the claimed lands were sufficient to entitle them to approval of their allotment applications are not issues on appeal.

[1] These appeals focus on whether BLM properly determined that the allotments were valid existing rights to which the State's right-of-way grants were expressly made subject, or whether the State correctly contends that the rights-of-way are valid existing rights to which the Native allotments must be made subject. The bulk of the State's arguments have been addressed by the Board in State of Alaska, GVEA, supra, and Golden Valley Electric Association (On Reconsideration) (GVEA (On Reconsideration)), 98 IBLA 203 (1987). Although the State essentially requests that we reconsider those decisions, we find no reason to alter them.

The key to those cases and the instant appeals lies in the concept of relation back. In State of Alaska, GVEA, 110 IBLA at 227, 229,

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3/ We note that the Board's jurisdiction is triggered by the timely filing of a notice of appeal. See, e.g., City of Klawock, 94 IBLA 107 (1986). Where a BLM decision approving a Native allotment is not appealed, the question of whether BLM properly approved the allotment does not come within the Board's jurisdiction. As noted above, that decision then becomes final for the Department. Since Sinyon's allotment has been approved in a final Department decision, we deny the State's request for adjudication of Sinyon's allotment. No further adjudication of the allotment within the Department is appropriate.

which involved a conflict between Federal Highway Act rights-of-way and Native allotments, where the allotment applications were filed after the grants of the rights-of-way, but Native use and occupancy preceded those grants, we relied upon the existing rights analysis articulated in GVEA (On Reconsideration), supra. In that case, we found that a Native allotment applicant is accorded a statutory preference right to an allotment of land commencing with the first use and occupancy of the land in a qualifying manner. 98 IBLA at 205. Although that inchoate preference right does not vest until completion of the required 5 years use and occupancy coupled with the filing of a timely application, once the preference right becomes vested, it relates back to the initiation of the use and occupancy and preempts conflicting applications filed after that time. 98 IBLA at 205, 208. See also State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315, 1319 (D. Alaska 1985), aff'd sub nom. Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987); Aguilar v. United States, 474 F. Supp. 840, 845 (D. Alaska 1979); James E. Dawson, 111 IBLA 139, 142 (1989); United States v. Flynn, 208, 234, 88 I.D. 373, 387 (1981). 4/

The records in these cases amply support BLM's determinations that both Sinyon and Mohamad began their use and occupancy of the lands in April and May 1965, respectively, before the State filed its right-of-way applications. Furthermore, since both of them filed their Native allotment applications virtually contemporaneously with initiating use and occupancy, the State had constructive notice that the lands were so used and occupied. See Angeline Galbraith (On Reconsideration), 105 IBLA 333, 335-36 n.2 (1988). In fact, it appears that the State had actual notice of the Native's claims since it sought and received quitclaim deeds from both Sinyon and Mohamad covering the disputed lands. 5/ Thus the completion of the requisite 5 years' qualifying use and occupancy vested both Sinyon and Mohamad with preference rights to their respective allotments as of the date of their first use and occupancy in 1965. Because their rights predated the State's June 1966 right-of-way applications, those right-of-way grants were issued subject to the Native allotments.

The Board also addressed the State's estoppel arguments in State of Alaska, GVEA, stating:

> Finally, the State contends that estoppel should apply to prevent challenges to its rights-of-way. The State asserts that it relied in good faith on the issuance of its rights-of-way, receiving no notice from either BLM or [the Native allottee] that there would be a problem with those rights-of-way. Among other factors, a crucial misstatement in an official decision is an

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4/ In State of Alaska, GVEA, 110 IBLA at 229 n.4, we also rejected the argument that the allotments should issue subject to the rights-of-way, noting that no authority had been cited under which BLM would be required to so limit the allotments.

5/ We express no opinion on the validity or effect of those deeds.

> express precondition for invoking estoppel. Cyprus Western Coal Co., 103 IBLA 278 (1988), and cases there cited. There was no affirmative misrepresentation or concealment of the facts by Departmental officials. Again, as previously discussed, the rights-of-way were issued subject to valid existing rights.

110 IBLA at 231. The State's argument would, in effect, grant it a benefit not authorized by law. Nothing in the cases cited by the State supports such a proposition. Edward L. Ellis, 42 IBLA 66, 69 (1979).

State of Alaska, GVEA also helps answer the State's contention that BLM abused its discretion by failing to consider the public need for the highway rights-of-way. The Board acknowledged that under the Native Allotment Act, the Secretary is afforded discretion in adjudicating allotment applications. 110 IBLA at 229 n.4. Such discretion is not unfettered. Pence v. Kleppe, 529 F.2d 135, 140 (9th Cir. 1976). Relevant case law such as Aguilar v. United States, supra; State of Alaska v. 13.90 Acres of Land, supra; and Degnan v. Hodel, No. A87-252 Civil (Feb. 15, 1989), circumscribe the Secretary's discretion, the exercise of which must respect the limits established by those cases. No case cited by the State allows the Secretary to reach the result it seeks.

In its final argument, the State contends that cancellation of the rights-of-way is contrary to 43 U.S.C.§ 1166 (1988) which provides that "[s]uits brought by the United States to vacate and annul any patent shall only be brought within six years after the date of issuance of such patents." A right-of-way grant, however, is not an application for title and cannot be considered as passing title. State of Alaska v. Albert, 90 IBLA 14, 21 (1985). Therefore, the statute has no application. State of Alaska, GVEA, 110 IBLA at 231.

To the extent the State has made other arguments that have not been expressly discussed, they have been considered and rejected.

Therefore, 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 affirmed. 6/

John H. Kelly
Administrative Judge

6/ Our resolution of these appeals renders moot the State's motion to stay issuance of the patent for Sinyon's allotment.

ADMINISTRATIVE JUDGE BURSKI CONCURRING SPECIALLY:

In its appeals herein, the State of Alaska requests the Board to reconsider a number of its prior opinions concerning the effect of legislative approval of Native allotment applications under section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C.§ 1634(a) (1988). The lead opinion herein affirms the decisions below and expressly declines to revisit our past precedents. While, for reasons which I shall explain, I agree with the resolution of the instant appeals, I find myself in substantial agreement with the State that, at least insofar as State of Alaska, 110 IBLA 224 (1989), is concerned, further consideration of some of our past holdings is clearly warranted.

In order to understand the holding in State of Alaska, supra, it is useful to put the decision in its factual context. In State of Alaska v. Albert, 90 IBLA 14 (1985), this Board embarked upon what proved to be a tangled and convoluted foray into section 905 of ANILCA. That decision involved cross-appeals from a decision of Judge Morehouse, entered in a contest brought by the State, holding that compliance with the Native Allotment Act of 1906, as amended, 43 U.S.C.§ 270-1 to 270-3 (1970) (repealed by section 18 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (1988)), had been established, but further holding that the allotment would be approved subject to two State rights-of-way which had been applied for and approved after Albert had commenced her occupancy but prior to her formal application for an allotment. Additionally, Judge Morehouse ruled that the State had not shown compliance with the provisions of R.S. 2477. The State appealed both Judge Morehouse's determination that Albert had established use and occupancy and his finding on the non-establishment of an R.S. 2477 right-of-way, while Albert appealed from both the imposition of the rights-of-way and the failure of Judge Morehouse to dismiss the contest for a lack of standing on the part of the State to file a contest complaint.

In its decision, the Board first dismissed the State's appeal because its notice of appeal was untimely filed. Id. at 17. This jurisdictional dismissal, however, did not forestall the Board from noting that Judge Morehouse's ruling on the R.S. 2477 question "was clearly improper." Id. at 17-18 n.5. The Board then examined Albert's argument that Judge Morehouse erred in failing to dismiss the contest complaint.

As an initial matter, the Board agreed with Judge Morehouse that, since section 905(a)(4) was clearly inapplicable, the State, under section 905(a)(5), had 180 days in which to protest legislative approval of the allotment based either on access needs or the presence of improvements, which it did not do. Id. at 20. Judge Morehouse had concluded that this failure did not bar the State's contest of the allotment because of the provisions of section 905(e) which required the Secretary to identify and adjudicate any conflicting "record entry or application for title" prior to the issuance of a certificate of allotment. The Board, however, rejected this determination, noting that the right-of-way was neither a record entry

nor an application for title and finding, therefore, that section 905(e) did not apply. Accordingly, the Board held that Judge Morehouse "should have granted the motion to dismiss the contest." Id. at 21. Notwithstanding this holding, however, the Board observed that BLM had taken no action to cancel the right-of-way, that "it is unlikely that BLM will take action adverse to the State's interest in these rights-of-way" since "the vesting of the allotment and the subsequent approval of the allotment cannot defeat the previously granted State rights-of-way" and that "[i]f for some reason BLM were to cancel the State's right-of-way grant, the State would have the right to appeal." Id. at 21-22. Finally, for reasons which remain obscure, the Board dismissed Albert's appeal even though it had clearly held that she was correct in her contention that the contest, itself, should have been dismissed.

In a little more than 18 months after the issuance of the Albert decision, the Board found it necessary to modify the holding therein in its decision in Golden Valley Electric Association (On Reconsideration), 98 IBLA 203 (1987). That case held that, consistent with the District Court's decision in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), and this Board's decision in United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981), use and occupancy by a Native of a parcel of land creates an inchoate preference right which, once vested (i.e., when conjoined with an application), relates back to the date of the initiation of the use and defeats all subsequently made appropriations of the land, including subsequently issued rights-of-way where founded on application or use commencing after the initiation of Native use and occupancy, if such Native use and occupancy was open and notorious at the time of the conflicting application.

The Golden Valley decision very carefully distinguished two prior Board decisions, Edward A. Nickoli, 90 IBLA 273 (1986), and Leo Titus, Sr., 89 IBLA 323 (1985), as cases in which use of the land for trails had occurred prior to the commencement of Native use and occupancy. However, with respect to its decision in Albert, the Board noted that, to the extent that it had stated that Albert's inchoate preference right arising out of her use and occupancy could not defeat rights-of-way issued prior to the vesting of that right, the decision must be modified. The Board stated that "Albert's inchoate preference right could defeat the previously issued rights-of-way if her use and occupancy was open and notorious at the time the right-of-way grant issued such that it would have disclosed to an observer on the ground that the land was under active development or use." 98 IBLA at 207 (emphasis in original).

In State of Alaska, supra, the Board yet again revisited this question. That appeal arose from a decision by the Kobuk District Office which declared the rights-of-way that were the subject of the original Albert appeal to be null and void to the extent that they crossed the Albert allotment, finding that Albert had used her allotment continuously

and notoriously from 1938 to 1967, including the period in which the rights-of-way had issued. On appeal, the State disputed the finding that Albert's use was sufficiently open and notorious so as to defeat the State's rights-of-way and argued that the allotment should be made subject to the rights-of-way. Alternatively, the State requested that the matter be referred for a hearing to determine whether Albert's use was open and notorious at the time the rights-of-way were granted.

In opposing the State's appeal, BLM argued that, under the relation back doctrine, Albert's rights related back to 1938 and that the allotment could not be made subject to the right-of-way because "ANILCA legislative approval of the allotment had the effect of removing from BLM the administrative jurisdiction to adjudicate conflicting claims to the land." 110 IBLA at 227. 1/ Additionally, both BLM and Albert argued that the doctrine of administrative finality barred readjudication of Albert's qualifying use and occupancy.

In rejecting the State's appeal, the Board made a number of statements which I do not believe can be sustained. First, the Board opined that "[w]hether Albert's use and occupancy of the land was sufficient to qualify for an allotment under the regulations in 43 CFR Part 2560 is not an issue in this case." 110 IBLA at 228. While I have no objection to this statement to the extent that it holds that, because of legislative approval, the question of Albert's entitlement to an allotment was no longer open to adjudication, I do strongly take exception to any implicit assertion that legislative approval constituted a finding that compliance with the law had occurred. Such is simply not the case.

There is nothing in section 905 that can fairly be said to constitute a legislative finding that, in those cases subject to legislative approval, the allotment applicant had complied with the laws and regulations leading to an allotment. Indeed, this Board has expressly noted that the effect of legislative approval was to approve allotment applications where the allotment applicant had not complied with the law. See Angeline Galbraith, 97 IBLA 132, 170 n.12, 94 I.D. 151, 171 n.12 (1987) ("Congress has, by its legislative approval of many unprotested allotments, authorized passage of title to others who might not qualify under the Act.") Legislative approval constituted an assertion by Congress of its plenary authority to dispose of public land and neither purported to nor could it change the underlying facts attendant to those allotment applications so approved.

While I recognize that the decision in State of Alaska, supra, did not expressly embrace the position that legislative approval constituted,

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1/ This is, essentially, the Thorson argument (see State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984)), to which I will return later in this opinion.

in effect, a legislative finding of fact that the allotment applicant had complied with the law, it is clear that this was precisely what both BLM and Albert were contending and this point was critical to BLM's and Albert's assertion that administrative finality barred consideration of use and occupancy. Insofar as that argument is concerned, I would merely note my view that since a finding that an allotment application was legislatively approved did not subsume an adjudication of an applicant's entitlement thereto under the Native Allotment Act, there is no adjudication, whatsoever, of the quantum of use and occupancy which actually occurred such as might give rise to application of the doctrine of administrative finality.

After determining that the allotment claim was legislatively approved, the decision in State of Alaska, supra, then examined the question whether "legislative approval allows any further examination into the circumstances of Albert's use and occupancy of the land in order to determine whether reservations for the rights-of-way may be included in the allotment." Id. Relying on the Golden Valley decision, the opinion concluded that legislative approval prevented any further inquiry. The decision reasoned that since, under the relation back doctrine applied in Golden Valley, the rights of the Native allotment applicant related back to the date of initiation of use and occupancy, here, where legislative approval was operative, the rights related back to the initiation of use and occupancy claimed by Albert. The problem, however, is that there is nothing in the legislative approval of Native allotments which evinces an intent to relate back to any date. Compare section 905(a) of ANILCA dealing with allotment applications ("all Alaska Native allotment applications * * * are hereby approved on the one hundred and eightieth day following December 2, 1980,") with section 906(c)(1) of ANILCA dealing with State selections ("[a]ll tentative approvals of State of Alaska land selections * * * are hereby confirmed * * * and the United States confirms that all right, title and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval").

Moreover, the decision ignored the point that the relation back doctrine, as explicated by United States v. Flynn, supra, only applies in the absence of intervening rights. This was recognized in Golden Valley, which expressly found that the Native allotment applicant's use of the land was open and notorious as of the time the rights-of-way issued therein, such as would prevent these rights-of-way from constituting valid existing rights. Since legislative approval is, itself, expressly made "[s]ubject to valid existing rights," it seems to me that there is nothing in section 905 which could fairly be said to preclude a holder of a right-of-way from showing that, as of the time that the right-of-way issued, there was no use or occupancy on the land sufficient to defeat its acquisition of an easement. This would not defeat a Native allotment; it would merely, as the statute provides, make the allotment subject to the right-of-way.

But, while there is nothing in the statute which might preclude such an attempt to establish that the use and occupancy of the allotment was not

sufficient to defeat the right-of-way as of the time of issuance of the right-of-way, application of the "principle" announced in State of Alaska v. Thorson, supra, might well bar consideration of the matter. While the decision in Thorson dealt with the effect of legislative approval on tentatively approved State selections, the principle espoused, i.e., that legislative approval constituted an immediate conveyance of lands involved such that determinations of what "valid existing rights" a State selection was subject to was beyond the purview of the Department, would seem to be applicable to legislatively approved Native allotment applications, at least insofar as rights-of-way are concerned. 2/

I have recently written a detailed statement concerning my views of the Thorson decision. See Eddie S. Beroldo, 123 IBLA 156, 160-68 (1992) (concurring opinion). I will not repeat them herein. Suffice it for the present to reiterate my conclusion that, since Thorson is demonstrably wrong, it should be reexamined and overruled at the earliest possible opportunity. In a similar vein, I believe that the various holdings of State of Alaska, supra, set forth above should meet a corresponding fate.

However, notwithstanding the foregoing, it seems to me clear that, despite the demonstrable infirmities of both Thorson and State of Alaska, the decisions presently under review were ultimately correctly decided. Both of the Native allotment applicants herein not only asserted occupancy prior to the filing of the application for a right-of-way, both of them had also noticed their occupancy in BLM prior to any State filing. Under the regulation applicable at that time, 43 CFR 2212.9-1(g) (1964), "The filing of an acceptable application for allotment will segregate the lands to the extent that conflicting applications for such lands will be rejected, except when accompanied by a showing that the applicant for allotment has permanently abandoned occupancy of the land." The applications for rights-of-way subsequently filed by the State were not accompanied by the requisite showing. Thus, independent of actual use and occupancy by the Native applicants, the filing of the Native allotment applications prevented the State from acquiring and the Department from bestowing any adverse rights with respect to the lands embraced within those applications, while those allotment applications remained of record. Accordingly, allowance of the rights-of-way to the extent they conflicted with the earlier-filed Native allotment applications was error. Moreover, the rights-of-way were expressly issued subject to valid existing rights as of the date of the grants. These allotments were such rights and, therefore, any rights granted to the State by those documents are necessarily subservient to the rights of the allotment applicants.

2/ While the provisions of section 905(e) of ANILCA would seem to represent an express repudiation of the analysis in Thorson with respect to record entries and applications for title, I think the original decision in Albert correctly held that this provision would not be applicable to an issued right-of-way. See 90 IBLA at 21.

In summary, I agree with the State that, to the extent that State of Alaska, supra, stands for the proposition that legislative approval prevents any inquiry into actual Native use and occupancy for even the limited purpose of determining the existence of a valid existing right under section 905(a)(1) of ANILCA, that decision is in error and should be overruled. However, under the facts in the instant appeals, the Native allotment applicants had formally applied for the allotment prior to the initiation of any rights by the State, the Department, under 43 CFR 2212.9-1(g) (1964), was barred from granting and the State was prevented from obtaining any rights inconsistent with those asserted under the Allotment Act. Therefore, the question of actual use and occupancy prior to grant of the rights-of-way is no longer germane and the State's request for a fact-finding hearing is properly denied. Thus, I concur in the ultimate disposition of these appeals.

James L. Burski
Administrative Judge