



COPPER VALLEY ELECTRIC ASSOCIATION, INC.

177 IBLA 289

Decided June 8, 2009



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

COPPER VALLEY ELECTRIC ASSOCIATION, INC.

IBLA 98-351

Decided June 8, 2009

Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring a portion of a right-of-way on which an electrical transmission line was constructed to be null and void to the extent that it coincides with lands within a surveyed Native allotment. A-062297, AA-7336.

Decision affirmed on grounds stated herein.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976--Alaska National Interest Lands Conservation Act: Generally

A “holder of an ROW” has rights founded in an approved ROW grant. By contrast, an applicant without an approved ROW grant is not a “holder of an ROW” even if it constructed its facility without one. An ROW applicant that constructed an ROW facility, even with BLM permission, but never followed applicable regulatory requirements that required accurate on-the-ground maps to be submitted before the ROW could be granted, does not have a valid existing right for an ROW over the location where the facility was constructed under ANILCA and cannot claim a right to an ROW grant under FLPMA.

APPEARANCES: James D. Linxwiler, Esq., and Steven J. Bookman, Esq., Anchorage, Alaska, for Copper Valley Electrical Association, Inc.; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Carol Yeatman, Esq., Anchorage, Alaska, for Florence B. Sabon.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Copper Valley Electric Association, Inc. (CVEA) appeals from a decision dated April 23, 1998, of the Alaska State Office, Bureau of Land Management (BLM),

declaring a portion of CVEA's right-of-way (ROW), A-062297, for an electrical transmission line to be null and void to the extent that it coincides with lands within a surveyed Native allotment, AA-7336, conveyed to Florence B. Sabon. This case has been suspended for years, due in part to the hopes of the parties for a legislative resolution of longstanding conflicts between utility line operators in the State of Alaska and Native allotment holders. In the absence of any legislative solution, this Board returned the case to its active docket by order dated December 18, 2008 (2008 Order), and directed the parties to submit briefs answering specific articulated questions. Those briefs have been submitted, and the Board hereby affirms the decision on narrow factual grounds.

CVEA, BLM, and the Alaska Legal Services Corporation (ALSC), on behalf of allotment-holder Sabon, appear and submit pleadings in this appeal. In briefs presented to this Board in 2005, consistent with a report by the United States Government Accountability Office (GAO) on issues common to conflicts between utility ROWs and Native allotments in Alaska, GAO Report Number GAO-04-923, Oct. 7, 2004 (GAO Report), and in its brief submitted in 2009, CVEA argues that the issues presented in this appeal demonstrate the negative effects brought on by conflicting government policies and will have an impact on at least 11 utility companies in Alaska including CVEA, all of which will be forced to pay considerable sums of money for what will amount to trespass across Native allotments. CVEA argues that the "relation-back doctrine" adopted by this Board in 1987 allowed Native allotment applications to "relate back" to the date of first use and occupancy, thereby establishing inchoate rights that predated the utility companies' valid ROWs and constructed utility lines. CVEA claims the companies had no reason to know of the Native allotment claims until the applications were later filed, and that the doctrine of relation back thus unfairly shifts the costs and burdens of changes in Federal land use policy to the companies. In its 2009 brief, ALSC presents a short but comprehensive history of 20th century debate over Native lands in Alaska and contends that companies working in Alaska had every reason to expect that land over which they sought to construct facilities could have been claimed by Natives under applicable Federal legislation. BLM contends that CVEA never perfected its ROW application as required by applicable regulations, never complied with multiple requests by BLM for maps or supplementation that would allow the agency to issue final determinations regarding the ROW application, and never obtained an ROW grant, before Sabon submitted her Native allotment application in 1971.

We agree with BLM that the facts in this case make the issues more narrowly and easily resolved than argued by CVEA. Based on the record and exhibits supplied by the parties in their 2009 briefing, we find that CVEA did not follow the regulatory requirements necessary to complete an application for the ROW, and therefore did not, prior to the time Sabon filed her application in 1971, obtain or perfect a valid right to an ROW crossing the land subject to Sabon's allotment. Indeed, at the time

her application was filed, the CVEA application had been rejected; notes in the record indicate that BLM had considered whether to pursue the company for trespass. During the period of time after BLM vacated its rejection of the application (1974) and before it rejected it a second time (1981), CVEA failed to submit a statutory protest to the allotment application. We could only rule in favor of CVEA by determining both that BLM's approval of the ROW in part (though not the part at issue here), effective 1982, related back to either the date the application was first filed or the date CVEA unilaterally constructed the ROW in anticipation of BLM's approval, and also that the date of CVEA's application or construction (1965) is meaningful in establishing rights to portions of the ROW rejected at the time Sabon submitted her application (1971) and held for rejection in 1982. There is no basis in law or regulation for such a holding. Neither the application nor CVEA's facility construction constituted an approved ROW, and neither appropriated the public lands as against future potential occupants. We leave the broader issues regarding the "relation-back" doctrine raised by CVEA to another case.

STATEMENT OF APPLICABLE LAW

CVEA applied for a Federal ROW for an electrical transmission line in 1965. Sabon applied for a Native allotment in 1971. Accordingly, we begin with a brief discussion of law applicable to such applications at the relevant times. We then turn to the facts of record relating to both applications.

A. Rights-of-Way.

The law governing Federal ROWs when CVEA submitted its application was the Act of March 4, 1911, *as amended*, 43 U.S.C. § 961 (1964), which authorized the Secretary "under general regulations to be fixed by him, to grant an easement for [ROWs] . . . over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electric power" Departmental regulations effective in 1965 appeared at 43 C.F.R. Subpart 2234, and applied within Alaska. 43 C.F.R. § 2234.1-1(a)(3) (1965).

These rules provided that any application "must be accompanied by a map prepared on tracing linen and . . . five print copies thereof, showing the survey of the [ROW], *properly located . . . so that said [ROW] may be accurately located on the ground* by any competent engineer or land surveyor," and must comply with specific requirements as to, *inter alia*, scale, courses, distances, location of initial and terminal points, and other specifications in the case of unsurveyed land. 43 C.F.R. § 2234.1-2(d) and (d)(i)-(vii) (1965) (emphasis added). The ROW applicant could request permission to construct the facility in advance of the ROW's approval. *Id.* at § 2234.1-3(b)(1) (1965). BLM had authority to permit advance construction on a "satisfactory showing" of necessity, *id.*, but the applicant proceeded at its peril:

(2) Any grant of advance permission is *solely for the convenience of the applicant and is not a commitment by the Department that a[n ROW] will be approved*. The Department's authority in acting on a[n ROW] application is not restricted in any way by the grant of advance permission or any requirements laid down in such grant of permission and the Department may impose additional or different requirements within the scope of the applicable statute and lawful regulations thereunder, as conditions precedent to the approval of the [ROW]. *A grant of advance permission is revocable at will, and the grantee assumes all the risk of operating under such permission.*

(3) Any occupancy or use of the land of the United States without authority will subject the person occupying or using the land to prosecution and liability for trespass.

43 C.F.R. § 2234.1-3(b) (1965) (emphasis added). Moreover, while advance construction allowed an applicant to delay compliance with some aspects of the application process, the obligation to submit proper maps to identify the location of the ROW could not be waived. To the contrary, 43 C.F.R. § 2234.1-3(b) (1965) specified that “[r]equests for advance construction authority need not meet the formal requirements of § 2234.1-2(a) to (c)”; by contrast it did not allow the applicant to avoid subsection 2234.1-2(d) (1965) -- the requirement to submit maps with identified and verifiable locations.

BLM “will approve” an ROW application that “is complete and in conformity with the law and regulations and [for which] all required reports have been obtained” 43 C.F.R. § 2234.1-4(a)(1) (1965). By contrast, an “application which does not conform” will be rejected. *Id.* at (a)(2). Upon completion of construction, the ROW holder must submit “proof thereof” in a standard form statement and certificate (Forms 5 and 6 at Appendix B to the regulations) attesting that the facility actually constructed “conform[s] to the map and field notes which received the approval” (Form 5) and is found “on the exact location represented on the map approved” by the Department (Form 6). 43 C.F.R. § 2234.1-4(b)(1) (1965). If the construction deviated from what was approved or applied for, the “party in interest must file a map of amended location of the [ROW] for the project as actually constructed.” *Id.* “Any deviation made prior to such approval will be at the risk of the applicant.” *Id.*

Rules in place when CVEA first pursued an ROW for the lands in question were unequivocal in requiring the applicant to map its location so that it could be identified by BLM; the applicant was also required, if advance permission to construct were granted, to conform its construction to the approved map. Any unilateral action by the applicant, whether by advance construction or by deviation from the ROW requested or ultimately approved, was undertaken at the risk of the applicant.

Effective October 21, 1976, Congress enacted section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2793, which repealed the prior 1911 legislation governing ROWs across the public lands, subject to valid existing ROWs. FLPMA substituted new provisions governing ROWs for electric transmission lines at section 501(a)(4), subject to applicable regulations. 43 U.S.C. §§ 1761(a)(4) and 1765 (1976 and 2006). FLPMA provided that any pending application “shall be considered as an application under” Title V of FLPMA. 43 U.S.C. § 1770(a) (2006). In regulations adopted in 1980 and amended in 1986, BLM retained requirements that any application be accompanied by “a map, USGS quadrangle, aerial photo or equivalent” showing the location of the proposed ROW, 43 C.F.R. § 2802.3(a)(3) (1995). Under these rules, this Board routinely affirms BLM’s denial of ROW applications when an applicant’s information is incomplete or erroneous. *E.g.*, *Pete Zanetti*, 113 IBLA 239, 241 (1990); *Edward J. Connelly*, 94 IBLA 138, 145-46 (1986); *John W. Barbee*, 60 IBLA 81, 84 (1981); *cf.* *Santa Fe Northwest Information Council, Inc.*, 174 IBLA 93 (2008) (majority and dissenting opinions on sufficiency of application).

B. Native Allotments and Alaska Native Claims Settlement Act.

The Alaska Native Allotment Act (Act of May 17, 1906), *as amended*, 43 U.S.C. §§ 270-1 through 270-3 (1970), provided legal authority for the Secretary to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy for a 5-year period. *Joan A. (Anagick) Johnson*, 159 IBLA 121, 122-23 (2003); *Forest Service, U.S. Department of Agriculture*, 143 IBLA 175, 177-78 (1998). The most recent set of regulations applicable to BLM’s consideration of Native allotment applications was promulgated in 1970, and remains in effect with minor amendments. *See* 43 C.F.R. Subpart 2561 (1971, 2008), 35 Fed. Reg. 9597 (June 13, 1970). In addition, prior to 1971, various statutory enactments provided authorization for individual Alaskan Natives and Native groups to apply for land transfers. *See, e.g.*, Alaska Native Township Act of 1926, 43 U.S.C. §§ 733-36 (repealed 1976).

By the late 1960s, a number of legal issues and actions had arisen with respect to lands within Alaska claimed by Native Alaskan individuals and groups, leading to new legislation dealing with Native claims and land rights. *See* S. Rep. No. 92-405, at Part VI (Oct. 21, 1971). On December 18, 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 688, 43 U.S.C. §§ 1601 *et seq.*, with goals of enhancing the standard of living of Alaska Natives by settling Native land claims and disputes, establishing a compensation fund, and permitting land selections by Native villages and regional corporations. *Joan A. (Anagick) Johnson*, 159 IBLA at 122.

In order to preserve the status quo pending consideration of ANCSA and thereafter, the Department of the Interior and Congress issued a series of orders which prevented appropriation of lands in Alaska between 1969 and 1972. To preserve the status of Alaska lands pending legislation, on January 17, 1969, the Secretary of the Interior issued Public Land Order No. (PLO) 4582, which withdrew all unreserved public lands within Alaska from appropriation or selection under the public land laws. 34 Fed. Reg. 1025 (Jan. 22, 1969). This PLO was extended and continued in effect until the passage of ANCSA. PLO 4962 (Dec. 11, 1970); PLO 5081 (June 24, 1971). Section 17(d)(1) of ANCSA expressly revoked PLO 4582, but, at the same time, established a 90-day temporary withdrawal of “all unreserved public lands in Alaska from all forms of appropriation under the public land laws” 43 U.S.C. § 1616(d)(1) (2006).¹

ANCSA permitted Native villages and regional corporations to select for conveyance lands within Alaska within 3 years after December 18, 1971. Section 12(a) of ANCSA permitted Native village corporations (identified in ANCSA section 11) to select lands within townships in which any part of the village is located. 43 U.S.C. § 1611(a)(1) (2006). Section 11(a), 43 U.S.C. § 1610(a)(1) (2006), withdrew land within townships enclosing a Native village subject to valid existing rights. Section 16 of ANCSA specified further withdrawals of or applications for land, subject to valid existing rights, within particular townships and villages. 43 U.S.C. §§ 1615, 1613(h)(5) (2006).

But ANCSA extinguished any claims based on “aboriginal right, title, use or occupancy of land or water areas in Alaska,” and claims based on statute or treaty relating to Native use and occupancy. 43 U.S.C. § 1603(a) through (c) (2006). Section 18(a), 43 U.S.C. § 1617(a) (2006), expressly repealed the Act of May 17, 1906, but grandfathered applications for Native allotments pending on ANCSA’s enactment date, December 18, 1971. 43 U.S.C. § 1617(a) (2006).

On May 30, 1973, 38 Fed. Reg. 14218, BLM promulgated rules implementing ANCSA, including rules governing BLM’s administration of lands that had been the

¹ The point of section 17(d) was to provide the Secretary time to take affirmative action to withdraw lands for particular purposes, without intervening selections or appropriations. The Secretary could withdraw lands for specified purposes within 9 months pursuant to subsection (d)(2)(A), after which subsection (B) provided that lands not withdrawn became available for State selection and appropriation under the public land laws. *Id.* at § 1616(d)(2)(B) (2006). Withdrawals issued under the authority in section 17(d)(1) during the 90-day moratorium did not expire, while withdrawals issued during the 9-month period in section 17(d)(2) expired within 5 years under the terms of subsection (d)(2)(D). *Id.* at § (d)(2); *Asamera Oil, Inc.*, 77 IBLA 181, 185-86 (1983).

subject of Alaska Native selections. 43 C.F.R. Subpart 2650. These rules contained specific requirements for BLM decisionmaking with respect to lands that were selected by Native individuals and groups under ANCSA. Thereafter, before BLM could issue a contract, ROW, or other land permit for such lands, “views of the concerned regions or villages shall be obtained and considered.” 43 C.F.R. § 2650.1(a)(2)(i) (1974).

C. Alaska Native Interest Lands Conservation Act

On December 2, 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487. Section 905(a) was enacted, *inter alia*, to resolve pending and unresolved Native allotment applications by establishing that they were legislatively approved without adjudication under the Native Allotment Act, thereby promoting finality. S. Rep. No. 413, 96th Cong., 2d Sess. 237, *reprinted in* 1980 U.S.C.C.A.N. 5181. Section 905(a) provided for automatic legislative approval of pending allotment applications in certain circumstances:

Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906, . . . which were pending before the Department of the Interior on or before December 18, 1971, and which describe . . . land that was unreserved on December 13, 1968², . . . are hereby approved on the one hundred and eightieth day following December 2, 1980, except where provided otherwise by paragraph (3), (4), (5), or (6) . . . of this subsection

43 U.S.C. § 1634(a)(1) (2006). Thus, effective June 1, 1981, all applications pending on the December 18, 1971, date of ANCSA’s repeal of the Alaska Native Allotment Act and describing land unreserved on December 13, 1968, would be legislatively approved, with exceptions provided in subsections 905(a)(3)-(6). 43 U.S.C. § 1634(a)(1) (2006); *see Heirs of Harlan Mahle*, 171 IBLA 330, 385 (2007).

Section 905(a)(5) provided that an application was not subject to legislative approval under subsection (a)(1) if a protest was filed against it.

² Dec. 13, 1968, is the day preceding publication of the application for PLO 4582, 33 Fed. Reg. 18591 (Dec. 14, 1968). S. Rep. No. 413, 96th Cong., 2d Sess., *reprinted in* 1980 U.S.C.C.A.N. at 5228. As explained in *Betty J. (Thompson) Bonin*, 151 IBLA 16, 26 n.8 (2000), that date was the “earliest date which would not run into the controversy as to when the lands affected by PLO 4582 had been removed from entry and location.” It was “chosen clearly for the purpose of allowing legislative approval of those allotment claims which were initiated subsequent to that date on lands which would have been available but for the withdrawal effected by PLO 4582.” 151 IBLA at 25.

Paragraph (1) of this subsection . . . shall not apply and the Native allotment application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, if on or before the one hundred and eightieth day following December 2, 1980—

. . .

(C) A person or entity files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity.

43 U.S.C. § 1634(a)(5) (2006). Accordingly, individuals who objected to an allotment or claimed an interest in or improvements on the land described in a Native allotment application were allowed to file a protest of such application within 180 days of the enactment of ANILCA, or no later than June 1, 1981. In the absence of a protest, an application would be legislatively approved on that date. A protest filed after the passage of the 180 days must be dismissed. *Thelma M. Eckert*, 115 IBLA 43, 47 (1990).

Section 905(e) also required BLM, in making determinations which would lead to the granting of an allotment certificate, to adjudicate title disputes. It states:

Prior to issuing a certificate for an allotment subject to this section the Secretary shall identify and adjudicate *any record entry or application for title* made under an Act other than [ANCSA], the Alaska Statehood Act, or the Act of May 17, 1906, as amended, which entry or application claims land also described in the allotment application, and shall determine whether such entry or application represents a valid existing right to which the allotment application is subject. . . .

43 U.S.C. § 1634(e) (2006) (emphasis added).

FACTUAL AND PROCEDURAL BACKGROUND

A. CVEA's ROW Application and BLM's Rejection Decisions.

By letter dated March 26, 1965, CVEA submitted an application to BLM for an ROW grant for three segments of a 14.4 kV electrical distribution line, 50 feet in width and totaling approximately 40 miles. *See Ex. 1 to BLM's 2009 Supplemental Brief*. It was serialized as A-062297. The application was "made pursuant to Title 43, Chapter 2, sub part 2234 of the code of Federal Regulations." *Id.* at ¶ 6. The

segment at issue here (segment 1) was to run parallel to the Glen (also Glenn) Highway Tok Cutoff, from miles 2.8 to mile 12.5. *Id.* at ¶ 8.³ Maps of Alaska available on the internet confirm CVEA's reports that the Tok Cutoff is a part of the Glenn Highway that connects Tok, Alaska, with the Richardson Highway at Gakona. Statement of Reasons (SOR) at 4. For reference, Sabon's Native allotment lies at "approximately mile 12 of the Tok Cutoff," close to the termination of the transmission line at "Aurora." *Id.*

With its application submitted March 29, 1965, CVEA attached as Exhibit B maps of the three segments. A cover sheet, however, stated that the "attached maps are preliminary. Complete designations of the route will be provided as part of the as-built drawings that will be forwarded at a later date." Application Ex. B cover note (emphasis added). The maps in the record consist of the described segments drawn on paper with written descriptions and measurements, but without any corresponding map of Alaska or on-the-ground landmarks.

We emphasize the language in this cover sheet because it articulates CVEA's expectation that it could delay filing specific, identifiable route designations until after the facility was built. CVEA presumed that construction would substitute for advance planning and that identification of the precise ROW route would occur as work crews developed it on-site. CVEA thus assumed that it would be allowed to build first and map later an ROW "as-built" by its contractor. CVEA's failure to identify planned route locations contradicted 43 C.F.R. § 2234.1-2(d) (1965), which required identification of the ROW location and route on maps at the time of application, notwithstanding whether the application sought permission to construct in advance. 43 C.F.R. § 2234.1-3(b) (1965). The record shows that CVEA's imprecise approach towards the ROW's location during the application process, while consistent perhaps with common utility practice almost a half-century ago, thwarted BLM's effort to follow its rules and made it impossible for BLM to grant the ROW until a 1980s Departmental policy was instituted to resolve thousands of miles of unauthorized land use by issuing ROWs where possible.

Beginning in April 1965, the record contains a number of documents showing that CVEA sought permission to construct the ROW segments in advance of a final ROW decision, hired contractors, and proceeded to clear land to construct the ROW, while BLM struggled to ascertain the precise location of the proposed transmission lines. *E.g.*, Mar. 29, 1965, BLM telephone memorandum (indicating that CVEA had orally requested permission for advance construction); Apr. 5, 1965, letter from

³ The other portions are some distance away. Segment 2 would parallel the Richardson Highway from mile 130.3 to mile 132, while segment 3, the longest, "parallels the Glen Highway from mile 145.5 to mile 119 thence in a generally southerly direction approximately two miles." *Id.*

CVEA to BLM (asking for “permission to commence advance construction before receiving official permit” during summer season); Apr. 14, 1965, ROW Check Slip (ROW application A-062297 does not meet requirements of regulations, “can not plot, no distances and degrees”); Apr. 14, 1965, letter from CVEA to BLM (advising BLM that CVEA had awarded contract for route “clearing” and was awarding construction contract, and seeking authorization to begin construction on Apr. 26, 1965); Apr. 28, 1965, letter from BLM to CVEA (“preliminary maps [for other segments] do not contain courses and distances as required by 43 CFR 2234.1-2(d)(ii) and cannot be accurately plotted,” and explaining that advance permission requires appropriate clearances with the Alaska Highway Department and the Bureau of Reclamation); Apr. 28, 1965, letter from BLM to Alaska Department of Highways; May 10, 1965, letter from Alaska Department of Highways to BLM (asking for route changes to “Gakona to Aurora” (Tok Cutoff) segment while awaiting maps on other segments); May 10, 1965, BLM handwritten note of communication (CVEA had “contracts out for further line (power) clearing . . . would like permission to go ahead with project . . .”); June 16, 1965, letter from BLM to CVEA (explaining that “advance permission for Gakona to Aurora segment” could be approved after maps were submitted that would resolve Alaska Highway Department concerns).

On July 29, 1965, CVEA’s contractor, DeWild Grant Reckert & Stevens, submitted maps and a letter to BLM explaining that they enclosed “one linen and five prints of the right-of-way” for all segments. By letter dated September 27, 1965, BLM advised CVEA that the maps for the portion from Gakona to Aurora and the short portion from Mile 130 to 132 along the Richardson highway were satisfactory, but the maps for the other segments contained discrepancies requiring correction. These corrections were allegedly made and submitted on new maps on November 29, 1965. No record document indicates that BLM ever gave advance permission, but CVEA did construct the transmission lines, and BLM apparently did not object.

The BLM Resource Area Manager, Glenallen Field Office, conducted a field examination for segment 1, apparently in anticipation of granting the ROW. But by memorandum dated April 4, 1966, he reported that the location of the lines as built did not square with the maps CVEA had submitted; he annotated a copy of CVEA’s map, and explained that “the starting point of the power line [ROW] is over one-half mile east of where it is shown on the records.” He stated that the lines and highway needed to be “replotted using the starting point on the attached map.” In an April 14, 1966, ROW Check Slip, a BLM employee questioned the scale of the maps, and stated:

An attempted re-plotting of the CVEA R/W as per [the] memo of 4-4-66 . . . revealed that the [point of beginning] was indeed mis-plotted on our plats \pm ½ mile westerly of the actual P.O.B. indicated by the field examination.

The re-plotting also disclosed that the maps submitted by the applicant are inaccurately plotted. The problem is a discrepancy between the stated length of a course and distance and the “as plotted” length. The error exceeds 400' in 2.5 miles at one point. . . . the error involved placed the relative positions of the highway and powerline R/W in different positions. Since we have no application for the highway R/W there is no way to confirm any positioning.[⁴]

In view of this fact, and the lack of a written metes and bounds description, the certainty of being able to plot the powerline R/W accurately becomes very doubtful.

Apr. 14, 1966, Memorandum of Records Section. This problem occurred for segment 1, but “is to be found on the maps of other sections of the powerline R/W also.”

On April 28, 1966, BLM sent a letter to CVEA explaining that it had examined the ROW maps; it advised CVEA that, “instead of correcting the incomplete maps as originally filed on March 29, 1965, and amended on July 29, 1965, maps showing the project as actually constructed could be filed if there is substantial deviation from the location originally given.” BLM reminded CVEA that “the grant has not yet been approved” and gave CVEA 60 days to “complete and validate the application . . . failing in which the incomplete application must be rejected.”

By letter dated April 29, 1966, CVEA advised BLM that its engineer would be in Alaska within 30 days and would make “final calculations . . . on the ground” and requested an unstated extension of time. Months passed.

On August 30, 1966, BLM served CVEA with a letter giving the company another 30 days from receipt to comply with the April 28, 1966, letter. “Your failure to comply will result in rejection of the application.” Months passed.

On December 29, 1966, BLM issued a decision entitled “Application Rejected.” 1966 Decision. BLM explained that CVEA had not submitted corrected maps, rejected the application, noted the right of appeal, and explained that the case would be closed when the time for appeal passed. In a cover letter, BLM’s Chief, Division of Lands and Minerals Program Management, advised the District Manager, Anchorage, to “institute trespass proceedings.” CVEA did not appeal, and therefore that decision became final.

⁴ The highway ROW includes land covered by the State of Alaska’s application, serialized A-067759, along which the Tok Cutoff is constructed.

CVEA did, however, submit a new set of maps on February 2, 1967. BLM reviewed this information. By memorandum dated February 6, 1967, a BLM Records Section employee explained that attempting to replot “the powerline in light of the annotated applicant’s map (Gakona to Aurora, sheet 1 of 2) . . . [t]he problems encountered . . . 4/13/66 are still with us; namely, trying to show the powerline in its relation to the Tok Highway.” Explaining that the cause of the error remains “the difference between the staked length of each bearing and the actual distance drawn,” he stated that “[i]t is my opinion that . . . our plotting will remain uncertain until completely new maps or a written Metes and Bounds or both are submitted.”⁵ A handwritten record states that CVEA’s map “meets the requirements of the regs[,] plotting problems notwithstanding. There could be several very good reasons why the road on our map is different from the road as shown in the maps submitted by the applicant.” The note is unsigned.

An unauthored June 18, 1967, “Short Note Transmittal” requested a land report. On June 29, 1967, a BLM employee (Hampson) identified the Tok Cutoff portion of the ROW for the first time as located in Ts. 6 and 7 N., R. 1 E., and T. 7 N., R. 2 E., Copper River Meridian (CRM), and recommended that the “proof of construction” be accepted. This Land Report is followed by a handwritten analysis (by “Ellie”) about the longest segment of the ROW (segment 3) along the Glen Highway, indicating more problems with plotting that segment and locating the highway. The drafter of this memorandum explained that it is “BLM’s intent” to plot the locations on public land maps.

The next documents in the record are extensive and detailed BLM Master Title Plats (MTPs) for all townships covered by the three ROW segments, current to June 15, 1972, and dated March 20, 1973. As best we can determine, BLM plotted the ROW segments on its MTPs in preparation for revisiting the application.

On October 9, 1974, BLM issued a Decision to CVEA entitled “Decision of December 29, 1966 Vacated; Additional Information Required.” 1974 Decision. The 1974 Decision vacated the 1966 Decision rejecting the application. BLM ordered CVEA to submit five copies of maps in compliance with regulations, which by then had been amended at 43 C.F.R. Subpart 2802. In addition, BLM explained that under ANCSA, the Native villages of Gakona and Gulkana had submitted land selections which covered portions of the lands covered by the proposed ROW segments. “It is the responsibility of the applicant to obtain the comments and views of the residents of the Native villages . . . and the Native regional corporation, Ahtna, Inc. (Copper River Native Assn.). This information must be obtained by [CVEA] and

⁵ A metes and bounds description of land which has not been surveyed under the rectangular system of public land surveys describes the land by giving courses and distances and a tie to a public land corner. *Hugo H. Pyes*, A-30541 (June 9, 1966).

filed in this office.” 1974 Decision at 1. BLM explained that, once it received new maps and the information regarding Native selections, it would be able to continue processing the subject application. *Id.* at 2.

On March 28, 1978, BLM issued a new decision entitled “Application Held for Rejection, Additional Information Required.” 1978 Decision. Explaining that CVEA had not responded to the 1974 Decision, BLM held the application for rejection without further notice, and gave CVEA 30 days to respond. In a brief letter dated April 20, 1978, CVEA provided maps and stated: “It is our understanding that since our application was filed and construction was completed several years before the ANCSA, it is not necessary to obtain comments from the native organizations.” CVEA did not otherwise explain its 3.5 years of silence in response to the 1974 Decision. This letter first articulated CVEA’s view that its filing of an ROW application and construction of lines in 1965 established valid rights that foreclosed any subsequent conflicting land entry.

A May 22, 1978, memorandum signed “Dave H,” again confirmed problems with CVEA’s maps, presumably the ones submitted in 1978. The “geographic ties in this case are inconsistent with themselves . . . since the [townships] are [now] surveyed it might be suggested that the project be tied to the survey system and eliminate the discrepancy.”

BLM issued another Decision, entitled “Application Rejected, Case Closed,” dated July 31, 1981. 1981 Decision. BLM explained that CVEA had refused to comply with BLM’s previous directives to communicate with the Native associations, and explained that 43 C.F.R. § 2650.1(a)(2)(i) required that “views of the concerned regions or villages shall be obtained and considered” before BLM may grant an ROW. Explaining that FLPMA ROW regulation 43 C.F.R. § 2802.4(c) permits BLM to reject an application “where a deficiency notice has not been complied with,” BLM did so. 1981 Decision at 2. CVEA timely submitted a Notice of Appeal which BLM transmitted to this Board, where it was docketed as IBLA 81-959. The case transmittal memorandum was accompanied by a list of conflicts with CVEA’s ROW application, including Sabon’s allotment application.⁶

B. Sabon’s Native Allotment Application.

On July 18, 1971, Sabon signed a Native allotment application pursuant to the Act of May 17, 1906, in which she asserted qualifying seasonal use and occupancy of lands, for hunting, trapping, berry-picking and firewood-cutting for subsistence

⁶ CVEA filed a Request for Hearing but did not follow regulations requiring service on this Board. *See* Sept 22, 1981, Request for Hearing, and cover memorandum from BLM forwarding request to Board.

purposes, since June 1954. She reported no improvements. A February 23, 1973, memorandum from the Bureau of Indian Affairs (BIA) to BLM explained that BIA received the application “date stamped July 20, 1971.” BIA transmitted it to BLM on March 24, 1972. The application itself sought 160 acres of public land in sec. 18 in unsurveyed T. 7 N., R. 3 E., CRM, and a map attached to the application drew the site as within T. 7 N., R. 3 E. But by memorandum dated August 16, 1972, BIA sought to “correct” the legal description to encompass 160 acres of land in T. 7 N., R. 2 E., CRM. In its 1973 transmittal, BIA explained that it had made an error in plotting the land on the wrong map and had therefore incorrectly typed the application as located within R. 3 E. BIA explained that the land described by Sabon was actually located in secs. 7 and 18, T. 7 N., R. 2 E., CRM, and thus it plotted the allotment within secs. 7 and 18, straddling the Tok Cutoff near the Copper River.

In 1980, BLM issued an MTP for T. 7 N., R. 2 E., CRM, which plainly showed Sabon’s allotment, crossed by CVEA’s ROW application. At that point, the application had been revived by the 1974 Decision and not yet rejected by the 1981 Decision. Both serial numbers are correctly listed on the 1980 MTP.

C. BLM’s Approval of the Native Allotment and the ROW

By 1980, BLM’s current MTP plotted the ROW application in direct conflict with Sabon’s Native allotment application. By June 1981, CVEA had not protested Sabon’s application under ANILCA section 905(a)(5)(C). In July 1981, BLM rejected CVEA’s application and CVEA then appealed. BLM had neither identified Sabon’s application as having been legislatively approved nor had BLM adjudicated it, despite a clear Congressional directive to do one or the other.

In the early 1980s, independent of CVEA’s 1981 appeal, the Washington, D.C., Office, BLM (WO), confronted thousands of miles of unauthorized occupancy of public lands for ROW use, existing when FLPMA was enacted in 1976. Sept. 29, 1980, Instruction Memorandum (IM) No. 80-822. On October 8, 1981, the WO issued IM No. 82-16, entitled “Unauthorized [ROWs] that Existed Prior to October 21, 1976,” which provided “revised guidance for authorizing unauthorized uses” which existed on that date. The IM explained that FLPMA required BLM “to manage the public lands and collect fair market rental fees for non-Federal uses of the public lands. Currently, it is estimated that we have in excess of 100,000 miles of unauthorized [ROW] uses on the public lands. Our objective is to have all of these uses under authorization by July 31, 1984.” The IM directed BLM State Offices to contact unauthorized users of the public lands and attempt to place their uses under ROW grant. The “objective [was] to place these uses under authorization by July 31, 1984, to protect the user, provide adequate records for land management, and obtain a fair market return for the public. A grant based on an incomplete or poor application is better than no grant.” IM 82-16 at 2.

Under this directive, BLM requested dismissal and remand of CVEA's pending appeal, which the Board granted, and BLM resumed consideration of CVEA's application. On February 24, 1982, BLM granted a partial ROW in a decision entitled "Non-Returnable Payment Required, Right-of-Way Application Rejected in Part, Right-of-Way Application Held for Rejection in Part, BIA Comments Required, Advance Rental Required, Right-of-Way Grant Transmitted for Signature." 1982 Decision. BLM granted the ROW application in part, subject to annual rental of \$2,550, to the extent not in conflict with Native occupancy. But it rejected the application where it conflicted with Native village selections, and it "held for rejection" the application "as to those portions affecting [expressly identified] unapproved Native allotment claims," including Sabon's allotment application (AA-7336). *Id.* at 2. As to the portions "held for rejection," BLM explained that CVEA "must furnish evidence of BIA concurrence before BLM can grant a[n] ROW across an unapproved Native allotment claim" within 60 days, or ask for an extension of time. *Id.* at 3. With the 1982 Decision BLM transmitted the partial ROW grant, which was subject to all "valid rights existing on the effective date of this grant." ROW at Special Stipulation 14. CVEA signed the ROW grant on March 10, 1982, and paid a first annual rental of \$2,550 on March 25, 1982. CVEA did not appeal the 1982 Decision, challenge the ROW grant, sign it under protest, or submit BIA concurrence as to the Sabon allotment within 60 days or thereafter.

A year later, on April 4, 1983, BLM conducted a field examination of Sabon's pending Native allotment. The examiner's report, issued April 5, mapped the allotment, showed the Tok Cutoff and CVEA's powerlines, and noted in writing that both the highway and powerline transect the allotment. Field Examination Report at ¶ D.4. On July 8, 1983, BLM issued a decision finding that Sabon's Native allotment application AA-7336 had been legislatively approved, effective June 1, 1981, pursuant to ANILCA section 905(a)(1), 43 U.S.C. § 1634(a)(1) (2006), pending a final boundary survey. The decision also stated that the allotment would be subject to an easement for the Tok Cutoff as established by PLO 1613, 23 Fed. Reg. 2376, pursuant to the Act of August 1, 1956, 79 Stat. 898, and transferred to the State of Alaska pursuant to the Alaska Omnibus Act, Pub. L. No. 86-70, 73 Stat. 141. BLM conducted U.S. Survey No. 10277, Alaska, for Sabon's allotment; it was officially filed on March 10, 1997.

In April 1998, BLM issued at least two decisions addressing Alaska's road ROW and CVEA's powerline ROW application.⁷ In its April 23, 1998, decision, the State Office declared CVEA's right-of-way null and void to the extent it crossed Sabon's allotment. BLM stated that Sabon's vested preference right under her allotment application, which was legislatively approved, related back to her 1954 initiation of

⁷ The record contains material related to applications submitted by the State of Alaska, Native village selections, and rental assessments, not relevant here.

qualifying use and occupancy under the Native Allotment Act. BLM held that this 1954 date predated and preempted CVEA's conflicting 1965 ROW application for the same land.

CVEA appealed from the State Office's April 1998 decision, and this is the appeal that is the subject of this decision.

Shortly thereafter, the State Office issued a decision, dated April 28, 1998, declaring the State highway ROW for the Tok Cutoff, A-067759, null and void to the extent it conflicts with Sabon's Native allotment. The State appealed to this Board, which affirmed in part and reversed in part BLM's decision. *State of Alaska (Sabon)*, 154 IBLA 57 (2000). The Board agreed with BLM that Sabon's vested preference right related back to the initiation of her qualifying use and occupancy in 1954. But we found that PLOs had effectuated a withdrawal of the land on which State highways were constructed, subject to the State's ROW applications, back to 1949. See PLO 601, 14 Fed. Reg. 5048 (Aug. 16, 1949), continued by PLO 1613, PLO 757, 16 Fed. Reg. 10749 (Oct. 16, 1951). PLO 1613, 23 Fed. Reg. 2376 (Apr. 11, 1958), revoked PLO 601 but established an easement for the Tok Cutoff, encompassing all surveyed and unsurveyed public lands lying within 150 feet on either side of the center line of the highway. 23 Fed. Reg. at 2377. While "the effect of PLO 1613 was to permit Sabon to commence use and occupancy in 1958, it also made that use and occupancy subject to the highway easement which extended 150 feet on each side of the center line." *State of Alaska (Sabon)*, 154 IBLA at 62. Thus, while we otherwise affirmed,⁸ in the case of road ROW lands covered by the PLOs which had withdrawn the land, we reversed because the State ROW constituted a "valid existing right" under section 905(a) of ANILCA. *Id.*

ARGUMENTS ON APPEAL

In its SOR, CVEA presents six arguments. CVEA's first argument is a policy grievance against ANILCA section 905(a)'s legislative approval provision. CVEA claims that "CVEA has done no wrong here," and that it could have had no possible way, when it constructed its transmission lines near the Tok Cutoff, to anticipate that Sabon would submit an allotment application for lands straddling the lines. If we uphold the BLM decision, CVEA contends, it will be forced to shoulder the extreme financial burden of compensating allottees for trespass. "[W]hat the United States has accomplished to date is to shift from itself to innocent third parties the very significant cost of the implementation of its policy, enunciated in ANILCA § 905(a), of legislatively approving Native allotments on a wholesale basis, without individual adjudication." SOR at 12-13.

⁸ We held that approximately 0.5 acres, out of all of the land claimed by Sabon and crossed by the State highway ROW, was properly excluded from the ROW.

Second, CVEA argues that its 1965 ROW application predates the Native allotment application which Sabon submitted in 1971 at the earliest. Sabon's use and occupancy can only predate CVEA's 1965 ROW through the relation-back doctrine adopted by the Board in *Golden Valley Electric Association (On Reconsideration)*, 98 IBLA 203 (1987), which, CVEA complains, was the first time the Board allowed the date of a Native allotment application to relate to the date of first use and occupancy instead of the date of the application. CVEA argues that it is unfair to find that Sabon's use pre-dated CVEA's ROW when it was impossible for either the utility or the Department to have been aware of inchoate rights she had not yet asserted. CVEA contends that Sabon's Native allotment should have been granted subject to its powerline ROW. CVEA also asserts that the "relation back" doctrine contradicts ANILCA section 905(a)'s requirement that legislative approval of Native allotments be made "subject to valid existing rights." SOR at 47. CVEA states that Congress "certainly did not intend to ignite decades of litigation and force holders of permits and rights-of-way to pay millions of dollars for rights they had already been granted, or for which they had already applied, or where they had already constructed facilities and occupied the land." SOR at 48.

Third, CVEA contends that Sabon's allotment application was actually submitted to BLM in 1972, and therefore was not pending before the Department on December 18, 1971, when ANCSA extinguished all other rights, was not preserved by ANCSA, and could not have been legislatively approved under ANILCA. SOR at 18. CVEA reasons that if Sabon's application was not timely submitted, BLM "lacks a colorable claim that the allotment is valid."⁹ SOR at 25. CVEA seeks an evidentiary hearing regarding the timeliness of Sabon's application. *Id.* at 23. In its 2009 Brief, at 14, CVEA denies any intent to invalidate the allotment, but asks us to hold that it was subject to CVEA's ROW.

Fourth, CVEA claims that Sabon's use and occupancy of her allotment was not sufficiently "open and notorious" to put CVEA on notice of her use and occupancy of the land. SOR at 26, citing *State of Alaska (Irene Johnson)*, 133 IBLA 281 (1995). In that case, this Board required a hearing to determine whether a 1965 mineral ROW granted to the State of Alaska was a valid existing right under ANILCA section 905(a), requiring legislative approval of an allotment to be subject to the ROW. CVEA contends that this precedent controls here and prevented legislative approval of Sabon's allotment because, in 1965 when it constructed the transmission line, the record shows that her use was not sufficiently open and notorious. Therefore, CVEA claims, Sabon's "allotment is subject to the CVEA right-of-way." SOR at 32. Conversely, CVEA claims that "Sabon and the Department of the Interior

⁹ CVEA asserts that BLM could not "adjudicate the allotment." SOR at 24. Presumably, CVEA means to challenge BLM's finding that the allotment was legislatively approved.

thus lack a colorable claim to this allotment.” *Id.* As noted above, however, CVEA’s 2009 Brief clarifies that it does not seek to invalidate the allotment, but only to make it subject to the ROW.

Fifth, CVEA asserts that its ROW application was a “valid existing right” under ANILCA section 905(a) because the lines were constructed before ANILCA was enacted. SOR at 32. CVEA also claims that it had “State permits and applications for permits to the BLM.” *Id.* at 33. CVEA contends that the Board has authority to expand the scope of the term “valid existing right” to include an unapproved application “especially where the power lines were already constructed and in use serving the public.” *Id.* CVEA asserts that section 905(e) of ANILCA shows that any “application” is a valid existing right. Finally, CVEA argues that the approval of its ROW was merely a ministerial act, and BLM had no authority to reject it. *Id.* at 35, citing 43 C.F.R. § 244.14 (1954).¹⁰

Finally, CVEA asserts in its SOR that it received a utility permit from the State of Alaska to construct its transmission line within the State’s Tok Cutoff ROW. Therefore, CVEA asserts that to the extent the two coincide, CVEA possesses the same valid existing right that the State has along the Tok Cutoff. SOR at 37.

ANALYSIS

[1] CVEA argues that, by virtue of applying for an ROW across public lands and constructing transmission lines without an approved ROW from BLM, over time the route along which its lines were built ripened into a “valid existing right” as legally significant as an approved ROW under this Board’s precedent, *State of Alaska (Irene Johnson)*, 133 IBLA 281, and under ANILCA section 905(a) and (e), 43 U.S.C. § 1634(a) and (e) (2006). That it equates its application and construction to an approved ROW is clear at the penultimate page of its SOR where CVEA asserts that Congress would not “force holders of permits and [ROWS] to pay millions of dollars for rights they had already been granted, or for which they had already applied, or where they already constructed facilities and occupied the land.” SOR at 48 (emphasis added). We disagree. A “holder of an ROW” has rights founded in an approved ROW grant. By contrast, an applicant without an approved ROW grant is not a “holder of an ROW” even if it constructed its facility anyway. See *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1917) (acquiescence of government agents in the building of electrical facilities and transmission lines did not establish a right to use the land in the absence of compliance with applicable ROW legislation). What would have happened in this case had CVEA received an approved ROW in 1965, as did the State of Alaska in *State of Alaska (Irene Johnson)*, is the subject of irrelevant speculation. CVEA did not receive an ROW over Sabon’s lands, nor do we

¹⁰ The rule applicable to CVEA’s application is 43 C.F.R. § 2234.1-4(a)(1) (1965).

find that CVEA submitted an application that was “complete and in conformity with the law and regulations and [for which] all required reports have been obtained,” such that it was entitled to receive an ROW grant under 43 C.F.R. § 2234.1-4(a)(1) (1965). In the absence of such an approved grant, CVEA’s transmission lines are in trespass.

The critical difference between the holder of a valid permit or ROW, and an entity which never received one, was clearly articulated in rules governing CVEA’s application in 1965; they were forthright in notifying any ROW applicant that it bore full risk for any decision to construct its facilities in advance of ROW approval. Assuming that BLM’s silence in 1965 in response to CVEA’s request for permission for advance construction constituted acquiescence, such acquiescence was “solely for the convenience of the applicant,” “not a commitment by the Department that a right-of-way will be approved,” and “revocable at will”; CVEA “assumed all the risk of operating under such permission.” 43 C.F.R. § 2234.1-3(b) (1965).

BLM ultimately never approved an ROW for CVEA over Sabon’s lands and CVEA was not a holder of an ROW grant which Congress would protect on CVEA’s theory. By 1981, when Sabon’s allotment was legislatively approved, BLM had twice rejected CVEA’s entire application. Finally in 1982, in order to follow WO guidance, BLM granted a partial ROW over lands that expressly excluded those subject to Sabon’s application.¹¹ The IM which brought about this result, however, directed BLM State Offices to resolve use that was “unauthorized” on the 1976 date of FLPMA’s passage. CVEA’s partial ROW came about as a result of this IM; thus, CVEA’s use of even those lands for which CVEA *received* an ROW grant in 1982 was “unauthorized” in 1976. As to the portion of the ROW application crossing Sabon’s lands, CVEA’s use was rejected in 1971, unauthorized in 1976 and held for rejection in 1982. CVEA never held a valid existing right for an ROW across those lands and had no reason to expect that the portion of the ROW “held for rejection” would ripen into an ROW that was approved.

Nonetheless, CVEA requests the Board to conclude for purposes of addressing ANILCA that its occupancy ripened into the equivalent of a formal ROW grant effective the date of application or advance construction. CVEA’s argument presumes that the sheer existence of transmission lines for a beneficial public use (electricity) should compel us to conclude that an ROW for them was approved *de facto* over lands where it was denied, and for a location defined by wherever the lines can be found. In no uncertain terms, CVEA thus argues that it was entitled to appropriate

¹¹ We note that the ROW as approved was first effective in 1982. CVEA paid annual advance rental of \$2,550 for the ensuing year, as directed by BLM. BLM did not require and CVEA did not pay back rental to 1965. (The rental amount was amended by appraisal in 1984 to \$1,050.)

lands for an ROW by virtue of its construction decision. As noted above, applicable rules refute this suggestion as a matter of law. We cannot find otherwise even as a matter of equity.

CVEA's 1965 decision to construct its transmission lines did not constitute or become an ROW grant by BLM. From the outset, CVEA sidestepped the regulatory requirements for obtaining an ROW. When CVEA first applied for one in 1965, it did not submit a usable map pinpointing an identifiable location of its ROW, as required by 43 C.F.R. § 2234.1-2(d) (1965), instead advising BLM in writing that it would submit corrected maps of the ROW "as built." CVEA thus presumed that the option to construct the ROW in advance of approval conveyed permission to wait to submit maps that were required pre-construction until the route was decided by construction, contrary to 43 C.F.R. § 2234.1-3(b) (1965). Upon completion of construction, CVEA failed, despite BLM's requests over the course of years, to submit maps showing that the ROW as constructed is found "on the exact location represented on the map" submitted to the Department (Forms 5 and 6), or to "file a map of amended location of the right-of-way for the project as actually constructed." 43 C.F.R. § 2234.1-4(b)(1) ("any deviation . . . will be at the risk of the applicant"). Even decades later in this appeal, CVEA admits that it is "unsure," SOR at 37, of the precise location of its lines in relation to the roads and the State's road ROW.¹²

CVEA's suggestion that these delays were all BLM's responsibility is unfounded. Over and over, BLM sought correct maps and repeatedly, CVEA failed to provide accurate ones. When pressed, CVEA was silent, frequently for years, and was roused only by BLM's adverse decisions. Though in 1966 BLM requested accurate maps clarifying the actual placement of the transmission lines, it was only after BLM's 1966 Decision rejecting the entire ROW that CVEA submitted more maps in February 1967. These maps failed to provide accurate notice of the ROW's location consistent with the transmission lines actually constructed. Nonetheless, CVEA was again silent for 3.5 years after BLM's 1974 Decision vacating the prior 1966 Decision and repeating its demands for maps and communications with BIA. Only when CVEA's silence and lack of compliance provoked the 1981 Decision again rejecting the entire ROW did CVEA appeal. Nor was it CVEA's compliance that generated the partial ROW that ultimately was granted in 1982. To the contrary, it was BLM's WO policy to "authorize[] unauthorized use" of lands within the United States after the enactment of FLPMA, even where the application was incomplete, IM 82-16 at 2, that instigated BLM's effort to bring as much of the ROW application under lawful grant as it could in 1982. This set of facts makes it impossible for this Board to conclude

¹² Even were we to attempt to determine a precise location of the route, of the nature addressed by the Board in *State of Alaska (Sabon)*, 154 IBLA 57, it would be impossible when even CVEA remains unsure of where it is in relation to other land uses.

that BLM's granting an ROW for any of the lands subject to its application for one was merely a "ministerial act," as CVEA suggests.

Moreover, BLM's delay until 1998 to finally resolve outstanding portions of CVEA's ROW application did not change the fact that the ROW was not granted in 1982 for the disputed segment. The passage of 16 years from BLM's holding that the segment over Sabon's allotment would be held for rejection, in the absence of an affirmative showing by CVEA, does not cause the unapproved ROW to transform into the equivalent of an approved one, when the affirmative showing was never made.

In addition, CVEA consistently avoided any effort to assert timely legal protection of what it now claims to be valid rights as against Sabon's application. ANILCA gave CVEA 180 days, until June 1, 1981, to protest an allotment application that conflicted with an ongoing use of lands. CVEA did not file such a protest. CVEA suggests that it did not know it needed to file a protest because it presumed that any Native allotment application would be granted subject to the ROW which it had applied for and constructed in 1965. We have several difficulties with this argument. As noted, applicable rules plainly prohibited a conclusion that an incomplete application or unilateral construction decision afforded the applicant an ROW. In any event, by June 1981, CVEA's application had been pending for 16 years but "rejected" for half of that time – from 1966 to 1974 – a period covering Sabon's filing of her application. And BLM's 1974 Decision (vacating the 1966 Decision) provided notice to CVEA that BLM believed ANCSA-protected selections for lands covered by CVEA's transmission lines would have an impact on the application. BLM advised CVEA to communicate with BIA regarding ANCSA selections asserted by Native village corporations. CVEA was silent for years, finally advising BLM in 1978 that it did not believe it was compelled under ANCSA to communicate with BIA. Notwithstanding the implausibility of this legal analysis,¹³ the 1974 Decision refutes CVEA's assertion that it was unaware that Native allotment applications grandfathered by ANCSA may have conflicted with its unapproved ROW application. Whatever CVEA's legal position regarding the relative priority afforded its transmission lines as against a Native allotment application preserved by ANCSA, it is not credible for CVEA to assert that after the passage of ANILCA, it had no reason to believe there was any basis for submitting a protest under section 905(a)(5) to protect its conflicting rights. 43 U.S.C. § 1634(a)(5). In any event, ANILCA advised those with improvements on land subject to a Native allotment application to submit protests. *Id.* CVEA has never explained why it did not think this provision pertained to its situation.

¹³ Even regulations applicable in 1965 required an ROW applicant for Indian lands to submit applications with BIA. 43 C.F.R. § 2234.1-2(e) (1965).

We cannot accept any suggestion that CVEA had no knowledge of Sabon's application by the time ANILCA was enacted or that it did not know it had a deadline for submitting a protest. To the contrary, by 1980, BLM had issued an MTP for the precise township covered by both the Sabon application and by CVEA's application. The two were plotted in direct conflict. Between BLM's 1974 Decision advising the company that ANCSA had direct consequences on its application and ANILCA's passage, CVEA had years to investigate the status of the lands on which it claimed rights and improvements.

And this Board has rejected the notion that a person with a conflicting land use could miss the ANILCA protest deadline because he did not know of its requirements. In *Thelma M. Eckert*, we noted that members of the public are deemed to know the content of relevant statutes and duly promulgated regulations. 115 IBLA at 47, citing 44 U.S.C. §§ 1507, 1510 (1982); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); see also *Lynn Keith*, 53 IBLA 192, 88 I.D. 369 (1981). Eckert argued that she should not be held to the ANILCA protest deadline on grounds that she presumed her rights were otherwise protected. We disagreed:

In *State of Alaska v. Heirs of Dinah Albert*, 90 IBLA 14 (1985) . . . “[t]he State filed no ANILCA protest relating to its rights-of-way, presumably because it assumed they would be protected.” 90 IBLA at 20. The Board held in *Albert* that *section 905(a) of ANILCA constituted notice to the world that specified allotment applications would be approved after the passage of 180 days in the absence of a protest specifically made during the time limitation established for raising such objections. Id. . . . [T]he following three prerequisites set forth in the statute must be met to preclude legislative approval: First, a protest must be filed; second, the protest must have been filed within the 180-day deadline established by section 905(a)(1); and third, the party filing the protest must allege and, if necessary, demonstrate that improvements exist on the land. Thus, a protest filed more than 180 days following enactment of ANILCA must be dismissed.*

Thelma M. Eckert, 115 IBLA at 47 (emphasis added). ANILCA established “notice to the world” and CVEA to protect rights by asserting a statutorily-required protest, in the absence of which legislative approval of the Native allotment application would occur. CVEA's failure to establish that legal prerequisite – a protest against Sabon's allotment filed by June 1981 – prohibited it from raising it in 1998, 15 years after Sabon's allotment was legislatively approved in 1983.

CVEA points out that BLM did not expressly advise it of Sabon's application in its 1974 Decision; that BLM did not mention Sabon's application to CVEA until the 1982 Decision, after ANILCA's protest deadline; and did not serve the 1983 decision

legislatively approving Sabon's application on CVEA. Such failures on BLM's part are disturbing. Nonetheless, BLM's 1998 decision cannot "reopen" the ANILCA protest deadline. Even if a post-ANILCA-deadline BLM decision could do so, CVEA sat on the issue for 16 years after the 1982 Decision advised it that Sabon's application conflicted with its ROW application and would be held for rejection as to the lands jointly applied for. CVEA filed no appeal of the 1982 Decision, did not challenge the 1982 ROW grant or sign it under protest, failed to submit BIA concurrence as to the Sabon allotment within 60 days or otherwise indicate that it had taken action to obtain concurrence, and did not communicate any concern to BLM. It paid annual rental from 1982 forward. CVEA was on notice in 1982 that BLM saw Sabon's allotment as a dead-on conflict with its transmission lines, and that the ANILCA deadline had passed. If it believed that this information provided it a basis for a belated ANILCA protest, or notification of Sabon's allotment approval under ANILCA, it did not say so. We will not take up such questions when CVEA raises them 16 years later.

We find that CVEA never received an ROW grant for the lands subject to Sabon's allotment. CVEA did not have a "complete [application] in conformity with the law and regulations and [for which] all required reports have been obtained" that would justify an argument that approval was required under 43 C.F.R. § 2234.1-4(a)(1) (1965). Therefore it did not have a valid existing right by virtue of applying for and unilaterally constructing an unapproved transmission line in 1965. We will not adopt CVEA's proffer that we equate its constructed lines to an approved ROW, and therefore a valid existing right, on these facts. We thus turn to CVEA's individual arguments.

First, we reject CVEA's complaint that ANILCA section 905(a) "shift[s] to innocent third parties the very significant cost of the implication of its policy." See also SOR "G" at 47-48. We neither agree nor disagree with CVEA's contentions regarding the equitable positions of the players in this case, *id.* at 9-12, because ANCSA and ANILCA are Acts of the U.S. Congress, and we have no authority to reconsider legislative enactments. "The Board's authority derives from the executive branch; it does not coincide with that of the judiciary." *Robert P. Vlassof*, 158 IBLA 380, 383 (2003), citing *Mack Energy Corporation*, 153 IBLA 277, 290 (2000). We leave it to ALSC to argue the policy merits of the statutory enactments, as it has done in its 2009 Brief.

Second, the above conclusion avoids our delving into the propriety of the relation-back doctrine, which CVEA asks us to reconsider. CVEA SOR at 13-18. While BLM issued its 1998 decision on the ground that Sabon's 1971 Native allotment application related back to her first use and occupancy in 1954 and thus pre-dated CVEA's 1965 application, our decision to affirm BLM's 1998 decision derives from facts which precluded BLM from granting the application in any event.

Even in 1971, when Sabon submitted her application for lands that were unreserved in 1968, CVEA's application had been rejected since 1966. In 1976, CVEA's presence on the lands was unauthorized. IM 82-16. When the June 1, 1981, ANILCA protest deadline passed, the application had been resurrected by the 1974 Decision, yet CVEA filed no protest. In 1983, when BLM granted Sabon's application, the ROW had been held for rejection for the lands subject to her application, without comment from CVEA. At no critical point did CVEA submit the information required to make its application complete. Accordingly, we need not undertake an independent analysis of the relation-back doctrine to affirm BLM's decision.

Third, the record shows that BIA informed BLM that it had date-stamped Sabon's application in the summer of 1971. Accordingly, it was pending before the ANCSA cut-off date of December 18, 1971. We find no basis for addressing CVEA's lengthy charge that Sabon's application was not pending on the date of ANCSA's passage, nor would we grant CVEA's request for a hearing on that question. More importantly, if CVEA believed Sabon's application should have been rejected, it was obligated to submit a protest under ANILCA but it never did so. It cannot do so now. For the same reason, we reject CVEA's fourth argument that Sabon's use and occupancy was not sufficiently open and notorious to justify an allotment, whether in its entirety or as to lands subject to transmission lines.

Fifth, we reject CVEA's argument that its application should be seen as a valid existing right under ANILCA section 905(a) or (e) that compelled BLM to legislatively approve Sabon's allotment subject to an ROW for the transmission lines. CVEA argues that because the "line[s] had actually been constructed many years prior, and were in place on the ground, serving the public," they are "valid existing rights" subject to protection under section 905(a), SOR at 32, and that, even acknowledging that the term has not been interpreted to include "rights" that are not "perfected under state or federal law," *id.* at 33, we should enlarge the scope of the definition to include such "rights." CVEA also contends that section 905(e) defined "applications" for ROWS as valid existing rights. We cannot agree.

Clearly ANILCA gave express protection to valid existing rights, but we cannot expand the definition of "valid existing rights" in a way that would permit CVEA to assert what should have been raised in a protest 17 years after the statutory deadline for filing one. And we do not construe the term to include rights that were not perfected by complying with applicable regulations. Those rules specified that a decision to construct an ROW facility without approval was undertaken at the risk of the applicant and that a unilateral decision to construct an unapproved ROW facility across the public lands was not a ticket to appropriate the public lands. We will not construe ANILCA to create such authorization, outside the statutory protest provision available for entities with improvements on lands subject to Native allotment

applications.¹⁴ Finally, we agree with BLM that section 905(e)'s reference to "applications" did not establish that unapproved ROW applications are valid existing rights under section 905(a). The only two applications referenced in section 905(e) are a Native allotment application and an "application for title" to land. 43 U.S.C. § 1634(e) (2006). Contrary to CVEA's suggestion, made by deleting the words "for title" in quoting the statute, SOR at 34, an ROW application does not constitute an "application for title" under section 905(e) of ANICLA. See BLM's 2009 Brief at 17. And, as BLM correctly notes, an ROW does not convey title to land, see 43 C.F.R. § 2234.1-3(a) (1965), and even a vested ROW grant is not an "application for title" within the meaning of section 905(e). *State of Alaska v. Heirs of Dinah Albert*, 90 IBLA at 20-21.

Finally, we reject CVEA's argument that its ROW should be allowed to the extent it coincides with the State's ROW for the Tok Cutoff. Finding CVEA's extensive argument on this point to be promising for CVEA, SOR at 37-47, and given CVEA's admission that it was "unsure whether the portion of its line that crosses the Sabon allotment actually lies within the Tok Cutoff right-of-way," *id.* at 37, we directed the parties to identify precisely the overlap between the State's ROW and CVEA's transmission lines in our 2008 Order. We required the parties to "provide evidence of the known locations of the two as of the date the powerline was constructed, and state their positions on the relationship between the applications submitted by CVEA to the State and Federal governments in the 1960s." We take CVEA's vague response in its 2009 Brief, and its concession that "[a]t least some portion of the power line crossing the Sabon Allotment was thus constructed outside the highway [ROW]," as an admission that the two do not actually coincide. We address this argument no further.

We affirm BLM's decision on the grounds stated herein. When all is said and done, CVEA's contention that the "Department of the Interior should bear the burden and cost of resolving conflicts between allotments and utility [ROWs]," SOR at 19, constitutes a policy complaint that should be taken to the United States Congress. As a legal argument, it has no foundation. When CVEA applied for an ROW in 1965, it did not follow the regulations by identifying a precise ROW location on a map. As recently as its 2009 Brief, CVEA concedes that the precise location of its lines have not been mapped sufficiently to ascertain overlap with the State's road ROW. And, although it argues now that such procedure "appears to have been standard Alaska practice," 2009 Brief at 10, the record does not suggest that BLM did anything other than consistently attempt to obtain full compliance from CVEA, without success. The rules in place unequivocally specified that CVEA would bear the brunt and the cost if

¹⁴ In addition, no FLPMA ROW existed for the segment at the time of passage of ANILCA, because at that time CVEA's application was held for rejection. Such an application is not a valid existing right under either section 905(a) or (e).

it turned out that CVEA's decision to construct its lines in advance of an approved ROW created legal problems. That eventuality has come to pass, and CVEA asks that someone else – Sabon, the Department of the Interior, the taxpayer – pay for the cost of its decades-old decision. For years, this Board has deferred adjudication of this matter, in the event that the U.S. Congress would solve CVEA's problem, as CVEA and BLM indicated might happen and the GAO Report advised ought to happen. As a legal matter, however, without legislation, there is no basis for granting CVEA the relief it requests.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed on the grounds stated herein.

_____/s/_____
Lisa Hemmer
Administrative Judge

I concur:

_____/s/_____
Christina S. Kalavritinos
Administrative Judge