TITLE REVIEW – USE & OCCUPANCY
HIGHWAY RIGHTS-OF-WAY AND ALASKA NATIVE ALLOTMENTS

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The purpose of this paper is to provide guidance for those professionals developing right-of-way mapping or performing surveys on behalf of the Department of Transportation and Public Facilities or other State of Alaska agencies. For several types of highway rights-of-way to take effect, they must either be applied to "*public lands, not reserved for public uses*" or they will be "*subject to valid existing rights*". With regard to Alaska Native Allotments, the question is: when does the allotment claim constitute a reservation or valid existing right that will prevent the imposition of a highway right-of-way? Other than a ROW expressly granted by an action of the Bureau of Indian Affairs, several types of highway rights-of-way may apply:

- Omnibus QCD Rights of Way (PLOs & Others)
- Title 23 Right of Way Grants
- RS-2477 Trails
- State/Federal Section Line Easements
- Subdivision Dedications

Background: In 1906, Congress passed the Alaska Native Allotment Act, which authorized the Secretary of the Interior to allot individual Alaska Natives a homestead of up to 160 acres of land.[1] Native Allotment applications could be filed until December 31, 1971. According to BLM, between 1906 and December 31, 1971, applications were filed for 5,830 allotment parcels. 10,200 remaining applications were submitted after that date for a total of 16,030 parcels. Each allotment applicant could apply for up to 4 parcels for a total of 160 acres. As of March 2014, BLM had only 303 remaining active parcels to adjudicate. These include parcels where the State and the ANCSA corporations had denied reconveyance and parcels on federal lands. Native allotment cases continue to be reopened and re-adjudicated.

In a 1956 amendment to the Native Allotment Act, Congress required that "no allotment shall be made to any person under [the 1906] Act until said person has made proof satisfactory

[1] Act of May 17, 1906, ch. 2469, 34 Stat.197 (1906), Repealed by Pub. L. No. 92-203, §18(a), 85 Stat. 688, 710 (1971) Alaska Native Claims Settlement Act.

to the Secretary of the Interior of substantially continuous *use and occupancy* of the land for a period of five years."[2]

> "Since 1987, when addressing disputes concerning the validity of rights-of-way within Native allotments, Interior has applied the 'relation back' doctrine and invalidated utility companies' rights-of-way across certain Native allotments. Under this legal principle, Interior grants priority to allotees if the date of the allotees claimed initial use and occupancy of available land predates other uses and rights-of-way, even if the allotment application was submitted after the right-of-way was issued. The rights of Alaska Native allotees relate back to when they first started using the land, not when the allotment was filed or granted. Prior to 1987, Alaska Native allotments generally were subject to rights-of-way existing when they were approved.[3] Federal courts have dismissed legal challenges to Interior's use of the relation back doctrine because the U.S. government has not allowed itself to be sued with regard to Alaska Native allotments."[4]

> "Interior's policies in the early 1970s required clear, physical evidence to support a Native's use and occupancy of an allotment claim. Since traditional Native land uses, such as hunting, fishing, and gathering, did not leave much physical evidence, Interior questioned the legitimacy of many allotment applications and eliminated or reduced the size of many allotments. In response, many Natives appealed Interior's decisions regarding their allotment applications. In 1976, Interior was compelled by a federal appeals court decision to provide hearings before denying any allotment application for factual reasons. In addition to providing hearings for pending applications, Interior, as a result of this decision, reopened cases for applicants that had been denied a hearing in the past, slowing the allotment adjudication process. Also, in 1979, the U.S. District Court ruled that a Native's right to the land was deemed to have vested as of the date of first use and occupancy, rather than at the time the allotment was approved.[5] Therefore, a Native's use of an allotment took priority over other land selections made by the State of Alaska under the Alaska Statehood Act of 1958. This case also slowed down the allotment adjudication process, because BLM had to recover land from the state and other entities so it could be reconveyed as Native allotments. Also, BLM reopened and readjusted cases that had been denied in the past due to conflicts with other land selections.

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[2] Act of August 2, 1956, ch.891, 70 Stat. 954 (1956)
[3] See Golden Valley Electric Ass'n, 85 IBLA 363 (1985), vacated, 98 IBLA 203 (1987)
[4] September 2004 ALASKA NATIVE ALLOTMENTS Conflicts with Utility Rights-of-way Have Not Been Resolved through Existing Remedies, U.S. Government Accountability Office – GAO-04-923
[5] Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979)

In 1980, in an attempt to get the allotment adjudication process moving forward again, Congress legislatively approved all pending allotment applications (with certain exceptions) without regard to the applicant's actual use of the land, as part of the Alaska National Interest Lands Conservation Act (ANILCA). Section 905(a)(1) of ANILCA states that, "Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the [1906 Alaska Native Allotment Act] which were pending before the Department of the Interior on or before December 18,1971… are hereby approved…" Although ANILCA reduced the need for factual investigations and hearings regarding a Native's use and occupancy of an allotment approved under the act, conflicting interpretations of the wording and intent of the statute continued to hamper the allotment adjudication process. In particular, differing interpretations of the phrase 'valid existing rights' with regard to rights-of-way, set the stage for conflicts between Native allotees and holders of rights-of-way and resulted in numerous legal appeals."[6]

"Prior to 1987, Alaska Native allotments were generally subject to rights-of-way existing when they were approved.[7] However, in 1987, the IBLA began applying the relation back doctrine to declare certain existing rights-of-way null and void. Under the relation back doctrine, the IBLA gives priority to an allotee if the allotees claimed initial use and occupancy of the land predated other uses and rights-of-way, even if the allotment application was submitted after the right-of-way was issued.[8] Legal challenges to Interior's use of the relation back doctrine in federal court have been dismissed because the U.S. government has not waived its sovereign immunity and allowed itself to be sued with regard to Alaska Native allotments.[9] Sovereign immunity is a legal doctrine that precludes bringing suit against the government without its consent. Congress has enacted various statutes setting out the circumstances under which the U.S. government has consented to be sued. Under the Quiet Title Act, the U.S. government has waived its sovereign immunity for certain land issues; however, the waiver in the act does not apply to 'trust or restricted Indian lands.' Since Alaska Native allotments are

[6] Ibid 4, p. 8-9

[7] See, e.g., State of Alaska v. Heirs of Dinah Albert (Albert Allotment), 90 IBLA 14 (1985) and Golden Valley Electric Ass'n (Irwin Allotment), 85 IBLA 363 (1985), citing United States v. Flynn, 53 IBLA 208 (1981). According to the IBLA opinion on the Albert allotment, the State of Alaska had represented in a brief that where state right-of-way grants preceded the filing of an allotment application, but postdated the alleged use and occupancy, BLM had, in the past, issued allotment certificates subject to such state rights-of-way. 90 IBLA at 19, n.7. On reconsideration of the Golden Valley Electric case, the IBLA shifted its policy and adopted the relation back rule, voiding the rights-of way. 98 IBLA 203 (1987).

[8] See, e.g., Golden Valley Electric Ass'n (On Reconsideration), 98 IBLA 203, 207 (1987); State of Alaska, Golden Valley Electric Ass'n, 110 IBLA 224 (1989).

[9] See, e.g., Alaska v. Babbit (Foster), 75 F.3d 449 (9th Cir. 1995); Alaska v. Babbit (Albert), 38 F.3d 1068 (9th Cir. 1994).

> 'restricted Indian lands,' federal courts have ruled that they do not have jurisdiction to review the IBLA's decisions concerning the application of the relation back doctrine to rights-of-way over Native allotments." [10]

Conveyance of Pre-Statehood Highway Rights-of-Way to the State of Alaska (PLOs & Others)

The Public Land Orders establishing highway rights-of-way in Alaska were subject to valid existing rights as stated in the text of the orders. PLO 386 was more specific in that in that it was "Subject to valid existing rights (including the rights of natives based on occupancy and the provisions of existing withdrawals)…" Prior to statehood, PLOs were the basis for many of the highway rights-of-way that were ultimately conveyed to the State in the Omnibus Act Quitclaim deed.[11] Some of these rights-of-way have been found to cross Native allotment parcels where the use and occupancy preceded the effective date of the PLO. At first glance, it would appear that a PLO that is subject to the existing use and occupancy of a Native allotment could not take effect. A public road placed across a valid Native allotment cannot be claimed by the public under adverse possession[12] or by a taking through inverse condemnation.[13]

Recovery of Native allotments erroneously conveyed to Alaska as a part of State lands selection was the subject of the 1979 *Aguilar*[14] case in federal district court. The IBLA had affirmed the rejection of the allotment applications without a hearing because the land claimed by the allotees had already been conveyed to the State of Alaska. The allotees claimed that their use and occupancy upon which their allotments are based commenced prior to the conveyance of the land to the State. The court concluded "If the defendant [United States] has mistakenly or wrongfully conveyed land to the State of Alaska to which plaintiffs have a superior claim, it is the responsibility of the defendant to recover that land."

Note that while most of the rights-of-way conveyed to the State in the Omnibus QCD were based on PLOs, others that had been established through another authority would also be

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[10] Ibid 4, p. 12

[11] On June 30, 1959, pursuant to section 21(a) of the Alaska Omnibus Act, the Secretary of Commerce issued a quitclaim deed to the State of Alaska in which all rights, title and interest in the real properties owned and administered by the Department of Commerce in connection with the activities of the Bureau of Public Roads were conveyed to the State of Alaska.

[12] *Haymond v. Scheer*, 543 P.2d 541 (Okla. 1975) "It is well settled that there can be no adverse possession against the federal government which can form the basis of title by estoppel or under the statute of limitations; and it has been held that the same rule applies where the lands involved are lands that have been allotted to Indians with restrictions upon alienation…"

[13] *United States v. Clarke,* 445, U.S. 253 (1980) U.S. Supreme Court March 18, 1980. "…although prescribing that allotted lands 'may be condemned for any public purpose under the laws of the State of Territory where located," requires that they nonetheless be 'condemned."

[14] Ibid 5, The decision noted "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy,…"; "The fact that these Natives did not file an application for an allotment until after the land was selected by the State does not eliminate the protection given their right of use and occupancy."

afforded the same protection through the Aguilar reconveyance process if they had been erroneously conveyed to the State and subject to a prior valid claim.

In 1983, the *Aguilar* parties agreed to procedures to resolve the erroneous conveyance of allotments to the State.[15] Upon a determination that the allotee's use and occupancy predated the rights of the State, BLM would have the option of requesting a quitclaim deed from the State or file a suit to have the patent to the State cancelled. As an alternative, the State may offer to convey a portion of the allotment, or the entire allotment subject to reservations as a settlement. The offer to settle may be accepted upon successful negotiations between the State, BLM and BIA on behalf of the allotee.

BLM position: In 2007, I spoke with a BLM realty specialist[16] about what I had perceived as a change in position in their handling of allotments where the use and occupancy may have preceded the highway right-of-way. In my early years with DOT&PF Right of Way, we had received many "Null and Void" decisions cancelling rights-of-way across allotments because of the "relation back" doctrine as applied to the date of use and occupancy. The issuance of "Null and Void" determinations had dropped off to almost nothing and it appeared that the BLM adjudicators were generally making all allotments subject to Omnibus Act roads without consideration of use and occupancy dates. As a result of my conversation I was provided with a copy of a 1982 Solicitor's memo[17] and two pages out of the BLM guidebook regarding adjudication of Native Allotments. In paragraph 11 of the guidebook titled Omnibus Act Roads, it is stated that "…all allotments encompassing an Omnibus Act road must be made subject to an easement for the road. However, research is required to determine whether the applicant's use and occupancy predated the quitclaim deed, any withdrawal for the road, or public use of the road. If the applicant's use did predate, title recovery is required to obtain the easement back, as in other Aguilar-type situations. See modified Regional Solicitor's opinion dated August 23, 1982." The Solicitor's opinion notes that while allotments would be subject to Omnibus rights-of-way where use and occupancy came after the 1959 conveyance, that rule would not apply to allotments where use and occupancy predated the QCD. The above referenced modification to the 1982 opinion is the following hand written note on the first page: "Modified – This proc. applies across the board to native allotments. Prior rights to roads must be vindicated with Aguilar procedures [initials 'DJH'[18]]" In summary, while the allotment date of occupancy might predate the PLO that created the highway right-of-way, BLM acknowledges that the Omnibus QCD could have erroneously conveyed the easement interest to the State and the only way to clear the allotment title is through an *Aguilar* reconveyance procedure.

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[15] Stipulated Procedures for Implementation of Order, U.S. District Court, February 2, 1983.
[16] Betsy Bonnell, Realty Specialist, Central Yukon Field Office, Fairbanks District Office, BLM
[17] Reservation of Omnibus Act Rights-of-Way in Patents and in Native Allotment Certificates, August 23, 1982, Office of the Regional Solicitor, Alaska Region
[18] These initials likely belong to Dennis J. Hopewell, an attorney with the BLM Office of the Regional Solicitor in 1982.

DNR position: Recent conversations[19] and past experience working with DNR Realty and legal staff has revealed that while *Aguilar* obligates the federal government to attempt title recovery of an erroneously conveyed allotment, the State of Alaska is not obligated to reconvey the property without consideration of State interests. DNR Mining, Land & Water may reconvey an allotment upon the request of BLM but the State's decision to reconvey is discretionary and not appealable. As a result, DNR has not and will not reconvey land or interests in land that the State has received for highways or airports. BLM recognizes that DNR will deny reconveyance requests that impact transportation facilities, but as stated above, they are obligated to make the request.

For BLM, use and occupancy are clearly critical elements in determining whether Omnibus deeded rights-of-way should be made subject to a prior existing claim. For DNR, use and occupancy are important considerations, but the primary factor in making a decision to reconvey is whether it is in the State's best interest.

DNR stated its position in a 1991 Director's Policy[20] that requires protection of "significant state interests" when considering *Aguilar* reconveyances. These significant state interests would include "Any land improved by a state agency", "All existing roads trails and public use sites" and "Section line easements". To protect its interests, the State will reconvey subject to easements or consider a land exchange.

An example of the tension that exists between the State and Federal positions regarding *Aguilar* reconveyances is the case of the Stephen Northway allotment (US Survey No. 5349). In 2007, Tanana Chiefs Conference notified DOT&PF Right of Way that the conflicting Alaska Highway began construction in March of 1942 while Mr. Northway's use and occupancy began in August of 1930. Based on the "relation back" doctrine, TCC asserted that the allotment claim was a superior valid existing right with respect to the highway right-of-way. DOT&PF responded that the Alaska Highway right-of-way had been conveyed by the federal government to the State of Alaska by QCD on June 30, 1959. Title recovery, to the extent that the Northway claim was valid, would have to be pursued through the *Aguilar* process.

In late 2010, the Department of the Interior, Office of the Solicitor contacted the State Department of Law to explore settling claims concerning the Northway allotment and the "highway easement without going through the time consuming and expensive *Aguilar* process." In January of 2011 the AGO responded that "While the State understands that Interior may wish to avoid the *Aguilar* procedures, it would not be in the State's interest to either reconvey the right-of-way to the Northway heirs or to pay the heirs for the right-of-way". The following round from the DOI Solicitor stated, "I understand the state has a general policy of using *Aguilar* procedures for title recovery but I think the facts in the Stephan Northway case are sufficient to warrant an exception. In your reply letter, you do not mention anything about the

[19] Jerri Sansone, Chief Realty Services Section, DNR, MLW – email dated June 17-18, 2014.
[20] Policy for Reconveyance of Native Allotments, Director's Policy File 92-02, October 14, 1991

evidence of use and occupancy. So I am wondering if your position is that no matter how strong the evidence may be the state will insist on use of the *Aguilar* procedures. In addition, I am not sure if the statement in your letter that 'any dispute regarding title must be adjudicated under the *Aguilar* stipulated procedures' means that the state would require the U.S. to go through the entire *Aguilar* process and bring suit in federal court. Or is it your position that the state will simply not voluntarily recognize and resolve a claim for a state highway?" The AGO responded, "In any event, you are correct in your understanding that the state would require the U.S. to go through the entire *Aguilar* process and ultimately bring an action in federal court in this case."

Subsequently, BLM issued a 90-day letter on June 16, 2011, as required under *Aguilar* stipulation No. 4, inviting the State to provide evidence supporting our position. In response, DNR Realty Services Section stated on September 8, 2011, "If a reconveyance request is received for the Alaska Highway within Lot 2 of U.S. Survey No. 5349, the State will decline to voluntarily reconvey."

Aguilar allotments require a survey to define the parcel being reconveyed from the State to the United States. An oddity regarding *Aguilar* allotment surveys is that there exist a few official Alaska State Land Surveys (ASLS) based on DNR Cadastral survey instructions that were completed, approved and filed without benefit of a certificate or seal by a professional land surveyor licensed to practice in Alaska. These were done because it was believed that the allotment to be reconveyed constituted a federal interest and as they were surveyed by BLM surveyors in conjunction with their official duties they were exempt from the State licensing statutes. For an example see ASLS 89-237 (Plat No. 93-5 Mt. McKinley Recording District, July 23, 1993).[21] This ASLS was monumented with standard BLM 1-1/4'" brass cap monuments. The current procedure is that the reconveyance surveys are performed as a U.S. Survey under which the DNR Survey Chief approves the instructions and reviews the survey and plat. This procedure removes the duplication in which BLM after receiving the conveyance from DNR would paper plat a U.S. Survey from the ASLS prior to conveying to the allotee.[22] Note that this did not occur with ASLS 89-237 as the Allotment Certificate (50-95-0449) described the parcel being conveyed as ASLS 89-237.

Conclusion: When a land interest for a highway or airport that has been conveyed from the federal government to the State of Alaska is in conflict with a native allotment claim, the State's interest should be considered valid without regard to the allotee's date of use and occupancy until such a time that the conflict is resolved through an Aguilar reconveyance process.

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[21] ASLS 89-237 contains the following certificate: "I hereby certify that I am the Deputy State Director for Cadastral Survey, Alaska, Bureau of Land Management. The lands noted herein have Federal interest under Aguilar vs. United States, 474 Federal Supplement 840 (D. Alaska, 1979) and have been surveyed by me or under my supervision by authority of the Memorandum of Understanding dated July 25, 1991…" Signed by the Deputy State Director for Cadastral Survey, Bureau of Land Management

[22] June 19, 2014 email exchange with Gerald Jennings, DNR Chief, Survey Section.

Title 23 Right of Way Grant

FHWA is authorized to appropriate and transfer certain public lands owned by the United States and managed by the Bureau of Land Management (BLM) or the U.S. Forest Service (USFS) to DOT&PF under the 1958 Highway Act.[23]

Since the mid-1980's the Attorney General's Office on behalf of DOT&PF has appealed "Null and Void" decisions issued by BLM relating to Title 23 Grants of highway rights-of-way that crossed native allotments where the allotee's date of occupancy preceded the date of the highway grant. The issue is best stated in an Alaska Law Review article[24] by E. John Athens, Jr., the AAG who handled most of the allotment appeals relating to DOT&PF claimed rights of way.

> "The effect of *GVEA (On Reconsideration)* and *State of Alaska (GVEA)* was to defeat many of the highway right-of-way grants made by the BLM to Alaska where they conflicted with a Native allotment claim. The nullification of Alaska's grants was premised on the IBLA's interpretations of law in 1987 and 1989, notwithstanding that almost all of the highway right-of-way grants had been issued to Alaska in the 1960's and the roads had long since been built in reliance on the grants."[25]

The issue came to a head with the Foster claim for a native allotment that overlaps with part of the Parks Highway right-of-way. The right of way for the Parks was granted by BLM in 1969 and a related material site was granted in 1961.

> "By express terms within the 1969 and 1961 BLM grants, as in most BLM grants to Alaska issued pursuant to 23 U.S.C. § 317, the BLM provided that the rights granted to Alaska would be paramount to any other claims to the land based on settlement, entry, or occupancy."[26]

Foster applied for a native allotment in 1971 with an occupancy date of 1964. The IBLA[27] affirmed the BLM "Null and Void" decision with respect to the 1969 right-of-way grant but the decision did not affect the 1961 material site. The State pursued the case through federal district court and the 9th Circuit court of appeals but the court dismissed the case on the basis of sovereign immunity.

> "State v. Babbitt (Foster), 75 F.3d 449 (9th Cir. 1995) As the GAO report indicates, the Ninth Circuit decision in *Foster* held that the United States is

[23] The Act of August 27, 1958, as amended, 23 U.S.C., Sections 107(d) and 317. Implementation through 23 CFR Sections 712.501-503.
[24] The Ninth Circuit Errs Again: The Quiet Title Act As A Bar To Judicial Review, E. John Athens, Jr., December 2002.
[25] Ibid., p. 436
[26] Ibid., p. 438
[27] 125 IBLA 291, Department of Transportation and Public Facilities, March 9, 1993

immune from actions seeking judicial review of decisions that approve allotments and void conflicting rights of way. However, *Foster's* aftermath is not discussed in the report. The Ninth Circuit has created a jurisdictional void, as the *Foster* case amply demonstrates.

After the Ninth Circuit issued its *Foster* decision, Mrs. Foster sued the state in state superior court for trespass and ejectment based on the IBLA's approval of her allotment and its voiding of the Parks Highway easement where it crossed her allotment. The superior court dismissed Mrs. Foster's complaint because Public Law 280 (28 U.S.C. § 1360(b)) exempts ownership disputes concerning Indian trust lands from that statute's grant of jurisdiction to the state. The Alaska Supreme Court affirmed the dismissal in *Foster v. State,* 34 P.3d 1288 (Alaska 2001).

Thus, neither the state nor Mrs. Foster can obtain judicial redress for perceived interference with their respective property rights. In *State v. Babbitt (Foster),* the Ninth Circuit held that the state could not obtain judicial review in federal court challenging the IBLA's cancellation of its right of way for the Parks Highway, while in *Foster v. State,* the Alaska Supreme Court held that Mrs. Foster could not bring an action in state court to eject the state from the right of way after the IBLA cancelled it.

The federal government could fill this void by suing the state in federal court on Mrs. Foster's behalf, thus waiving its sovereign immunity and providing a judicial forum in which the competing ownership claims could be litigated. However, the federal government has not taken this action and, as the GAO report notes, it is unlikely to do so because of concerns that litigation would result in allotments being declared invalid.

The upshot of the *Foster* litigation is that neither state nor federal courts have jurisdiction to adjudicate conflicts between Native allotments and rights of way. The status of Mrs. Foster's rights in her allotment and the status of the state's interest in the Parks Highway where it crosses the Foster allotment are in limbo. Given the federal government's understandable reluctance to initiate litigation on Mrs. Foster's behalf, those rights are likely to stay in limbo for the foreseeable future."[28]

"The practical effect of the Ninth Circuit decision is that it maintains the status quo: Alaska possesses and controls the Parks Highway where it crosses Foster's allotment claim, and Foster cannot oust Alaska."[29]

[28] Ibid. 4, p. 55-58
[29] Ibid. 21, p. 441

Conclusion: The State of Alaska has asserted a position that the terms of a Title 23 right-of-way grant are superior to the occupancy claims of a native allotee. However, the merits of its position cannot be tested in the State Supreme Court due to lack of jurisdiction or the federal appeals court due to failure to waive sovereign immunity. Without a waiver of federal sovereign immunity the State cannot be ejected from the allotment. Until the federal court agrees to hear the issue on its merits, and judgment is found against the State, the date of allotee use and occupancy should not be considered as a valid basis for BLM's revocation of a Title 23 Highway grant.

RS-2477 Trail Rights-of-Way

Revised Statute 2477[30] provided a federal offer for road easements over public lands. The interpretation and application of RS-2477 in Alaska is a highly debated and controversial subject and is most difficult when attempting to assert a right-of-way claim across federal lands and Native allotments.

> "R.S. 2477 easements can be created either by the positive act of authorized authorities or public user of a right of way across the 'public lands.' Native used and occupied lands, however, are not 'public land.' Therefore, a right of way under R.S. 2477 can only be obtained if, at the time the R.S. 2477 grant is accepted, the lands were not subject to the individual use and occupancy rights of an Alaska Native who has applied for an allotment."[31]
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> The acceptance of an RS-2477 right-of-way may be made by an official act.[32]
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> "When an allotment is being conveyed, the patent may or may not note that the land title is subject to a ROW for a public road or trail. BLM does not have authority to conclusively determine whether or not a claimed ROW is validly established, so neither silence nor specific mention of a ROW is conclusive."[33]

[30] The Mining Law of 1866 - Lode and Water Law, July 26, 1866 (Section 8 - 14 Stat. 253) The above referenced Section 8 of the 1866 Mining Law was re-designated as Section 2477 of the Revised Statutes 1878. (43 U.S.C. 932) RS 2477 was repealed by Title VII of the Federal Land Policy and Management Act on October 21, 1976.

[31] Rights of Way on Allotments – R.S. 2477 and Other Access Questions, David S. Case, Attorney, Office of the Solicitor, Anchorage Region, DOI, May 21, 1980

[32] Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.)(enbanc), cert. denied 411 U.S. 917 1973). AS 19.40.010 (concerning the Trans-Alaska pipeline haul road) properly accepted the RS 2477 grant.

[33] Special Legal Status of Alaska Native Allotments and Restricted Native Townsite Lots, June 2007, Roger L. Hudson, Attorney, Office of the Regional Solicitor, Alaska Region, DOI.

> "…this Department has long taken the position that it is unnecessary to include any reservation or exception for the right-of-way in a patent…The reason for this is that grants of public lands upon which there is such a public highway are subject to the easement despite the absence of a reservation in the patent or grant."[34]

> "Although available information suggests the possibility an existing trail across a Native allotment claim might qualify as a preexisting R.S. 2477 right-of-way, the Department is not required to adjudicate such rights-of-way. Since the adjudication of R.S. 2477 rights-of-way is primarily a matter for the state courts, and since no Departmental need would be served by an adjudication of the R.S. 2477 roadway in this case, no mention of the right-of-way should appear in the conveyance."[35]

Where a Native allotment is subject to an *Aguilar* reconveyance, and the deed from the State of Alaska to the U.S. contains reservations or exceptions for pre-existing rights-of-way, BLM would then be obligated to make the allotment deed subject to those same encumbrances.[36]

Validating an RS-2477 across a Native allotment may present jurisdictional challenges. State courts have no jurisdiction in resolving an RS-2477 issue relating to a Native allotment. If the State claims an RS-2477 right-of-way, Federal courts may not have jurisdiction given the State's 11th Amendment sovereign immunity. Federal courts may not have jurisdiction under the Quiet Title Act (28 U.S.C. 2409(a)) due to the Indian lands exception. To move past the jurisdictional issue the State can pursue a claim of an RS-2477 across an allotment by filing a condemnation action in Federal Court under 25 U.S.C. § 357 or the United States could sue on the allotee's behalf in Federal Court.

In 2013, the State of Alaska filed a QTA suit against the United States[37] in regard to several RS-2477 trails in the Chicken area. Portions of the trails crossed two Native allotments. As the allotments are excepted from the QTA, the State suit condemned those portions under 25 U.S.C. § 357 with the provision that as the RS-2477 rights-of-way were being claimed as pre-existing highway easements, no compensation would be owed for the condemnation taking.

Conclusion: RS-2477 trail rights-of-way can exist across Native allotments if the acceptance by public user or "official action" predates the use and occupancy by the allotee. Where contested, title clearance may require a condemnation action in federal court.

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[34] Alfred E. Koenig, A-30139 (Nov. 25, 1964)
[35] Leo Titus, Sr. IBLA 84-747, Decided November 13, 1985
[36] Review comments, Jerri Sansone, Chief Realty Services, MLW/DNR, 7/3/14 email
[37] State of Alaska DNR and DOT&PF v. United States, et al., Case No. 4:13-cv-00008-RRB, U.S. District Court

Section Line Easements

State section line easements apply to each section of land owned or acquired by the State.[38] Land that is subject to an *Aguilar* allotment reconveyance as it had been erroneously transferred to the State is still land owned or acquired by the State and would be subject to a state SLE of 100-feet or 50-feet on each side of the section line as applicable. While the 1991 DNR policy[39] regarding reconveyance of Native allotments includes SLEs among significant state interests that shall be considered and protected in a reconveyance, it also notes that surveyed SLEs can be vacated if they do not serve a useful purpose and do not need to be reserved if the allotment claim pre-dates any state interest.

Federal SLEs, for practical purposes, would not be considered applicable to a Native allotment while the allotment is still subject to federal restricted status.[40] It is conceivable, however, that the section line in question meets the tests of survey and offer/acceptance of the RS-2477 grant while the land was in unreserved land status, or prior to occupancy by the allotment claimant. Subsequently, the allotment could be released from restricted status and become subject to State law including those governing the establishment of section line easements. In that rare scenario, it would be possible to have a former restricted native allotment become subject to a federal section line easement.

Conclusion: The imposition of a state or federal section line easement over a restricted native allotment, while possible, would be the exception rather than the rule. When reviewing reconveyed Aguilar allotments or allotments released from restricted status, SLE status should be considered.

Dedicated Streets in a Restricted Allotment Subdivision

This type of right-of-way is dissimilar from the previously discussed authorities in that the issue is not about date of use and occupancy creating a prior existing right, but how the best intentions can sometimes go awry.

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[38] On March 26, 1951, the legislature enacted § 1 Ch. 123 SLA 1951 which stated that "*A tract 100 feet wide between each section of land owned by the Territory of Alaska or acquired from the Territory, is hereby dedicated for use as public highways...*" Also see A.S. 19.10.010 Dedication of land for public highways.

[39] Ibid. 19

[40] The May 21, 1980 memo by David S. Case referenced in the RS-2477 section suggests that a case can be made for federal section line easements across allotments if the section lines had been surveyed and the offer/acceptance in place prior to allotee occupancy and use. The memo supports this conclusion by acknowledging the Territorial Legislature's acceptance of the RS-2477 grant as an 'official action" sufficient to complete the dedication. Later DOI positions seemed to consider a section line easement to be an "unconstructed" highway therefore not meeting the "construction" requirement of the RS-2477 grant.

Occasionally street rights-of-way created by subdivision are incorporated into a highway project. BIA has allowed restricted native allotments to be subdivided according to state law and then either deeded as restricted lots to heirs or others who are able to hold title to restricted lots, or the lots are unrestricted and can be sold to any party.

> "…it has generally been recognized that it is in the allotment owner's own commercial self-interest to voluntarily comply with the state laws relating to subdivisions, so that prospective purchases will be encouraged and enabled to do business with him or her."[41]

A problem with a subdivided allotment located in Naknek was identified in 2000, within the boundaries of Bristol Bay Borough. One of the heirs of the original allotee questioned whether Borough had authority to install sewer lines under dedicated streets within the subdivision. The issue revolves around whether the dedicated streets were in fact created under state statutes governing subdivisions, or whether that dedication constitutes an alienation of the allotee's interest in conflicts with federal law. The subdivision was approved by BIA, however, in violation of 25 CFR § 152.25(d), the allotee received no compensation for the dedicated streets.

Upon review by the DOI Solicitor, it was recommended to BIA that all future allotment subdivisions be accompanied with a grant of easement pursuant to 25 U.S.C. § 323 based on the allotee's consent and informed waiver of compensation.

> "Although subdivisions of Native Allotments in restrictive status fall under the jurisdiction of the federal government and are not subject to DNR requirements, BIA has chosen to submit them to DNR for approval in order that the plats can be filed in the state recording office…Dedication of rights of way on Native Allotments is a problem because BIA doesn't recognize the signing of the Certificate of Ownership and Dedication as dedicating legal public access under federal law because of the "Inalienable" clause in the Alaska Native Allotment Act of 1906. BIA is working with various platting authorities to find a solution."42

Recognizing the need to address the issue of dedications for future allotment subdivisions and to validate those that had been purportedly dedicated to the public in the past, on July 16, 2003, Senate Bill 1421, the "Alaska Native Allotment Subdivision Act was introduced.

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[41] Permissible uses of dedicated streets in allotment subdivision, Memorandum, Roger L. Hudson, DOI Solicitor to Glenda Miller, Realty Officer, BIA, October 12, 2000

[42] Subdivisions in the Unorganized Borough, Gerald Jennings, PLS, Bill Brown, PLS & George Horton, PLS, February 15, 2002, 37th Annual Alaska Surveying and Mapping Conference

As a result the act was passed on October 18, 200443 and provided:

"(a) In General. — An Alaska Native owner of restricted land may, subject to the approval of the Secretary—

(1) subdivide the restricted land in accordance with the laws of the—

(A) State; or

(B) applicable local platting authority; and

(2) execute a certificate of ownership and dedication with respect to the restricted land subdivided under paragraph (1) with the same effect under State law as if the restricted land subdivided and dedicated were held by unrestricted fee simple title.

(b) RATIFICATION OF PRIOR SUBDIVISIONS AND DEDICATIONS.—

Any subdivision or dedication of restricted land executed before the date of enactment of this Act that has been approved by the Secretary and by the relevant State or local platting authority,

as appropriate, shall be considered to be ratified and confirmed by Congress as of the date on which the Secretary approved the subdivision or dedication."

Conclusion: As a result of PL 108-337, dedicated street rights-of-way as shown on previously filed and future subdivisions of restricted Native allotments will be considered to be as valid as any street dedication created under state law for subdivisions of unrestricted lands.

[43] Public Law 108-337, 108th Congress, An Act To authorize the subdivision and dedication of restricted land owned by Alaska Natives., October 18, 2004