F-12971 (2561)
F-43895 (2627)
F-21630 (75.0)
F-37579 (2821)
(964)(TDK/FJR)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

JAN 05 1990

Maureen Teresa Lewis P.O. Box 2486 Fairbanks, Alaska 99707	:	F-12971 Native Allotment Application
State of Alaska Department of Natural Resources Division of Land and Water Management Land Title Section 3601 C Street, Suite 960 Anchorage, Alaska 99503	:	F-43895 State Selection Application Access Protest
State of Alaska Department of Transportation and Public Facilities 600 University Avenue, Suite F Fairbanks, Alaska 99709-3695	:	F-21630 Dalton Highway Right-of-Way F-37579 Elliot Highway Right-of-Way

April 7, 1987 Protest Dismissed
Rights-of-Way Declared Null and Void in Part
June 1, 1981 Protest Considered
Native Allotment Application Approved
State Selection Rejected in Part
Allotment Subject to Elliot Highway
Native Allotment Application Conformed to Survey

On June 9, 1970, the Bureau of Indian Affairs (BIA) filed Native allotment application F-12971 and evidence of use and occupancy on behalf of Maureen Teresa Lewis. The application was filed under the provisions of the Act of May 17, 1906, as amended, 43 U.S.C. 270-1 to 270-3 (1970), which was repealed with a savings provision by the Alaska Native Claims Settlement Act (ANCSA) of December 18, 1971, 43 U.S.C. 1617. The application, as amended, which was

before the Department on June 8, 1970, indicates use and occupancy since 1963 for approximately 160 acres of unsurveyed land located within Secs. 19 and 30, T. 8 N., R. 5 W., Fairbanks Meridian.

On July 5, 1983, pursuant to Sec. 905(c) of the Alaska National Interest Lands Conservation Act (ANILCA) of December 2, 1980, 43 U.S.C. 1634, the land description was amended in order to encompass the land the applicant originally intended to claim. Native allotment F-12971 now falls within Secs. 29 and 30, T. 8 N., R. 5 W., Fairbanks Meridian. By Notice dated January 26, 1987, the State of Alaska and interested parties were afforded 60 days to protest the application in the amended location, under the criteria of Sec. 905(a)(5) of ANILCA.

On April 7, 1987, the State of Alaska filed a protest, stating that the allotment conflicts with the 200-foot right-of-way of the reconstructed Elliott Highway (F-37579) and the 200-foot right-of-way of the Dalton Highway (F-21630), as well as the original Elliott Highway, which was conveyed to the State of Alaska under the Omnibus Act by quitclaim deed dated June 20, 1959.

Because the protest was filed after the March 30, 1987 deadline, it cannot be considered timely and is hereby dismissed.

On February 25, 1975, the State of Alaska filed as-built maps of the Alyeska Pipeline Service Company Livengood to Yukon River Road, a portion of the Dalton Highway serialized as F-21630. A corrected copy of page 20 of the as-built maps was filed on June 13, 1975. The State of Alaska requested the Bureau's records be noted pursuant to Secretarial Order 2665, dated October 16, 1951. The maps indicate construction began on August 16, 1969, and ended August 10, 1971.

On August 31, 1979, the State of Alaska, Department of Transportation and Public Facilities, was granted Right-of-Way F-37579, under the authority of the Act of August 27, 1958, 72 Stat. 885; 23 U.S.C. 317. The right-of-way was issued subject to valid rights existing on the date of the grant.

The Dalton Highway, serialized as F-21630, and the reconstructed portion of the Elliott Highway, serialized as F-37579, were constructed after Maureen Teresa Lewis's claimed use and occupancy in 1963. The centerlines of both highways were used as corner locations for the survey of her allotment, and the survey follows the centerline of the Dalton Highway from its intersection with the Elliott Highway, northwesterly for 25.89 chains. Because these grants are subject to valid existing rights, the Native allotment takes precedence over these rights-of-way. The rights-of-way are hereby declared null and void as to that portion within Native allotment F-12971 and will not be reserved in the certificate of allotment, when issued. (See State of Alaska, Golden Valley Electric Association, 110 IBLA 224 (1989).)

The application cannot be legislatively approved because on June 1, 1981, a valid protest was filed by the State of Alaska under the criteria set forth in Sec. 905(a)(5) of ANILCA. Section 905(a)(5) states in pertinent part:

> . . . 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 the effective date of this Act--

(B) The State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist.

Based upon adjudication of the application, this office has determined that at the time the claim was initiated, the lands were vacant, unappropriated and unreserved and the applicant has satisfied the use and occupancy requirements of the Act of May 17, 1906, as amended. Therefore, Native allotment application F-12971 is hereby approved as to the land described below.

Survey of this Native allotment application was officially filed on October 12, 1988, a copy of the survey plat is enclosed. The official surveyed description of the claim is as follows:

U.S. Survey No. 8610, Alaska, located on the Dalton Highway approximately 3½ miles southwest of the village of Livengood, Alaska.

Containing 159.97 acres.

All applications approved pursuant to the Act of May 17, 1906, are subject to the provisions of the Act of March 8, 1922, as amended, 43 U.S.C. 270-11 and 270-12. It has been determined that the above-described lands are without value for minerals; therefore, none shall be reserved to the United States.

On November 14, 1978, the State of Alaska filed general purposes grant selection application F-43895 pursuant to Sec. 6(b) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), as amended, for the lands in T. 8 N., R. 5 W., Fairbanks Meridian, including the lands encompassed by Native allotment application F-12971. Section 6(b) of the Alaska Statehood Act of July 7, 1958, provides that the State may only select vacant, unappropriated, and unreserved public lands in Alaska. The lands described above were segregated by the Native allotment application at the time of State selection. Therefore, State selection application F-43895 is rejected as to the 159.97 acres in conflict with Native allotment application F-12971 and all the minerals therein.

The Certificate of Allotment will reserve the following to the United States:

A right-of-way for ditches or canals constructed by the authority of the United States pursuant to the Act of August 30, 1890, 43 U.S.C. 945.

This allotment shall be subject to:

An easement for highway purposes, extending one hundred (100) feet each side of the centerline of the Elliott Highway, as transferred to the State of Alaska pursuant to the quitclaim deed dated June 30, 1959, and executed by the Secretary of Commerce pursuant to the authority of the Alaska Omnibus Act, Pub. L. 86-70, 73 Stat. 141.

The applicant has 60 days from the receipt of this decision to notify this office in writing, if the survey as described does not contain all the improvements originally intended to be on this parcel. Any claim that the surveyed location is different than the intended location must be supported by clear and substantial evidence of the error. Unless so notified, the allotment application will be considered correctly surveyed.

Plats showing the location of the allotment application are enclosed.

Any questions the applicant may have regarding future use relative to the Native allotment application should be directed to Tanana Chiefs Conference at the following address.

Tanana Chiefs Conference
Realty Office
122 First Avenue
Fairbanks, Alaska 99701

The addressed parties have 60 days from receipt of this decision in which to initiate a private contest against the Native allotment application pursuant to departmental regulation 43 Code of Federal Regulations (CFR) 4.450 (copy enclosed).

Failure of any of the addressed parties to initiate a private contest within the time indicated above will result in the Native allotment application being approved and the other parties being rejected as to the lands in Native allotment application F-12971. This action will become final without further notice. The addressed parties have a 30 day appeal period which commences upon expiration of the 60 days allowed for initiation of a private contest. (State of Alaska, 48 IBLA 229). To avoid summary dismissal of the appeal, there must be strict compliance with the regulations. All parties not having the right to initiate a private contest who wish to appeal this decision must follow the provisions of the appeal procedures.

An appeal from this decision may be taken to the Interior Board of Land Appeals, Office of Hearings and Appeals, in accordance with the enclosed regulations in Title 43 Code of Federal Regulations (CFR), Part 4, Subpart E. The appellant has the burden of showing that the decision appealed from is in error.

If an appeal is taken, the notice of appeal must be filed with the Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513-7599, within 30 days of the receipt of this decision, except for those parties who have the appeal period set forth above. Do not send the appeal directly to the Board. The appeal and case history file will be sent to the Board from this office. The regulations also require the appellant to serve a copy of the notice of appeal, statement of reasons, written arguments

or briefs on the Regional Solicitor, Alaska Region, U.S. Department of the Interior, 222 West Eighth Avenue, #34, Anchorage, Alaska 99513-7584. To avoid summary dismissal of the appeal, there must be strict compliance with the regulations. Form 1842-1 is enclosed for additional information.

If a private contest or an appeal is filed, each party named in the heading of this decision must be served. In addition, the following agencies must also be served:

Bureau of Indian Affairs
Realty Office
U.S. Federal Building and Courthouse
Box 16, 101 Twelfth Avenue
Fairbanks, Alaska 99701

State of Alaska
Department of Natural Resources
Division of Land and Water Management
State Interest Determinations Unit
P.O. Box 107005
Anchorage, Alaska 99510-7005

/s/ Marcia K. Walker

Marcia K. Walker
Chief, Branch of Doyon Adjudication

Enclosures:
Form 1842-1
Appeal Regulations
Private Contest Regulations
Master Title Plat
Survey plat

Copy furnished to:

Tanana Chiefs Conference, Inc. (CM-RRR)
Doyon Building
122 First Avenue
Fairbanks, Alaska 99701
(w/cy of plats)

Bureau of Indian Affairs (CM-RRR)
Realty Office
U.S. Federal Building and Courthouse
Box 16, 101 Twelfth Avenue
Fairbanks, Alaska 99701
(w/cy of plats)

Bureau of Indian Affairs
Alaska Title Services Center (ATSC)
1675 C Street
Anchorage, Alaska 99501-5198
(certified true copy and plats)

Bureau of Indian Affairs
Attn: Native Allotment Coordinator
1675 C Street
Anchorage, Alaska 99501-5198
(w/cy of plats)

State of Alaska (CM-RRR)
Department of Natural Resources
Division of Land and Water Management
State Interest Determinations Unit
P.O. Box 107005
Anchorage, Alaska 99510-7005
(w/cy of plats)

Alyeska Pipeline Service Company (CM-RRR)
1835 South Bragaw Street
Mail Station 569
Anchorage, Alaska 99512
(w/cy of enclosures)

cc:
Pipeline Monitoring (983)

DM-Kobuk District (070)

F-026018 (2821)

964:TKennedy:adn:11-27-89:2768h

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
ARLINGTON, VIRGINIA 22203

Appeal of State of Alaska, Department of Transportation and Public Facilities	F-12971 Native Allotment F-43895 State Selection Application Access Protest F-21630 Dalton Highway Right-Of-Way F-37579 Elliott Highway Right-of-Way
IBLA No. 90-301	

STATEMENT OF REASONS

For its Statement of Reasons on appeal the State of Alaska submits the following:

FACTS:

The allotment application of Maureen T. Lewis was filed with the BLM on June 9, 1970. The application alleges use and occupancy since 1968 for land for land within Sections 19 and 30, T.8 N., R. 5W., Fairbanks Meridian. An application and evidence of occupancy form signed by Maureen T. Lewis was filed with the BLM on September 26, 1973. This also asserts that use and occupancy of the land began in 1968.

On May 12, 1978 the State of Alaska Department of Transportation and Public Facilities applied for a highway right-of-way on public land for a realignment project for the Elliott Highway. The right-of-way was granted to the state by the BLM on August 31, 1979. The serial number of the grant is F-37579. The grant was made pursuant to 23 U.S.C. § 317. The grant was issued subject to valid existing rights. The grant was effective on public domain lands, which were defined in the grant to

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include "those [lands] reserved or withdrawn for specific purposes, entered, selected, occupied and/or settled, and leased." The project was constructed in 1980 and 1981.

On January 15, 1973 the State of Alaska Department of Highways filed with the BLM "as-built" maps for the TAPS road. The TAPS road is now known as the Dalton Highway. This right-of-way was accepted by the BLM as an official public highway right-of-way on April 3, 1975. The BLM gave this highway right-of-way the serial number of the grant is F-21630. The right-of-way was established under the authority of Secretarial Order 2665.

The Dalton Highway was constructed between August 16, 1969 and August 10, 1971 as shown by the BLM records.

On October 24, 1970 Maureen T. Lewis signed a Road Right-of-Way Agreement granting various oil companies a road right-of way through her allotment claim. This road right-of-way is 200 feet in width. A copy of this agreement is attached to the accompanying Affidavit of John Bennett.

On July 5, 1983 the land description in the allotment application was amended to provide that the land claimed fell with Sections 29 and 30, rather than 19 and 30 as stated in the original application. It was this amendment which created the conflict with the Dalton Highway right-of-way. It was also this amendment which created the conflict with F-37579. Prior to 1983

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the application of Ms. Lewis did not include land covered by F-21630 and F-37579.

Because a valid protest was filed the allotment application was not legislatively approved, but rather was adjudicated. As a result of adjudication, the allotment application was approved by BLM decision dated January 5, 1990. This decision declared null and void the portions of F-21630 and F-37579 in conflict with the allotment claim. The BLM did not initiate a fact finding hearing on the question of Maureen T. Lewis' claimed use and occupancy, notwithstanding evidence contrary to her allegation of use and occupancy. Neither did the BLM consider this evidence in its decision.

Accompanying this Statement of Reasons is the Affidavit of John Bennett. Mr. Bennett has prepared a plat which shows the post 1983 allotment claim of Ms. Lewis and the area of conflict with F-21630 (the Dalton Highway right-of-way) and F-37579 (the realigned Elliott Highway right-of-way). Also shown on the plat is an outline of the pre-1983 allotment claim of Ms. Lewis. (This pre-1983 allotment claim is also depicted in a sketch attached to the 1976 Native Allotment Field Report prepared by the BLM.) Also attached to the Affidavit of John Bennett is a copy of grant F-37579, a copy of the BLM memo accepting the establishment of the right-of-way for F-21630, and a copy of the Proof of Construction for grant F-37579 showing that the realignment project was constructed in 1980 and 1981.

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An Affidavit of Counsel also accompanies this Statement of Reasons.

I. A Government Contest is Required.

If the Board determines that there is conflicting evidence, then a government contest is required. In State of Alaska, 85 IBLA 196, 202 (1985) the Board held:

> There is substantial evidence in the case files indicating that the applicants did not use and occupy the Yukon Island tracts in a substantial and continuous manner which was at least potentially exclusive of others. In light of the conflicting evidence and the failure of BLM to provide any analysis of the facts to support its adjudication in these cases, we are confronted with decisions which are not sustained on the record. In light of this record, we must conclude that there is sufficient doubt as to the adequacy of the allotment applications to require a Government contest. See Katmailand Inc., 77 IBLA 347 (1983). Accordingly, the decisions appealed from are set aside and the cases are remanded for initiation of a Government contest of the allotment applications. See Donald Peters, 26 IBLA 235, 83 I.D. 309, reaffirmed on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976), aff'd, Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978). A copy of the contest complaints shall be served upon the State of Alaska which, upon the filing of a proper motion, shall be allowed to intervene. See State of Alaska, 28 IBLA 83, 89-90 (1976).

Further, where the record contains evidence refuting the requisite use and occupancy, and the BLM approves the allotment without an analysis of the relevant facts, the BLM adjudication must be set aside and a government contest initiated. State of Alaska, 113 IBLA 80, 84 (1990). In the instant case the BLM

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failed "to provide any analysis of the facts to support its adjudication" that Maureen T. Lewis was entitled to the land covered by the highway rights-of-way.

The BLM's "analysis" is limited to noting that Ms. Lewis claims use and occupancy beginning in 1963, and that since this allegation predates F-21630 and F-37579, the state's rights-of-way are null and void. There is an unstated assumption that the claim of use and occupancy extends to all of the land for which she applied, and even the land covered by the highway rights-of-way. The BLM decision avoids any analysis of the facts pertaining to the area of conflict. Even the most recent Field Report, prepared in 1983, does nothing more than to note the conflicts between the allotment and the rights-of-way. No effort was made to determine if Ms. Lewis' qualifying use and occupancy included the area covered by the rights-of-way. No one from the BLM ever asked Ms. Lewis to give evidence of her use and occupancy of the land covered by the rights-of-way. Given the fact that the conflicts were created in 1983 by Ms. Lewis' amendment of the property description in her allotment application, and that this conflict was created by her only after the highways were built and the rights-of-way established, it was incumbent on the BLM to have given some credible analysis to whether there had been qualifying use and occupancy by Ms. Lewis of the areas in conflict.

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Some of the important facts which the BLM failed to consider are:

1. The failure of Ms. Lewis to protest the rights-of-way or ever object to them, despite the fact that the highways have been in use over 10 years. 1/ The inference of this inaction is that Ms. Lewis was not in fact claiming the land covered by the rights-of-way as part of her allotment.

2. That there is nothing within the area covered by the rights-of-way to indicate that this area was ever used or occupied by Ms. Lewis. There is no evidence to indicate that Ms. Lewis ever used this area for her improvements of any kind, for cultivation of any crops, for woodcutting, for hunting, berry picking, or for anything else.

3. In 1970 Ms. Lewis granted to various oil companies a road right-of-way through the land covered by her allotment claim. It is this right-of-way on which the Dalton Highway was constructed. This easement granted by Ms. Lewis is emphatic objective evidence of Ms. Lewis' intent not to claim the right-of-way of F-21630 as part of her allotment. This was totally ignored by the BLM.

4. It was not until 1983 (some 13 years after the Dalton Highway was built and 5 years after the BLM accepted the

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1/ BLM records show that the Dalton Highway designated as F-21630, was constructed between 1969 and 1971. The BLM records show that the Elliott Highway realignment project was constructed in 1980 and 1981. See Proof of Construction for R/W attached to the Affidavit of John Bennett.

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establishment of this right-of-way under S.O. 2665) that Ms. Lewis amended her allotment application to include part of the right-of-way within F-21630. Prior to 1983 Ms. Lewis had no intent to claim F-21630 as part of her allotment.

Based on the foregoing a government contest is required, and it was error for the BLM to cancel the state's rights-of-way without an analysis of the critical facts which relate to them and Ms. Lewis' claimed use and occupancy.

II. Rights-of-Way F-21630 and F-37579 are valid existing rights to which the allotment must be made subject.

Even assuming that Maureen T. Lewis initiated qualifying use and occupancy of her allotment claim prior to the date that the rights-of-way for F-21630 and F-37579 were established, that does not affect their validity. Any rights Ms. Lewis had when the rights-of-way became established were non-vested and subject both to the BLM's authority to issue right-of-way grants and to rights-of-way being established under S.O. 2665. Edward A. Nickoli, 90 IBLA 273, 278, n. 4 (1986). In Edward A. Nickoli the Board held that until there is legislative approval under 43 U.S.C. § 1634(a)(1), or until a Certificate of Allotment issues, the BLM retains authority to grant a right-of-way on land claimed for an allotment. In this case there was no legislative approval because of the valid protest that was filed. A Certificate of Allotment has yet to issue. Therefore, the BLM had the authority to impose right-of-way grant F-37579

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upon land included in the Maureen L. Lewis allotment. Because she had no vested rights to the land she claimed, the land was also subject to the establishment of a right-of-way (designated as F-21630) under S.O. 2665. Although Ms. Lewis' mere use and occupancy would protect her against other individual users of the land, Ms. Lewis acquired no rights as against the United States. In Tarpley v. Madsen, 178 U.S. 215, 20 S.Ct. 849, 851 (1899) the U.S. Supreme Court held:

> [M]ere occupation of the public lands gives no right as against the government.

See also Degnan v. Hodel, No. A87-252 Civil (D.Alaska 1989), 16 ILR 3037 (March 1989) where the court held that the BLM retains the authority to issue right-of-way grants up until the time that the allotment application is approved. Consistent with these decisions, an applicant cannot gain a right such as to defeat a grant by the federal government until such time as the application is approved. Until Lewis' allotment was approved by the BLM, the land remained public land subject to grants by the federal government and the establishment of rights-of-way under S.O. 2665.

The rights-of-way established under the authority of the Department of the Interior may only be terminated in accordance with the terms of the grants and departmental regulation. There is no allegation by the BLM or the allottee that the state has breached any term or violated any regulation which could be the basis for termination.

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The rights of way were for permanent public highways. The grant F-37579 was issued pursuant to and on the authority of 23 U.S.C. § 317. Right-of-way F-21630 was established by S.O. 2665 under the authority of 48 U.S.C. § 321a. 2/

Notwithstanding any claim of Indian occupancy, the land covered by the rights-of-way was public land under the jurisdiction of the BLM. Edward A. Nickoli, 90 IBLA 273 (1986). That the BLM had authority over these lands is also evident from the Native allotment regulations. 43 C.F.R. subpart 2561 gives the BLM authority over lands claimed by Indians based only on use and occupancy.

Two field solicitor opinions have held that land occupied by an individual Indian in accordance with the allotment act is not removed from the category of public lands until the certificate of allotment issues, resulting in a transfer of jurisdiction to BIA. In 1963, the field solicitor opined that despite the filing of Native allotment applications, the lands remained "public lands" and the BLM retained jurisdiction to grant a right-of-way to the State of Alaska. The conclusion was

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2/ This statute was repealed on June 25, 1959. However, S.O. 2665 remained in effect. Even were this secretarial order not effective when the right-of-way was established, there would still be a valid right-of-way under Revised Statute 2477, repealed in 1976. Although the Department of the Interior will not adjudicate an RS 2477 right-of-way (State of Alaska v. Heirs of Dinah Albert, 90 IBLA 14, 17 n.5 (1985)), the allotment claim nevertheless remains subject to valid existing rights established under this statute for the same reasons as argued with respect to S.O. 2665.

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reaffirmed in a second field solicitor opinion in 1977. Copies of these two opinions are attached to the Affidavit of Counsel which accompanies this Statement of Reasons. As late as January 16, 1980 the BLM and BIA entered into a Memorandum of Understanding (a copy is attached to the Affidavit of Counsel) that BLM would retain administrative jurisdiction, "including the granting of less than fee interests," over lands in pending Native allotment applications. Not only does this necessarily imply that right-of-way grants by the BLM would be valid, but even if the state were to seek a right-of-way today across lands applied for by a Native allottee, the Department of Interior's position is that BLM would have the jurisdiction to grant that right-of-way until such time as the allotment was approved. See Edward A. Nickoli, 90 IBLA 273, 278 (1986); Degnan v. Hodel, supra. This being the case, it is inconceivable that a right-of-way granted by BLM or established under S.O. 2665 were not valid. The only way the state could have acquired rights to the federal land was to seek a right-of-way grant pursuant to 23 U.S.C. § 317, or its predecessor statute. United States v. 10.69 acres of land, Yakima County, 425 F.2d 317 (9th Cir. 1970). This procedure was followed by the state with respect to F-37579, and the grant was issued by BLM.

With respect to F-21630, S.O. 2665 provided another means for the establishment of public highways which was not limited to governmental authorities. Under this procedure the

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oil companies constructed the TAPS road, and the right-of-way became established. This right-of-way became established in 1975 at the latest when the BLM acknowledged the right-of-way and designated it as F-21630.

In Myers v. U.S., 210 F.Supp. 695, 700 (D. Alaska 1962) the court confirmed that a road established on public domain land was superior to title or rights thereafter gained by an individual. The court held:

> Since the land over which the road was constructed was public domain in 1949 the United States needed no reservation for its right-of-way. Where a public road has been created over a part of the public domain, one who thereafter acquires title to, or rights in, that part of the public domain takes and holds subject to the right-of-way for such road and the rights of the public are not affected by the passing into private ownership of land over which a public road has been established.

When F-21630 and F-37579 were established the land was public domain. Ms. Lewis neither had title to this land nor rights in this land. In fact, she did not even apply for the land in conflict until 1983, long after these rights-of-way became established. 3/

Only if the rights-of-way had been contingent upon the land being vacant and unappropriated and if the state knew (or should have known) the land was not vacant and unappropriated

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3/ Since Ms. Lewis' 1970 application did not include land covered by the TAPS road, the Road Right-of-Way Agreement she signed on October 24, 1970 is superfluous. However, it nevertheless evidences a clear intent by Ms. Lewis not to include this land in her Native allotment claim.

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would basis exist for cancellation of the rights-of-way and those facts would have to be proved in an appropriate hearing before cancellation. The rights-of-way were not conditioned upon there being no Indian occupant of the land, nor was there any requirement anywhere that the rights-of-way only be "vacant and unappropriated land." The lack of any such requirement distinguish this case from Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), and from all other cases involving conflicts between state "selections" and allotment applications.

Even a term of grant F-37579 provided that the right-of-way is granted on public domain land, notwithstanding any entry, occupancy, selection or settlement. With respect to grant F-37579 footnote 1 provides:

> For the purpose of this grant, public domain lands include those reserved or withdrawn for specific purposes, entered, selected, occupied and/or settled, and leased.

Although there is no grant document with respect to F-21630, there is no reason why federal public land would have a different definition in S.O. 2665 since both grants and the secretarial order came from the Department of Interior. If Ms. Lewis' occupancy is accepted to have begun prior to the date of the rights-of-way, the lands covered by the rights-of-way nevertheless remained public domain land over which a public rights-of-way could be established.

While one may take issue with the BLM authorizing public rights-of-way to become established on land occupied by

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an Indian, this was nevertheless authorized by law and the rights-of-way are therefore valid. Only after the approval of the allotment application by the BLM did this legal authority cease.

To hold otherwise would not only conflict with the BLM regulations and the purpose of 23 U.S.C. § 317 and 48 U.S.C. § 321a, but it would also mean that there was no legal means by which the state could obtain a highway right-of-way across public land on which occupancy by an Indian is alleged or may in the future be alleged. Such a holding is contrary to the statutory scheme of 25 U.S.C. § 323, 43 U.S.C. § 1761 et seq., 48 U.S.C. § 321a, and 23 U.S.C. § 317, which laws are for the express purpose of enabling rights-of-way to be established public and Indian occupied land.

That the rights-of-way are valid existing rights is further evidenced by the fact that they are an interest in land which may only be cancelled upon specific written notice. I.e., the grants represent rights which exist until cancelled as required by law. In State v. Sarakovikoff, 50 IBLA 284, 287 (1980) the Board held that a contest proceeding could only be brought by a party with a sufficient interest in land, and that this requirement was satisfied where the interest was grounded on a specific statutory grant. In the instant case, the rights-of-way were established pursuant to 23 U.S.C. § 317 and 48 U.S.C. § 321a.

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At least with respect to F-37579, these rights existed until they were cancelled in writing. The applicable regulation to which this right-of-way grant is subject is 43 CFR § 2234.1-5(a) (1965), as specified in the grant. This regulation provided:

> No right-of-way shall be deemed to be cancelled except on the issuance of a specific order of cancellation.

Furthermore, by law BLM highway right-of-way grants are valid existing rights until specifically cancelled or terminated. Southern Idaho Conf. Ass'n of 7th Day Adv. v. United States, 418 F.2d 411 (9th Cir. 1969).

It must be emphasized that an express term of grant F-37579 was that the grant was subject to "All valid rights existing on the date of the grant." Although there is no equivalent term with respect to F-21630 because there is no grant document, it would only make sense to interpret S.O. 2665 as allowing the establishment of rights-of-way subject to valid existing rights existing on the date of establishment. Otherwise there would be a taking of property.

If Ms. Lewis did not have valid existing right to the land on the date the rights-of-way became established were issued then the land is subject to the rights-of-way. Because approval of the allotment application had not occurred at the time the rights-of-way were established, Ms. Lewis did not have rights to the land sufficient to prevent the rights-of-way from becoming

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established over the land she subsequently claimed. Edward A. Nicholi, supra; Degnan v. Hodel, supra. It must be remembered that Ms. Lewis' application did not even include the land covered by these rights-of-way at the time they became established. She did not amend her application to include this land until 1983.

There are three cases on which the BLM relies: Golden Valley Electric Ass'n (On Reconsideration), 98 IBLA 203 (1987); State of Alaska v. 13.90 Acres of Land, 625 F.Supp. 1315 (D. Alaska 1985); and Aguilar v. United States, 474 F.Supp. 840 (D. Alaska 1979). An examination of these cases shows that there is no basis for the proposition that an allottee has a valid existing right prior to approval of the allotment. Furthermore, these cases do not suggest that the BLM has no authority to issue rights-of-way over public domain land notwithstanding a claim of Indian occupancy or a preference right, or that no right-of-way may become established under S.O. 2665.

In GVEA (On Reconsideration) the Board notes that this decision "represent[s] a shift in BLM's policy regarding the issuance of allotment certificates subject to rights-of-way." 98 IBLA 207 n. 1. The Board based this shift on the decisions in 13.90 Acres and Aguilar, and applied the shift retroactively to pre-existing rights-of-way. The Board also noted that its decision was supported by Schumacher v. State of Washington, 33 L.D. 454 (1905).

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The critical fact in Schumacher was that under the Act of February 8, 1887 (24 Stat., 388) Indian occupancy made the land appropriated and thus unavailable for disposition by the United States. This act did not have a provision similar to the Native Allotment Act which gave an Indian a preference right only upon compliance with rules established by the Secretary of the Interior. With respect to the land claimed by Ms. Lewis there is no act which makes the land appropriated and her rights a valid existing right by mere occupancy or application.

Of further significance in Schumacher was that under the act of February 28, 1891 (26 Stat., 796) the entitlement of the State of Washington was expressly made subject to the claims of settlers "where settlements with a view to pre-emption or homestead have been, or shall hereafter be made." 33 L.D. at 456-57. Unlike Schumacher, the acts under which the rights-of-way became established, 23 U.S.C. § 317, 48 U.S.C. § 321a, and the BLM right-of-way regulations, 43 CFR subpart 2234 (1966), contain no such provision.

The public highway rights-of-way were subject only to valid existing rights. Although Ms. Lewis may (if her allegation of use and occupancy is correct) have had a preference right to the land at the time they became established, this preference right was not a valid existing right such as to limit the authority of the BLM over public domain land. With respect to rights-of-way over public domain land, there was no statute or

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law such as in Schumacher which diminished or limited the Department of the Interior's authority to issue right-of-way grants pursuant to 23 U.S.C. § 317 or to allow such rights-of-way to become established under S.O. 2665. Until GVEA (On Reconsideration) this authority was never doubted.

It should also be noted that neither in Schumacher nor GVEA (On Reconsideration) was there any analysis of the BLM's authority to grant rights-of-way, the effect of Indian occupancy on such grants, and at what point a preference or pre-emption right could become a valid existing right.

Similarly, Aguilar did not concern right-of-way grants by the BLM, or the establishment of rights-of-way under S.O. 2665, and the opinion contains no analysis of the BLM's authority to issue right-of-way grants over public domain land notwithstanding Indian occupancy or to allow such rights-of-way to become established. There is no discussion of BLM's long held position that it has the authority to make such grants (see Edward A. Nickoli, 90 IBLA 273, 278 (1986); Field Solicitor Opinions and Memorandum of Understanding, Exhibits A, B and C, Affidavit of Counsel). Nor is there a discussion of the case law recognizing that mere occupancy does not impair the government's authority over public domain land. Tarpley v. Madsen, 178 U.S. 215 (1899). United States v. Hurlburt, 72 F.2d 427, 428 (10th Cir. 1934). Nor did the court in Aguilar have any reason to be concerned about the need for public highway rights-of-way, and

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the procedure for establishing such rights-of-way on public domain land. See, United States v. 10.69 acres of land, Yakima County, 425 F.2d 317 (9th Cir. 1970). If there were no procedure for the establishment of a valid rights-of-way over public land due to a potential claim of Indian occupancy, then highways could not be built. (The state has no power to condemn federal land.)

Significantly, Aguilar did not equate the preference right of an Alaska Native to be a valid existing right prior to the time the preference right became vested. Such would defy logic, would interject uncertainty in public land law (since there would be nothing of record to indicate prior rights), and diminish the statutory authority of the BLM over the public domain lands. 4/ The BLM rights-of-way were subject only to valid existing rights. A preference right where there has been no approval of the Native allotment application is not a valid existing right. For the BLM to suddenly "shift" its policy ten years after the establishment of the grants and adopt the fiction of the preference right relating back to the date of first claimed occupancy and becoming a valid existing right as of this date is an unwarranted extension of Aguilar in violation of the state's rights and contrary to law.

4/ In fact, under the BLM's interpretation only vague and changing notions of what constitutes Indian occupancy would determine whether there were vested rights, even though the Indian might never apply for the land or might be actually using greatly in excess of 160 acres although his maximum entitlement would be 160 acres. See Case, Alaska Natives and American Law, page 139 (1984).

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In Aguilar the state was in the position of a competing entryman. The land involved was land selected by the state pursuant to its statehood entitlement. Id. at 845. Although, Aguilar does not mention it, the Statehood Act required the land to be selected to be vacant. Lucy S. Ahvakana, 3 IBLA 342 (1971). Thus, the state was merely in the position of a competing entryman, and the court's analogy to the right of preemption of settlers was appropriate. Id. at 845. Questions concerning the authority of the BLM and the Department of the Interior over public land were not involved.

The court in Aguilar relied in large part on Cramer v. United States, 261 U.S. 219 (1923). Cramer recognized that while the federal government had an obligation to protect Indian occupancy, only the federal government could interfere with that right. A passage in Cramer (quoted with approval in Aguilar, 474 F.Supp. at 843) states:

> Unquestionably it has been the policy of the Federal Government from the beginning to respect he Indian right of occupancy, which could only be interfered with or determined by the United States. Beecher v. Wetherby, 95 U.S. 517, 525; Minnesota v. Hitchcock, 185 U.S. 373, 385.

Cramer, 261 U.S. at 227. Thus, under Cramer and approved by Aguilar, the Department of the Interior has the authority to rights-of-way to be established notwithstanding Indian occupancy. The protections of Aguilar do not extend to grants by, or authorizations of, the federal government.

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For the Department of the Interior in GVEA (On Reconsideration) to expand the statutory language of the Native Allotment Act to mean that preference right is a valid existing right is to substantively change the long held BLM interpretation of the statute and practice of the BLM. In Stockley v. United States, 260 U.S. 532, 539 (1923) the court held:

> A change in the practice of the Land Department manifestly could not have the effect of altering the meaning of an act of Congress. What the act meant upon its passage, it continued to mean thereafter.

This principle has been made a regulatory requirement of the Department. 43 CFR § 2801.4.

In GVEA (On Reconsideration), the IBLA recognizes the "shift" in policy of the BLM with respect to making allotments subject to its previously established rights-of-way. Although this shift is contrary to law, whether or not the Board rules on this question it should not be applied retroactively to invalidate public rights-of-way relied on by the state for many years. 5/

One final note on Aguilar: the overriding concern of the court was obviously the protection of the land used and occupied by Alaska Natives. Independent of the Native Allotment Act and the preference right afforded Alaska Natives under it,

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5/ Stockley is cited by the court in Aguilar. Stockley was held to have a valid exiting right based on his full compliance with the applicable statute, which included the filing of a proper application.

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the Department of the Interior has a duty to protect from encroachment land used and occupied by Alaska Natives. 43 CFR § 2561.0-2. Curiously, Aguilar did not mention this regulation. Thus, even with no preference right Alaska Natives are afforded protection by the federal government. But the obligation of the BLM is broader than only protection of the interest of Alaska Natives. There is an obligation to administer the public domain consistent with the welfare of the general public, and as allowed by 23 U.S.C. § 317 and 48 U.S.C. § 321a, to grant highway rights-of-way or allow them to become established for the construction of needed roads over the public domain. To a certain extent there is a tension between the BLM's special obligation to Alaska Natives and its obligation to the public in general. Because BLM exercises its discretion to grant the state a right-of-way or allow one to become established under secretarial order to the detriment of an Alaskan Native does not mean that the right-of-way is void, as the BLM now interprets. The Department of Interior has recognized that the Department's obligation to protect Indian occupancy from outside encroachments does not extend to encroachments by the United States. Flynn and Orock, 53 IBLA 208, 234 (1981). See also Cramer, 261 U.S. at 227. In the instant case the encroachment are the rights-of-way specifically authorized by the United States.

Much of what has been stated above concerning Aguilar applies equally to State of Alaska v. 13.90 Acres of Land, 625

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F.Supp. 1315 (D.Alaska 1985). 13.90 Acres had nothing to do with BLM highway right-of-way grants or the authority of the BLM to allow highway rights-of-way to become established on land which is subsequently claimed by an Alaska Native.

Degnan v. Hodel, No. A87-252 Civil (D. Alaska 1989), 16 ILR 3037 (March 1989) holds that the BLM retains the authority to issue right-of-way grants up until the time that the allotment application is approved. Since Maureen T. Lewis' allotment application was not approved until 1990, over 10 years after the rights-of-way became established, the BLM retained full authority to issue right-of-way grants and allow them to become established until the 1990 approval. In Degnan the court held that after approval of the allotment application in 1975 "the Secretary was thereafter without power to diminish that title by reserving rights-of-way across the allotment lands." The obvious implication from the court's holding is that before the 1975 approval in Degnan the Secretary did have the power to grant and authorize rights-of-way across this land. The Degnan decision fully supports the state's position.

Based on the foregoing, highway rights-of-way F-21630 and F-37579 are valid existing rights to which the allotment must be made subject. Maureen T. Lewis' allegation of prior use and occupancy cannot render these rights-of-way void ab initio as determined by the BLM. By law allotments must be made subject to valid existing rights. 43 U.S.C. § 1634(a)(1).

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III. An allottee may not exclusively use and occupy more than 160 acres.

Ms. Lewis applied for her full entitlement of 160 acres in 1970. She described the land for which she applied in her application, and she stated that her qualifying use and occupancy began in 1968. (In an affidavit filed in 1973 she alleges that her exclusive use and occupancy of this land began in 1963.)

By its decision the BLM has effectively authorized Ms. Lewis to use and occupy exclusively substantially more than 160 acres of land. This is because not only was the 160 acres she applied for in 1970 made unavailable for the vesting of competing rights since the date of her claimed qualifying use and occupancy in 1968, but also the additional acreage she applied for in 1983 became unavailable as of 1968. There is no legal authorization for an allottee to have a vested right in, and exclusively use and occupy, more than 160 acres of land.

In Joash Tukle, 86 IBLA 26, 27 n.1 (1985) the Board commented on the effect of an amendment of a Native allotment application:

> Although appellant may have previously used and occupied the land at Oliktok Point, any inchoate right to an allotment for this parcel based on such use and occupancy never vested because there had been no timely application for that parcel. See generally United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981).

In United States v. Flynn, 53 IBLA 208, 234 (1981) the Board held:

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> Rather, it was only by application, together with the requisite use or occupancy, that the inchoate preference right matured into a vested right. The preference right was not an in praesenti grant of land. On the contrary, it required clear identification of the land sought by an applicant before it could be exercised. Indeed, the system of allotment could proceed on no other basis. A Native could clearly use or occupy in excess of 160 acres in a manner consonant with the Native Allotment Act. Prior to his or her application, the Native's use and occupancy would be protected against outside encroachments, same for that of the United States.

See also, Jonas Ningeok, 109 IBLA 347 (1989). Thus, it is clear that an allottee cannot obtain a vested right to land used and occupied until at least such time as there is an application. At the time F-21630 and F-37579 became established pursuant to Departmental authority, there was no application by Ms. Lewis for any of the land included in these grants. See the sketch of the Native allotment claim of Ms. Lewis attached to the BLM field report dated September 29, 1976.

Although the Board has developed a relation back doctrine to invalidate BLM granted rights-of-way on land subsequently claimed for an allotment (see Argument II, infra, where the state demonstrated that this doctrine is incorrect as to rights-of-way established pursuant to Departmental authority), this doctrine should not apply in the situation where an allotment application is amended to include land in previously established rights-of-way. Not only should third parties be able to rely on the initial application of Ms. Lewis when they establish their rights, especially where her application is for

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her maximum entitlement, but also to hold otherwise is to effectively give her a vested right to land greatly in excess of her entitlement. This is because her initial application segregates all of the land included in that application, thus precluding subsequent conflicting applications. 43 C.F.R § 2561.1(e). And if the relation back doctrine were held to apply, Ms. Lewis would also gain a vested prior right in additional land, even though this exceeds her entitlement.

Application of the relation back doctrine in the situation where an application is amended to include land where third parties have acquired rights after the initial application raises substantial questions of good faith and fair dealing by the allottee. The relation back doctrine invites an allottee to maneuver an allotment claim to take advantage of subsequently developed rights by third parties, and to hold for ransom title to the area in conflict. Amendments of property descriptions are thereby encouraged not to be based on a mis-description of property, but rather to be based on a motivation to gain an unfair economic advantage. This appears to be exactly the case with Ms. Lewis, since the original property description in her application is clear, the property was marked with corner posts, and a map was attached to the application depicting the land for which she applied. After the state's realignment project in 1980-81 for which the state received grant F-37579, Ms. Lewis realized that she no longer had significant highway frontage.

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To remedy this she amended her application in 1983 to include Dalton Highway frontage. Where the rights-of-way were established after her 1970 application, it is patently unfair and contrary to law to allow an amendment of the application after establishment of the rights-of-way to defeat those rights-of-way.

IV. Secretarial Order 2665 Requires the allotment to be made subject to the highway covered by F-21630

The allotment claim of Maureen T. Lewis must be made subject to the Dalton Highway right-of-way by virtue of Secretarial Order 2665. Although the BLM noted this order in its decision, it made no determinations with respect to whether S.O. 2665 allowed the establishment of a valid existing right to which the allotment claim must be made subject.

S.O. 2665, dated October 16, 1951, provides for the "establishment of rights-of-way or easements over or across the public lands" covered by public highways established or maintained in Alaska.

The BLM states in its decision that the highway was constructed between August 16, 1969 and August 10, 1971. It must be presumed that the portion of this highway in conflict with the allotment claim was public land at this time, since otherwise the BLM would have no jurisdiction to consider the allotment claim. In any case the records of the BLM do reflect that this was federal public land at the time the highway was constructed. The question then becomes whether Maureen T. Lewis had a valid

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existing right in the land at the time the highway was constructed.

Ms. Lewis did not file her allotment application until June 9, 1970. A review of the property description in this application shows that the land claimed did not include the Dalton Highway right-of-way. This is also shown by the U.S. Quadrangle map attached to the application on which the boundaries of the land claimed for the allotment is traced. The Native Allotment Field Report, dated September 29, 1976 clearly shows in a detailed sketch that the Native allotment claim does not conflict with the TAPS roads. (The TAPS road is what is now known as the Dalton Highway.) This sketch shows the land that Ms. Lewis applied for in her 1970 allotment application.

As the record shows, the maps for the right-of-way were filed with the BLM in January of 1973 by the State of Alaska. The record further shows that on April 3, 1975 the BLM accepted the right-of-way as established under S.O. 2665, and designated this right-of-way as F-21630.

It was not until July 5, 1983 that Ms. Lewis amended the land description in her allotment application. It is this amended description which creates the conflict with the Dalton Highway the right-of-way. There was no conflict previous to 1983.

It is the state's position that the earliest possible date Maureen T. Lewis could have acquired a valid existing right

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in the land in conflict was when she amended her allotment application to include the land covered by the Dalton Highway.

In addition to the authority set forth in Argument II, the following authority requires acceptance of the state's argument herein.

In State of Alaska v. 13.90 Acres of Land, 625 F-Supp. 1315, 1320 (D. Alaska 1985) the court held:

> Alyeska then argues that so long as a native's rights under the Allotment Act are inchoate (i.e., prior to application and vesting of rights) Congress, or an executive agency with Congressional authority, can withdraw the lands from entry and rededicate them to another use. This is generally true.

And at n. 7 on the same page:

> Rights to a native allotment vest upon filing of an application. [citations omitted] (land remains subject to the disposing power of Congress until entryman satisfies last condition imposed by law for the issuance of patent.

Under this authority, the land could be impressed with a public highway right-of-way until such time as the application was amended to include the land in question. Ms. Lewis did not have a vested right to this land until at least 1983. Until that time the land was public domain land subject to Secretarial Order 2665 and the authority of the BLM to grant rights-of-way. See also, Flynn v. Orock, 53 IBLA 208, 234 (1981).

In Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128, 140 n.7 (1989) the Board held that a Native allotment does not become a valid existing right until "the statutory

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requirements [of the Native Allotment Act] are met." One of the statutory requirements is compliance with "such rules as he [the Secretary of the Interior] may prescribe." 43 U.S.C. §§ 270-1 - 270-3, repealed with savings clause. One of these requirements is the filing of properly certified allotment application. 43 C.F.R. § 2561.1. See also, Jonas Ningeok, 109 IBLA 347 (1989) (In order for a Native allotment applicant to gain a vested right to an allotment, the applicant must show 5 years' use and occupancy of the land and the filing of an application therefore.)

At the time the Dalton Highway became an established easement under Secretarial Order 2665, there was no pending allotment application for the land in conflict. Therefore, under Kootznoowoo, the allotment was not a valid existing right to which the right-of-way must be subject.

V. The 1983 amendment to the land description is contrary to law and must be rejected.

43 U.S.C. § 1634(c) allows the property description in an allotment application to be amended if the original "description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to

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be claimed." In Angline Galbraith, 97 IBLA 132, 146 (1987) 6/ the Board held:

> We interpret section 905(c) as follows. First, an amendment of a Native allotment application describing different lands is permissible only where the new description embraces the lands originally sought. See Tukle v. Hodel, No. A85-373 (D. Alaska April 7, 1987). . . .

The Board made clear it was the applicant's burden to show that the amendment describes the land for which the applicant originally intended to apply.

In this case the only evidence that the amendment covers the land for which Ms. Lewis originally intended to apply is her self-serving and conclusory statement:

> I hereby certify that this description covers the land I originally intended to claim as my allotment.

This statement is dated July 5, 1983, and appears to be preprinted on a form supplied to Ms. Lewis by the BLM. From the record it appears that BLM simply accepted this statement and did no analysis to determine whether in fact the amendment embraces Ms. Lewis' original intent.

In Angeline Galbraith, supra at 147 the Board held:

> That an applicant contends his amendment describes the land originally intended does not, of course, settle the matter. Rather, the question of intent must be determined based on the facts and

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6/ This opinion was modified in Angeline Galbraith (On Reconsideration), 105 IBLA 333 (1989). However, the modification dealt only with the sufficiency of use of the land. The Board's decision remained unchanged with respect to amendment of property descriptions.

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> circumstances reflected in the record. Relevant to the question of intent are the geographic positions of the land described in the original application and the proposed amendment, the relation of the parcels to each other and to any land marks or improvement, the history of the legal status of the parcels, and the reasons why the original application did not correctly describe the intended land. See Pedro Bay Corp., supra. Moreover, an applicant should show how his or her activities since filing the application have been consistent with the present claim that other land was intended. Such factors should clearly indicate a reasonable likelihood that the land described by the amendment was the land intended to be claimed at the time of the original application.

(Emphasis added.)

Ms. Lewis has wholly failed to meet this standard. The record in fact contains overwhelming evidence that the amended property description does not reflect Ms. Lewis' original intent. Not only is the property description in her original application clear as to the land she claimed, but she attached a sketch of the property drawn on a U.S. Quadrangle Map to her application. Despite all the activity in the BLM records pertaining to this land, Ms. Lewis did nothing to amend this property description for 13 years. During this time she was represented by Alaska Legal Services Corporation, as shown by the 1973 affidavit she submitted to the BLM. It was by this affidavit that she amended her allotment application to allege exclusive use and occupancy of the land for which she applied since 1963. It would have been a simple matter for her also to have amended the property description in 1973. The Road Right-of-Way Agreement she signed

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on October 24, 1970 is emphatic objective evidence that Ms. Lewis did not intend to claim as part of her allotment the land covered by F-21630. Furthermore, the Dalton Highway was constructed between 1969 and 1971, and has been in continual use since that date, yet there was never a protest or complaint by Ms. Lewis that land she claimed was being encroached upon. The same is true with respect to the New Elliott Highway, which was constructed in 1980 and 1981.

As the Board noted in Angeline Galbraith, supra at 155:

> Thus, as an initial matter, it is the applicant's obligation to establish her entitlement to an allotment of the land.

Ms. Lewis has not done this with respect to the land covered by the amended description. Because the amended description contains land that was not originally intended to be claimed, the amendment is contrary to 43 U.S.C. § 1634(c) and must be rejected.

VI. Both the allottee and the BLM are estopped to deny the validity of F-21630 and F-37579.

In United States v. Wharton, 514 F.2d 406 (9th Cir. 1975) the court specifically authorized the use of estoppel against the federal government where the disposal of public lands by the Department of the Interior was involved. The court quoted with approval from its earlier decision in United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973):

> The Moser-Brandt-Schuster line of cases establish the proposition that estoppel is available as a defense against the government if the governments

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> wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel.

Wharton, 514 F.2d at 406.

In this case the state has shown that the federal government's conduct will work a serious injustice - the state will lose its rights-of-way on which it has constructed major highway facilities which have been used and relied on by the public for many years. There was no hint of a problem with the rights-of-way until the BLM decision in 1990. Further, it was the federal government's position, as expressed in grant F-37579, that highway rights-of-way were subject only to valid existing rights which existed at the time the right-of-way became established, and that the rights-of-way were effective notwithstanding entry, selection, settlement or occupancy of the public lands.

In Wharton the court held that erroneous advice from a local BLM office to Wharton and misrepresentations to Wharton through Congressman Ullman were sufficient to constitute affirmative misconduct. Wharton, 514 F.2d at 412. In the instant case it is submitted that the conduct of the BLM is far more egregious in view of the fact that the BLM's misrepresentations were made in the grant F-37579 which the BLM knew was going to be used for construction of a major highway facility. And further, BLM failed to notify the state or take any action against the rights-of-way until 1990, long after the

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highways were built. With respect to F-21630, the BLM accepted the establishment of the right-of-way, yet never informed the state that its definition of public land on which rights-of-way could be established might in the future change, and that this change would be applied retroactively.

Wharton also indicated that the public's interest should not be unduly damaged by imposition of estoppel. Application of estoppel in the instant case does not deprive the public of public domain land. The question is whether the state receives the rights-of-way on which its public highways are build or whether Maureen T. Lewis receives the land covered by the rights-of-way. Ultimately, the question is one of money, since the state will undoubtedly acquire the property if it does not prevail herein, because the land is necessary for the already constructed highway facilities. The public interest is only damaged if there is not application of estoppel, as the state will have to reacquire from Ms. Lewis property it already had owned.

The record shows that BLM knew that the state's rights-of-way were for the purpose of a public highways. This was the stated purpose of grant F-37579 issued by the BLM. And with respect to F-21630, the "as-built" plans of the highway were filed with BLM before the BLM accepted the right-of-way as established under S.O. 2665. With respect to the Dalton Highway right-of-way, Ms. Lewis even granted to the oil companies who

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built the road, a right-of-way for the purpose of the road. Both the BLM and Ms. Lewis knew that the state would rely on these rights-of-way for the Dalton Highway and Elliott. Neither Ms. Lewis nor the BLM ever objected. The BLM's grant of F-37579 and acceptance of F-21630 was a position asserted by conduct and word. S.O. 2665 was also a position asserted by the Department of the Interior. The record shows that Ms. Lewis did not object, protest or appeal the rights-of-way or the state's use of them. Thus a position was asserted by conduct by Ms. Lewis

It is also important to note that had BLM wanted to make the right-of-way subject to the allotment claim, all it had to do was to so specify. At the time of the establishment of the rights-of-way, Ms. Lewis' application was on record with the BLM (even though she had not yet amended her application to include land covered by F-21630). If the BLM wanted the rights-of-way to be subject to the allotment, all that needed to have been done in the grants was to insert a statement in grant F-37579 to the effect that "this grant is subject to allotment claim F-12971." Similarly, with respect to S.O. 2665 all the Secretary had to do was to specify that the establishment of rights-of-way on public land pursuant to this order were subject to pending and future Native allotment claims.

Prejudice is established because the BLM and Ms. Lewis allowed the state to use the right-of-way and yet did not object or protest or otherwise give notice that there was a conflict

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with the allotment claim. Furthermore, the lack of timely notice by BLM or Ms. Lewis to the state of any potential problem with its right-of-way has made it impossible to gather effectively evidence to rebut any claim by Ms. Lewis that she used and occupied the land covered by these rights-of-way.

The rights-of-way were acquired by the state in good faith. There was nothing of record to indicate that Ms. Lewis claimed or would claim in the future this land. Based on the law set forth in Argument II the state had no reason to suspect that its rights-of-way could be challenged on the basis of prior occupancy. Both the allottee and the BLM knew that the purpose of the rights-of-way was for construction and maintenance of a highway. Neither objected to the public use of the highways during the past 10 years. In fact the first notice to the state that there was any question concerning the validity of its rights-of-way was the 1990 BLM decision from which the state has appealed. Thus there has been reasonable reliance.

In view of these facts, equitable estoppel should preclude both Ms. Lewis and the United States from denying the validity of the rights-of-way. United States v. Eaton Shale Co., 433 F. Supp. 1256, 1272 (D. Colo. 1977). United States v. Georgia Pacific Co., 431 F.2d 92 (9th Cir. 1970). Any rights Ms. Lewis has were necessarily derived from the federal government. As such, she stands in the shoes of the federal government with respect to being estopped from denying the validity of the

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rights-of-way. The Alaska Supreme Court in State, Dept. of Transp. v. First Nat. Bank, 689 P.2d 483, 486 n.13 (Alaska 1984) held:

> The State, standing in the shoes of the federal government, would be estopped to deny the validity of Pippel's entry in any event . . . . The government should not be permitted retroactively to invalidate the deliberate action of its officers after they have been reasonably relied on for 34 years. See Municipality of Anchorage v. Schneider, 685 P.2d 94 (Alaska 1984); Fields v. Kodiak City Council, 628 P.2d 927, 931 (Alaska 1981).

The decision of Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987) held that both estoppel and laches may be applied against a Native allottee where the allottee failed to object to a road being constructed by defendant across the allotment. The court held:

> . . . Etalook is estopped by her husband's failure to object to the improvements when they were made.

Id. at 831. The court approvingly cited Armstrong v. Maple Leaf Apartments, Ltd., 436 F. Supp. 1125, 1147-50 (D. Okla. 1977) aff'd in part, 622 F.2d 466 (10th Cir. 1979), cert. denied, 449 U.S. 901 (1980) for the proposition that laches is available to defendants in actions brought by Indians with respect to their restricted lands. Etalook, 831 F.2d at 1445. Similar to Etalook, Ms. Lewis failed to protest, object or give any notice to the state of her claim to the land when rights-of-way were established and used through the years.

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The U.S. Supreme Court in United States v. Winona & St. Peter R.R. Co., 165 U.S. 463, 475-76 (1897) has held that after a prescribed lapse of time a conveyance by the federal government should be unassailable "notwithstanding any errors, irregularities, or improper action of its officers therein." Ten years after establishment of the rights-of-way the state should not have to defend their validity.

Federal law requires "affirmative misconduct" before the United States can be estopped. As construed by the federal courts, there is affirmative misconduct in this case. In Tosco Corp. v. Hodel, 611 F. Supp. 1130, 1206 (D. Colo. 1985) the court held:

> Therefore, we conclude that for the estoppel doctrine to be applied against the government, the conduct must be within the scope of the agent's authority, and must be an affirmative act which, on a balance of all the equities, amounts to "unconscientious or inequitable" behavior. Assuming all other elements of estoppel are present, . . . even conduct based on a mistake of law will qualify as "affirmative misconduct" if the refusal to estop the government will work an inequitable or unjust result.

As previously shown, the rights-of-way were established in accordance with federal law and were within the authority of the Department of the Interior to establish the rights-of-way. Issuance of grant F-37579 and S.O. 2665 were "affirmative acts" intended to be relied on by the state and public for the establishment of highways. Given the facts of this case and the

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law, it would be highly inequitable not to uphold the validity of the rights-of-way.

In a remarkably analogous situation the Alaska Supreme Court held Tetlin Native Corporation, standing in the shoes of the Department of the Interior, to be estopped from denying the validity of certain material site grants the BIA had issued to the state. Tetlin Native Corp. v. State, 759 P.2d 528, 534-37 (Alaska 1988).

Before patent issues the Department of the Interior may correct any erroneous action with respect to the disposal of public land. However, once there is a disposal, then the Department is not free to make corrections where the rights of innocent parties would be prejudiced. Courts have held that a right-of-way is in effect a patent. Allison v. State, 420 P.2d 189 (Az. 1966); Southern Idaho Conference Ass'n of Seventh Day Adventists v. United States, 418 F.2d 411 (9th Cir. 1969). Where there has been no final disposal of land by the Department of the Interior it is doubtful that a party could establish reliance which is a prerequisite of estoppel. However, once the Department makes a grant or the right-of-way becomes established pursuant to secretarial order, then the disposal of land has left the administrative process. The Department is then not free to correct wrongful agency action, and estoppel may apply in the proper case. See also 43 USC § 1166 which validates a wrongful disposal of public land, thereby preventing absolutely the

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Department from taking corrective action. There is no authority which holds that estoppel does not apply in the proper case where disposal of public land is involved. Wharton clearly is to the contrary.

Estoppel is a limitation on the Department of the Interior's ability to correct erroneous action with respect the disposal of public land. Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970) involved a letter from a BLM office advising applicants for a lease that they would not lose their priority if they refiled a corrected form within 30 days. This promise was unauthorized by statute, regulation, or decision. Another person filed before they refiled, and the Secretary of the Interior determined the first applicants had lost their priority. The court in Brandt held that the erroneous advice of the BLM estopped the Secretary to otherwise determine priority. See also Schuster v. C.I.R., 312 F.2d 311 (9th Cir. 1962) where the court held that a government commissioner could not always correct a legal mistake regardless of the injustice which will result. In Wharton the court noted:

> other courts have permitted estoppel to be used against the government in cases involving public land, or have indicated that estoppel would have applied on a proper showing of misrepresentation or reliance on governmental action. United States v. Big Bend Transit Co., 42 F.Supp. 459 (E.D. Wash. N.D. 1942); Udall v. Oelschlaeger, 129 U.S. App. D.C. 13, 389 F.2d 974 cert. denied 392 U.S. 909, 88 S. Ct. 2056, 20 L.Ed.2d 1367 (1968).

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As previously indicated the facts of the instant case are far more compelling for application of estoppel than the facts in the cases cited where estoppel was held to apply. This is due to the construction of permanent highway facilities, which have been relied on for over ten years by the public, and the delay of this time before the federal government decided to take action on what it now perceives were erroneously established rights-of-way. Both BLM and Ms. Lewis knew that the rights-of-way would be used, and were used, for highway facilities. Despite this knowledge both Ms. Lewis and BLM stood by and allowed the highways to be constructed and used for many years before giving any indication of an objection to the rights-of-way. Under similar circumstances the court in Etalook v. Exxon Pipeline Co., 831 F.2d 1440, 1445 (9th Cir. 1987) held that an Indian who claimed an allotment was estopped to complain about improvements constructed on the land when he failed to object when the improvements were made. Under the principles of Wharton the BLM is also estopped.

Because by law Native allotments are subject to valid existing rights (43 U.S.C. § 1634(a)), and the rights-of-way are valid existing rights, the state had no reason to suspect that they could be questioned by the BLM or by an allottee. See Argument II. As previously shown the rights-of-way were subject only to valid existing rights, i.e., valid rights which existed as of the date the rights-of-way were established. As previously

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several small communities. Because the BLM has discretion to make an allotment subject to existing and necessary rights-of-way, yet gave no consideration to doing so, the BLM decision was an abuse of discretion.

The Department of the Interior has discretion to grant or deny an allotment application in whole or in part so long as the discretion is not arbitrarily exercised. Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). In Chiskak, Hunt, Odinzoff, and Raymond, 22 IBLA 153, 154 (1975), part of the basis for the denial of the allotment was the Department's discretionary authority to deny an allotment application to protect the needs of the public to an airport bordering the allotment. The decision noted that:

> it is correct and proper for the Secretary to exercise his discretion to the end that such land be retained in public ownership.

The Board reaffirmed the department's discretion to grant less than full title to an allottee based on public policy and equitable considerations in Alyeska Pipeline Co., 52 IBLA 222, 225 (1981).

In Edward A. Nickoli, 90 IBLA 273, 278 and n. 4 (1986) the Board held that even the preference right an applicant receives upon completion of the use and occupancy requirements and the timely filing of a Native allotment application does not remove the discretion vested in the Secretary to grant the allotment. The Board further noted that title to land subject

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to an application remains in the United States even when the application is approved, and up until an instrument termed "Native Allotment" is issued to the applicant.

In this case the BLM had substantial reasons to at least consider making the allotment subject to the highway rights-of-way. Since they have been in use for many years and are vitally necessary for access, and during this time there has never been a protest or objection from either the BLM or Ms. Lewis, the public need and reliance by the state should have been considered by the BLM.

It is submitted that it was an abuse of discretion for the BLM not to have considered the public need and use of the highways.

VIII. 43 U.S.C. § 1166 Bars the BLM from Voiding Right-of-Way Grant F-21630 and F-37579.

Even if BLM could show that the right-of-way grants were improperly established, the attempt to void them more than 10 years after the property interest became vested in the state is barred by 43 U.S.C. § 1166 which provides:

> Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents.

The effect of 43 U.S.C. § 1166 is to validate these rights-of-way. State v. Alaska Land Title Ass'n., 667 P.2d 714, 729 (dissent) (Alaska 1983). The fact that 43 U.S.C. § 1166 refers only to patents and not rights-of-way does not make this statute inapplicable to the rights-of-way in question because there is

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substantial authority that a right-of-way is in effect a patent. In pending litigation the Justice Department has conceded that right-of-way grants issued by the BLM pursuant to 23 U.S.C. § 317 are easements. See excerpt from the Justice Department brief in State v. Lujan, et al., No. F-90-0006 Civil (D. Alaska), which excerpt is attached to the Affidavit of Counsel submitted with this Statement of Reasons. There is no reason to make a distinction with respect to rights-of-way established pursuant to secretarial order under authority of 48 U.S.C. § 321a. See also, Allison v. State, 420 P.2d 289 (AZ. 1966); Southern Idaho Conference Ass'n of Seventh Day Adventists v. United States, 418 F.2d 411 (9th Cir. 1969). Furthermore, the dissent of Justice Rabinowitz in Alaska Land Title Ass'n., clearly indicates the applicability of 43 U.S.C. § 1166 to federally created easements. Therefore, 43 U.S.C. § 1166 is applicable.

CONCLUSION

Based on the foregoing arguments the decision of the BLM must be reversed.

DATED: Oct. 10, 1990.

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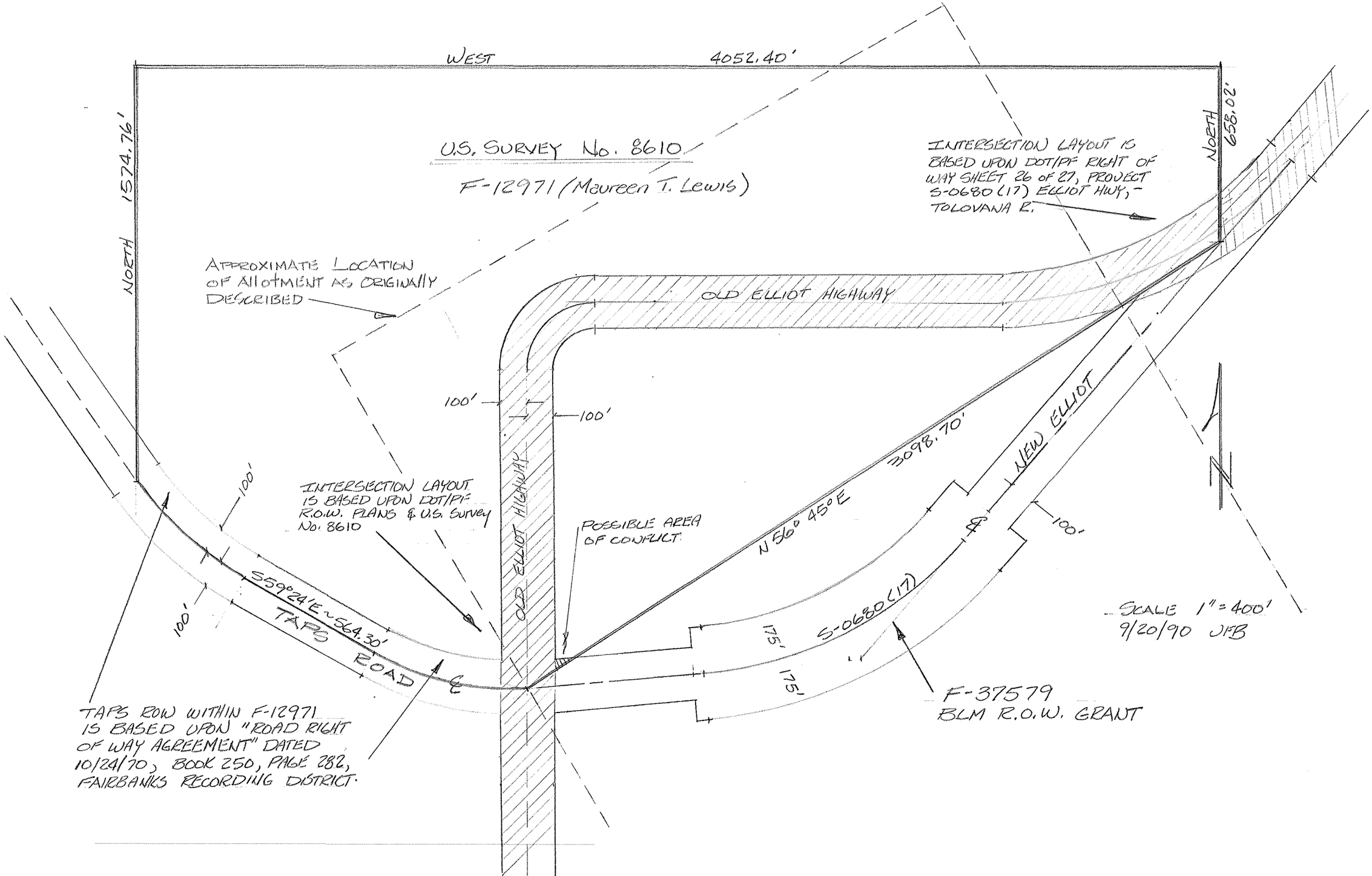
WEST
4052.40'
NORTH 1574.76'
NORTH 658.02'
U.S. SURVEY No. 8610
F-12971 (Maureen T. Lewis)
INTERSECTION LAYOUT IS BASED UPON DOT/PF RIGHT OF WAY SHEET 26 of 27, PROJECT S-0680(17) ELLIOT HWY, - TOLOVANA R.
APPROXIMATE LOCATION OF ALLOTMENT AS ORIGINALLY DESCRIBED
OLD ELLIOT HIGHWAY
100'
100'
INTERSECTION LAYOUT IS BASED UPON DOT/PF R.O.W. PLANS & U.S. Survey No. 8610
POSSIBLE AREA OF CONFLICT
N 56° 45° E
3098.70'
NEW ELLIOT
100'
S59°24'E ~564.30'
TAPS ROAD
OLD ELLIOT HIGHWAY
175'
S-0680(17)
175'
SCALE 1" = 400'
9/20/90 JFB
TAPS ROW WITHIN F-12971 IS BASED UPON "ROAD RIGHT OF WAY AGREEMENT" DATED 10/24/70, BOOK 250, PAGE 282, FAIRBANKS RECORDING DISTRICT.
F-37579
BLM R.O.W. GRANT