Editor's Note: Appealed -- No. F93-38 (D.Alaska Sept. 29, 1993), dismissed for lack of jurisdiction, (June 14, 1994); Refiled -- No. 94-35677 (9th Cir. June 20, 1994); aff'd, (Oct. 5, 1995), 67 F.3d 864; amended Jan. 11, 1996; rehearing denied 75 F.3d 449 (Mar. 19, 1996); cert denied, No. 95-1957 (Oct. 7, 1996), 117 S.Ct. 70

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

IBLA 89-474 Decided March 9, 1993

Appeal from a decision of the Alaska State Office, Bureau of Land Management, finding that Native Allotment AA-7791 was not subject to amended Federal-Aid Highway right-of-way grant Anchorage 052629.

Affirmed.

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

A Native allotment was not subject to an amended right-of-way grant for a Federal-Aid Highway because the amendment was subject to valid existing rights and was made after initiation of the Native claim.

APPEARANCES: E. John Athens, Jr., Esq., Office of the Attorney General, State of Alaska, Fairbanks, Alaska, for the State of Alaska; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Alaska, Department of Transportation and Public Facilities (State), has appealed from an April 24, 1989, decision of the Alaska State Office, Bureau of Land Management (BLM), that denied a State request to subject the Native allotment of Evelynn C. Foster (AA-7791) to amended Federal-Aid Highway right-of-way grant Anchorage 052629.

This case raises the question whether a Native allotment should be made subject to an amended right-of-way grant for a Federal-Aid Highway. It is now well established that a Native allotment will not be made subject to a right-of-way grant where qualifying use and occupancy by the Native applicant was initiated prior to issuance of the right-of-way grant, provided that the allotment applicant has since completed the required 5-year use and occupancy and filed a Native allotment application. See, e.g., State of Alaska, 125 IBLA 21, 22 (1992). Conversely, when a right-of-way was established before initiation of use and occupancy by a Native applicant, the Native allotment was made subject to the right-of-way. Frank Sanford, 119 IBLA 147, 151 (1991). The only question presented by such cases is whether the right-of-way was granted prior to the initiation of use and occupancy. The instant case gives a twist to the usual situation since it involves not only issuance of a right-of-way grant before, but also an amendment of that grant after initiation of use and occupancy by a Native

applicant. The question presented here is whether in such circumstances the Native allotment should be made subject to the amendment. We find that it should not.

In the instant case, the United States issued the State a Federal-Aid Highway right-of-way grant, pursuant to the Act of August 27, 1958, 23 U.S.C. § 317 (1988), on November 9, 1962, subject to valid existing rights. It was for the purpose of constructing and maintaining a 102.53-mile long highway (the "George Parks Highway") in the Talkeetna-to-Summit section of a planned highway between Fairbanks and Anchorage, Alaska. The right-of-way encompassed 300 feet on either side of the centerline of the highway or approximately 7,456.69 acres. On November 25, 1968, the State sought to amend the right-of-way grant so as to relocate a portion of the original right-of-way for the purpose of constructing and maintaining a new 11.045-mile section of highway known as "Project No. F-035-4(2)." BLM issued the amended right-of-way grant with which
we are here concerned on May 13, 1969, subject to valid existing rights. The new part of the highway was constructed at the amended location between 1969 and 1971.

Subsequent to issuance and amendment of the State right-of-way grant, on April 17, 1972, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), Foster filed a Native allotment application. She sought approximately 120 acres of unsurveyed land in protracted sec. 31, T. 21 S., R. 10 W., and protracted sec. 36, T. 21 S., R. 11 W., Fairbanks Meridian, Alaska, claiming seasonal use and occupancy of the land beginning in August 1964, following issuance of the right-of-way grant to the State but prior to issuance of the amended grant. She claimed no improvements on the land, but stated that the corners of her claim were marked. The description of the land sought was amended on August 25, 1972, to accurately describe the land actually used, occupied, and marked by Foster. The result was a shift to the northwest in the location of the allotment claim, thereby overlapping a portion of the right-of-way for the Federal-Aid Highway, both as it was originally granted in November 1962 and as it was amended in May 1969.

With the exception of an 8-acre parcel then considered mineral in character, BLM held Foster's Native allotment application for approval, following an August 13, 1977, field examination, by decision dated February 26, 1979. BLM held the application for rejection as to the 8-acre parcel, and stated that the entire decision would, in the absence of an appeal, become final 30 days after receipt of the decision. No appeal was filed. Subsequently, by decision dated December 7, 1979, BLM held State selection applications A-063041 and A-063042, filed on August 9, 1965, for rejection to the extent that they conflicted with Foster's approved application. By letter dated December 12, 1979, the State declined an offer to contest the Native allotment application within 60 days. The land encompassed by Foster's entire allotment claim (including the originally-excluded 8-acre parcel) was thereafter surveyed in 1983 and U.S. Survey No. 7492, Alaska, of Lots 1, 2, and 3, was accepted on April 25, 1985, and officially filed on June 7, 1985. The allotment claim was subsequently conformed to the survey. The survey places a section of the State's Federal-Aid Highway right-

of-way within the approved allotment claim so that the highway virtually bisects the allotment.

On March 1, 1989, BLM confirmed the December 1979 approval of Foster's allotment application with respect to the approved land and also approved the tentatively excluded 8-acre parcel, concluding it was not mineral in character. BLM also found that the Native allotment when issued would be subject to the Federal-Aid Highway right-of-way, as originally granted in November 1962. The State objected to this latter determination, requesting BLM to provide that the Native allotment would be subject to the amended right-of-way grant. The April 1989 decision denied this request, concluding that the Native allotment took precedence over the amended right-of-way grant because the application to amend the right-of-way grant was filed in November 1968, after Foster had initiated use and occupancy of the allotment in August 1964. BLM explained that such use and occupancy had given rise to an inchoate preference right that was subsequently perfected by the filing of a Native allotment application in April 1972 (as amended August 1972) that took precedence over the intervening application to amend the right-of-way grant. The State appealed to this Board from the April 1989 BLM decision.

The State now contends that Foster's Native allotment should be made subject to its amended Federal-Aid Highway right-of-way grant since BLM approved the amendment of the original grant before she completed 5 years of use and occupancy, as required by section 3 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-3 (1970), and filed her allotment application. The State argues that when the amended right-of-way was granted Foster had only an inchoate preference right that would not prevent the Native allotment from being made subject to the amended grant.

The State also belatedly challenges the validity of Foster's Native allotment application, contending that her application was not pending before the Department on or before December 18, 1971, and was not supported by proof of qualifying use and occupancy as to the land covered by the amended right-of-way grant. These matters were previously decided with administrative finality and are not subject to the Board's jurisdiction because there was no timely appeal from the February 1979 and March 1989 BLM decisions approving Foster's application. See State of Alaska Department of Transportation & Public Facilities, 124 IBLA 386, 390 (1992). The record establishes that both decisions were received by the State more than 30 days prior to the filing of the State's appeal on May 17, 1989, and therefore the appeal was untimely as to these decisions under 43 CFR 4.411(a) and cannot be here considered.

[1] A Native allotment will not be made subject to a right-of-way grant where qualifying use and occupancy that is open and notorious is initiated by the Native applicant prior to issuance of the right-of-way grant, subject to valid existing rights, thereby giving rise to an inchoate preference right that subsequently vests after completion of 5 years of use and occupancy and the filing of an allotment application. See State of Alaska Department of Transportation & Public Facilities, supra at 391; Golden Valley Electric Association (On Reconsideration), 98 IBLA 203, 205 (1987).

The reasons for this ruling are that the right-of-way grant is subject, at issuance, to the inchoate preference right of the Native applicant, and that the subsequent vesting of that right relates back to the date of initiation of the use and occupancy and takes precedence over the intervening right-of-way grant.

The State maintains that the situation is different in the case of an amendment of a right-of-way grant where the right-of-way was originally granted prior to the initiation of use and occupancy by the Native applicant and that the Native applicant's vested preference right would in any case be subject to the original right-of-way grant. We disagree with this analysis because we fail to discern any distinction between the original issuance of a right-of-way grant and a subsequent amendment of that grant. In either case, the initiation of qualifying use and occupancy that is open and notorious gives rise to an inchoate preference right that cannot be defeated or burdened by the subsequent issuance of a right-of-way grant whether original or amended. See Golden Valley Electric Association (On Reconsideration), supra at 205. Because the original and amended grants were both issued subject to valid existing rights, both were subject to the inchoate preference right. Once vested, that right related back to the date of initiation and took precedence over intervening conflicting rights. Id. This rule was designed to afford the Native applicant the full benefits of fee title to the allotted land under the Act of May 17, 1906, unburdened by any conflicting less-than-fee-title rights that did not precede the open and notorious initiation of his or her right thereunder. To hold otherwise would deny the Native the full protection of his or her use and occupancy intended by the Act of May 17, 1906. See Aguilar v. United States, 474 F. Supp. 840, 843-45 (D. Alaska 1979). This rule works no hardship on a holder of a right-of-way grant issued subject to valid existing rights.

We also find practical considerations support these conclusions where the effect of the amendment was to alter the location and dimensions of the right-of-way. In this situation, the effect of the amendment would often be the same as if an entirely new right-of-way had been sought in the amended form. Indeed, we can envision circumstances where the burden on the Native allotment would be considerably greater (perhaps even encompassing the entirety of the allotment lands), so as to deny the applicant the full benefit of lands to which she had a demonstrated statutory preference right. Yet, the State's reasoning would allow the Native allotment to be subject to the "amended" right-of-way in any case. Instead, we believe that a Native allotment should only be burdened to the extent that the Native applicant's lands were covered by a right-of-way grant at the time her use and occupancy began.

In the present case, while the original right-of-way grant was issued in November 1962 (prior to the initiation of Foster's use and occupancy in August 1964), the amendment was granted in May 1969 (following initiation). There is no evidence that such use and occupancy was not open and notorious. The right-of-way amendment came after the creation of Foster's inchoate preference right. Her right subsequently vested when the required 5-year use and occupancy were completed and the allotment application was filed in April 1972 (as amended August 1972). The vested right related back

to the date of initiation of use and occupancy in 1964 and the preference right took precedence over the intervening conflicting amended right-of-way grant. See State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315, 1319 (D. Alaska 1985), aff'd sub nom. Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987). Therefore, we conclude that BLM properly declined, in April 1989, to make Foster's Native allotment (AA-7791), when issued, subject to the State's amended Federal-Aid Highway right-of-way grant Anchorage 052629.

To the extent that the State has raised other challenges to BLM's refusal to make Foster's Native allotment subject to the State's amended right-of-way grant, they have been considered and rejected. Finally, although the State has requested a hearing, finding no material question of fact, we deny the request. See Woods Petroleum Co., 86 IBLA 46, 55 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary to the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Franklin D. Arness
Administrative Judge

I concur:

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David L. Hughes
Administrative Judge