COMMENT

THE NINTH CIRCUIT ERRS AGAIN: THE QUIET TITLE ACT AS A BAR TO JUDICIAL REVIEW

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This Comment examines recent Ninth Circuit decisions barring judicial review of administrative decisions adjudicating Native allotment claims and nullifying Alaska's highway rights-of-way where they conflict. The Ninth Circuit bases this bar to review on the Indian lands exception to the waiver of sovereign immunity found in the Quiet Title Act. This Comment illustrates where the Ninth Circuit erred in its analysis, and concludes with recommendations for legislation to correct the jurisdictional vacuum created by these Ninth Circuit decisions.

I. INTRODUCTION

The Ninth Circuit Court of Appeals has received criticism for its relatively high rate of questionable decisions.[1] U.S. Senator Murkowski has observed that the Ninth Circuit "has an appallingly high reversal rate by the Supreme Court,"[2] and there has even been

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1. Arthur D. Hellman, *Getting it Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425, 426 (2000) (arguing that the current Ninth Circuit "generates a disproportionate number of panel decisions that are wrong, and the existing en banc process fails to provide the necessary corrective").

2. Sen. Frank Murkowski, *Ninth Circuit, Arctic to Mexico Too Big for True Justice*, ALASKA BAR RAG, May-June 2000, at 10.

criticism within the Ninth Circuit itself.[3] This Comment will focus on how the Ninth Circuit has repeatedly erred regarding a sovereign immunity issue involving judicial review of certain administrative decisions.[4]

Recent decisions of the Ninth Circuit and the Alaska Supreme Court highlight the issue.[5] The cases involve a dispute between Evelynn Foster, who is an Alaska Native, and the State of Alaska over a parcel of land claimed for a Native allotment and crossed by a state public highway.[6] The federal court held that it lacked subject matter jurisdiction because of sovereign immunity; while the state court held that it lacked jurisdiction because it could not adjudicate matters involving Native allotment lands.[7] The result of these decisions is that no federal or state judicial forum exists to resolve the contested ownership of an important parcel of land.[8]

There is little reason to question the Alaska Supreme Court's decision;[9] a federal statute's proscription against state court jurisdiction is explicit.[10] However, there is ample reason to question the Ninth Circuit's decision that the Quiet Title Act deprives federal courts of jurisdiction.[11]

This Comment has several purposes. The first is to illustrate the Ninth Circuit's errors in *Foster*, and why the court should have concluded there was in fact jurisdiction for the federal district court to decide the merits of the case. The second purpose is to review a complex area of Indian law that has not received scholarly discus-

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3. *See infra* note 160 and accompanying text.

4. *See infra* note 62 and accompanying text.

5. *See* Alaska v. Babbitt (Foster), 75 F.3d 449 (9th Cir. 1995); Foster v. State, 34 P.3d 1288 (Alaska 2001).

6. *Foster*, 75 F.3d at 450-51; *Foster*, 34 P.3d at 1289.

7. *Foster*, 75 F.3d at 454; *Foster*, 34 P.3d at 1291.

8. Even if the assertion of sovereign immunity would leave a party with no forum for its claim, the lack of a forum is not a basis to avoid dismissal of a suit. Alaska v. Babbitt (Albert), 38 F.3d 1068, 1077 (9th Cir. 1994).

9. *See Foster*, 34 P.3d at 1290-91.

10. *See* 28 U.S.C. § 1360(b) (2000), which provides in relevant part:

> Nothing in this section . . . shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of [property held in trust by the United States or subject to a restriction against alienation imposed by the United States] or any interest therein.

11. *See* 28 U.S.C. § 2409a (2000). The Quiet Title Act waives the sovereign immunity of the United States, subject to certain exceptions, in actions to adjudicate title disputes involving real property in which the United States claims an interest. Block v. North Dakota, 461 U.S. 273, 275-76 (1983). Immunity is not waived where the land either is held in "trust or [is] restricted Indian lands." *Id*. at 283.

sion despite a number of Ninth Circuit decisions and a federal district court decision.[12] The Comment concludes with suggestions for legislation to fill the legal lacuna, thereby allowing the parties in *Foster* and similar cases to resolve their claims.

II. BACKGROUND

A. Development of the Legal Conflict

Until 1987, Native allotments were subject to Bureau of Land Management (BLM) highway right-of-way grants to the State of Alaska, provided the grants were issued before an allotment application was filed.[13] In 1987, the Interior Board of Land Appeals (IBLA) decided *Golden Valley Electric Ass'n [GVEA] (On Reconsideration)*.[14] In this decision the IBLA held, for the first time, that an allotment claim would not be subject to a right-of-way grant issued by the BLM to a third party, so long as the Native's use and occupancy of the allotment commenced before the grant was issued. The court held that this rule applies even if the allotment application were not filed with the BLM until after the right-of-way grant was made.[15] This holding was based on the "relation back" doctrine, by which the preference right to a Native allotment relates back to the date use and occupancy commenced, even though the application was filed later.[16] *GVEA (On Reconsideration)* "marked a departure from the approach espoused by the [IBLA]" in earlier decisions holding that allotments were subject to BLM highway grants.[17] Although *GVEA (On Reconsideration)* concerned a utility right-of-way that was not appropriated to the utility by the authorizing statute, the decision has nevertheless been applied to defeat highway rights-of-way appropriated to Alaska under 23 U.S.C. § 317. That statute provides for appropriations of federal land for highway purposes.[18]

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12. *See Albert*, 38 F.3d 1068; *Foster*, 75 F.3d 449; Alaska v. Babbitt (Bryant), 182 F.3d 676 (9th Cir. 1999); Alaska v. Norton, 168 F. Supp. 2d 1102 (D. Alaska 2001).

13. State of Alaska (Johnson & Craig), 133 IBLA 281, 287 n.8 (1995).

14. 98 IBLA 203 (1987) [hereinafter *GVEA (On Reconsideration)*].

15. *Id.* at 205-08.

16. *Id.* at 205.

17. *Johnson & Craig*, 133 IBLA at 287 n.8.

18. *See, e.g.*, State of Alaska (Foster), 125 IBLA 291 (1993); State of Alaska (Sinyon & Mohamad), 124 IBLA 386 (1992). The distinction of the highway right-of-way being appropriated to Alaska by the federal government pursuant to statute is critical. *See infra* notes 33, 109, 124, 125 and accompanying text. No IBLA decision has ever considered this distinction.

Although *GVEA (On Reconsideration)* was premised on the Native use and occupancy being open and notorious to defeat a subsequently granted right-of-way to Alaska,[19] even this check on an allotment applicant's power to defeat a highway right-of-way was soon abandoned by the IBLA. In 1989, in *State of Alaska (GVEA)*,[20] the IBLA held that the allotment applicant's right to the allotment (with respect to legislatively approved allotments) accrued at the time the allotment application stated that use and occupancy commenced, and there could be no inquiry into the sufficiency of use and occupancy or whether it occurred at all.[21]

The effect of *GVEA (On Reconsideration)* and *State of Alaska (GVEA)* was to defeat many of the highway right-of-way grants made by the BLM to Alaska where they conflicted with a Native allotment claim.[22] The nullification of Alaska's grants was premised on the IBLA's interpretations of law in 1987 and 1989, notwithstanding that almost all of the highway right-of-way grants had been issued to Alaska in the 1960s, and the roads had long since been built in reliance on the grants.[23]

In 1995, the IBLA expressed concern with the fairness of interpreting and applying the 1980 legislative approval statute[24] to divest previously established rights in the land. The IBLA held that a new law "could not retroactively change the status of the land to

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19. *Johnson & Craig*, 133 IBLA at 287-88.

20. 110 IBLA 224 (1989).

21. *Id.* at 229. Subject to exceptions, allotments after 1980 that had not already been adjudicated were legislatively approved. 43 U.S.C. § 1634(a) (2000). *See generally* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS (2d ed. 2002).

22. The IBLA in *State of Alaska (GVEA)* observed that Alaska had the opportunity to prevent legislative approval and require adjudication of the allotment by objecting pursuant to 43 U.S.C. §§ 1634(a)(5)(B) and (C) within 180 days of December 2, 1980. 110 IBLA at 228 (citing 43 U.S.C. §§ 1634(a)(5)(B) and (C) (1982)). However, until 1987 Alaska had no way of knowing that it needed to have made objections before 1982 to protect its highway rights-of-way appropriated under 43 U.S.C. § 317. Under 43 U.S.C. §1634(a)(1), legislatively approved allotments were required to be made subject to valid existing rights. Further, until the IBLA changed its interpretation in 1987, GVEA (On Reconsideration), 98 IBLA 203 (1987), all Native allotments were required to be subject to highway rights-of-way. *See supra* note 17. As to other problems with *State of Alaska (GVEA)*, see Judge Burski's opinion in *Sinyon & Mohamad*, 124 IBLA at 393-98 (Burski, J., concurring specially).

23. The two Golden Valley Electric Authority (GVEA) decisions are discussed in *Alaska v. Babbitt (Albert)*, 38 F.3d 1068, 1071-72, 1075-76, 1076 n.7 (9th Cir. 1994), where they are referred to as *Alaska I* and *Alaska II*.

24. 43 U.S.C. § 1634(a) (2000).

the detriment of a third party."[25] In 1997, the IBLA went further and noted that "[i]ndeed, these two [GVEA] decisions have been the subject of criticism within the Board and, at least in some aspects, their continuing validity has been undermined."[26]

Had it not been for the initial GVEA decision in 1987, the Foster allotment would have been made subject to Alaska's highway right-of-way by the BLM as a matter of course, and there would likely have been no ensuing litigation. Although the IBLA is now retreating from its 1987 and 1989 GVEA decisions, the BLM and the IBLA still use these cases as precedent to defeat Alaskan interests.[27]

B. Foster's Dispute with Alaska, and the Administrative Proceedings

The underlying dispute in the Foster litigation concerns her claim for a Native allotment that overlaps with part of the Parks Highway right-of-way owned by the State of Alaska.[28] Each party asserts that its rights are superior.[29]

Constructed between 1969 and 1971,[30] the Parks Highway is the main highway that connects Alaska's two largest cities, Anchorage and Fairbanks, and provides access to Denali National Park. The right-of-way for the Parks Highway was granted by the BLM to Alaska in 1969.[31] A material site to be used for the construction and maintenance of the Parks Highway was granted by

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25. State of Alaska (Johnson & Craig), 133 IBLA 281, 289 n.10 (1995).

26. State of Alaska (Goodlataw), 140 IBLA 205, 213 n.6 (1997).

27. State of Alaska (Sabon), 154 IBLA 57, 61 (2000) (order denying reconsideration). Although the two GVEA cases are not cited as controlling precedent, the order in *Sabon* is based on *State of Alaska (Foster)*, 125 IBLA 291, 293-94 (1993), which relies on the two GVEA cases.

28. Alaska v. Babbitt (Foster), 75 F.3d 449, 450-51 (9th Cir. 1995).

29. Alaska's principal arguments on the merits revolve around: (1) the plenary power of the federal government to make grants of public land to Alaska notwithstanding Indian occupancy of such land; (2) the nature of the public land grants made to Alaska as "appropriations" under 23 U.S.C. § 317, which rendered the land unavailable for allotment under the Alaska Native Allotment Act; and (3) the intention of the federal government as expressed in the highway grants themselves that the grants were paramount to other claims based on occupancy, settlement, or entry of the land. *See infra* notes 33, 109, 124, & 125 and accompanying text.

Foster has not identified or advanced specific arguments in her own name. Rather, her interests at the administrative level have been protected by the Office of the Regional Solicitor, U.S. Department of the Interior. *Foster*, 125 IBLA 291.

30. *Foster*, 125 IBLA at 292.

31. *Id*.

the BLM to Alaska in 1961.[32] Both the 1969 highway grant and the 1961 material site grant were made by the BLM pursuant to 23 U.S.C. § 317.[33]

By express terms within the 1969 and 1961 BLM grants, as in most BLM grants to Alaska issued pursuant to 23 U.S.C. § 317, the BLM provided that the rights granted to Alaska would be paramount to any other claims to the land based on settlement, entry, or occupancy.[34] Under § 317, the federal government granted states rights-of-way over federal lands both for highways and for material sites.[35] The BLM has regulatory authority over the rights-of-way.[36] The BLM also has regulatory authority over applications for Native allotments.[37]

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32. Foster v. State, 34 P.3d 1288, 1289 (Alaska 2001). A material site is generally an open pit where organic overburden has been stripped from the surface, and rock and gravel deposits are mined for road building materials. S. Idaho Conf. Ass'n of Seventh Day Adventists v. United States, 418 F.2d 411, 413 & n.2, 415 n.10 (9th Cir. 1969).

33. Each of the grants specifies that it is made pursuant to the Act of August 27, 1958, 23 U.S.C. § 317 (2000). 23 U.S.C. § 317 expressly provides that grants to the states are appropriations of public lands. An allotment may not be approved on appropriated land. *Id.; see also infra* note 124 and accompanying text.

34. Such grant terms are consistent with the plenary power of the United States over public land, including Indian occupied land. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955); United States v. Clarke, 529 F.2d 984, 986 (9th Cir. 1976); Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315, 1320 & n.7 (D. Alaska 1985), *aff'd sub nom.* Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987); s*ee also* United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1020 n.45 (D. Alaska 1977), *aff'd* 612 F.2d 1132 (9th Cir. 1980). To date no IBLA decision has addressed the legal effect of such grant provisions in the BLM grants to Alaska, although the issue has been raised. *See e.g.*, State of Alaska (Sabon), 154 IBLA 57, 59 (2000). The refusal of the IBLA to address this argument is yet another reason why there should be judicial review of IBLA decisions.

35. Alaska v. Norton, 168 F. Supp. 2d 1102, 1104-05 (D. Alaska 2001) (explaining the application of the statute).

36. *Seventh Day Adventists*, 418 F.2d at 414. Even if the underlying land is conveyed out of federal ownership, the BLM retains exclusive administrative authority over the rights-of-way. *Id*. at 415-16; *Norton*, 168 F. Supp. 2d at 1108 & n.14; s*ee also* State of Alaska Dept. of Highways, 20 IBLA 261, 268 (1975) (recognizing the "inferred authority" of the Secretary of the Interior to manage material site rights-of-way where "no such authority is expressly created by [23 U.S.C. § 317]").

A right-of-way remains valid and effective "until it is specifically canceled" by the BLM. *Seventh Day Adventists*, 418 F.2d at 414-15. *See also* 43 C.F.R. § 244.16 (1955) ("No right-of-way shall be deemed to be canceled except on the issuance of a specific order of cancellation.").

Foster applied for a Native allotment of land in 1971 with the Department of the Interior, in accordance with the Alaska Native Allotment Act of 1906.[38] Foster claimed to have commenced her use and occupancy of the land in 1964.[39]

Foster prevailed at the agency level in the conflict between her interests and Alaska's interests.[40] Initially, the BLM ruled that Foster's allotment claim nullified the state's highway right-of-way where the two conflicted, and approved Foster's allotment application. The BLM also ruled that the allotment was subject to the material site that it had granted to Alaska in 1961. Not only does this material site cover a large part of the allotment claim, but the Parks Highway is constructed entirely within the material site where it crosses the allotment. The IBLA affirmed the BLM decision, holding that the 1969 Parks Highway right-of-way was invalid where it crossed the land claimed by Foster because of her occu-

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Most of the rights-of-way appropriated by the BLM to Alaska pursuant to 23 U.S.C. § 317 were issued subject to the BLM regulations in Circular 1915. 43 C.F.R. Part 244 (1955). Later amendments to these regulations were made in the 1960s. Under 43 C.F.R. § 2801.4 (2001), the current BLM right-of-way regulations apply to all grants from the BLM unless the grant was issued before 1976 and the administration of the current regulations "diminishes or reduces any rights conferred by the grant . . . , in which event the provisions of the [pre-1976] grant . . . shall apply." *Id*.; *see also* Myers v. United States, 378 F.2d 696, 702 (Ct. Cl. 1967) (stating that with respect to Alaska's right-of-way grants, "the law in force at the time the grant is made governs").

37. The BLM has the regulatory authority to process applications for Native allotments pursuant to 43 C.F.R. subpt. 2561 (2001). *See* CASE & VOLUCK, *supra* note 21, at 125-27; s*ee also* Pence v. Andrus, 586 F.2d 733, 734-35 (9th Cir. 1978) (noting that the Department of the Interior regulations governing the grant of allotments met "at least the minimum due process requirements").

The IBLA is the component of the Department of the Interior that has review functions over BLM decisions. Harrison v. Hickel, 6 F.3d 1347, 1353 n.3 (9th Cir. 1993). The rules applicable to IBLA proceedings are found in 43 C.F.R. §§ 4.400-.415 (2001).

38. 43 U.S.C. §§ 270-1 to 270-3 (Supp. V 1965-1969) (repealed 1971). This Act was repealed in 1971 with a savings clause for allotment applications pending before the Department of the Interior on December 18, 1971. Id. § 1617(a) (2000); s*ee also Foster*, 75 F.3d at 450-51 & n.1. Under the Allotment Act, the Secretary of the Interior was authorized "under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land" in Alaska to Indian or Eskimo Natives of Alaska. 43 U.S.C. § 270-1. *See generally* CASE & VOLUCK, *supra* note 21 (discussing of the history of the Allotment Act and its substantive provisions).

39. *Foster*, 75 F.3d at 451.

40. *See* State of Alaska (Foster), 125 IBLA 291, 291 (1993).

pancy since 1964.[41] The decision did not affect the 1961 material site.[42] After the IBLA decision, an Allotment Certificate was issued to Foster, subject to the 1961 material site,[43] but not subject to the Parks Highway right-of-way.[44]

C. The Course of Judicial Proceedings

Alaska requested judicial review of the *Foster* IBLA decision in federal district court under the Administrative Procedure Act[45] and a provision in the Alaska National Interest Lands Conservation Act (ANILCA).[46] Alaska complained that it was error for the agency to void the Parks Highway right-of-way grant where it crossed Foster's allotment claim.[47] The district court accepted the federal government's argument that Alaska's action was covered by the Quiet Title Act (QTA),[48] and dismissed it.[49] Although the

41. The IBLA determined that *GVEA (On Reconsideration)*, 98 IBLA 203 (1987), was controlling precedent, requiring that the allotment claim prevail over the Parks Highway right-of-way where the two conflict. *Foster*, 125 IBLA at 293-95.

42. *Foster*, 125 IBLA at 293-95. The IBLA decision is silent on the 1961 material site because neither Foster nor Alaska appealed this part of the BLM's decision. Therefore, although the 1961 material site is not mentioned by the IBLA in its decision, Foster's allotment remains subject to this material site, as provided by her Allotment Certificate.

43. Foster v. State, 34 P.3d 1288, 1289-90 (Alaska 2001). This decision refers to a 1962 Parks Highway right-of-way and a 1969 amended Parks Highway right-of-way. The issue in the Foster litigation has always concerned the 1969 amended highway grant, which is the right-of-way on which the Parks Highway was actually constructed. *See also Foster*, 125 IBLA at 292 (explaining the situation).

44. *Foster*, 34 P.3d at 1290.

45. 5 U.S.C. § 702 (2000).

46. Alaska v. Babbitt (Foster) No. F93-038 CV, slip op. at 1 (D. Alaska June 16, 1994). The specific ANILCA provision is codified at 43 U.S.C. § 1632(a) (2000); *see infra* note 114 and accompanying text.

47. *Foster*, No. F93-038 CV, slip op. at 6.

48. *Id.* at 2; *see also* 28 U.S.C. § 2409a (2000).

49. *Foster*, No. F93-038 CV, slip op. at 6; *see* Alaska v. Babbitt (Albert), 38 F.3d 1068, 1073 (9th Cir. 1994) ("[T]he United States remains in the position of trustee of . . . property [subject to an allotment application] pending completion of the allotment process."). The BLM issues "trust certificates" for approved allotments. 43 U.S.C. § 1634(a)(1) (2000). The lands allotted are "inalienable and non-taxable" and under "the protection of the United States," unless such restrictions are removed in accordance with BLM approval. 43 C.F.R. § 2561.3 (2001).

Although the distinction is not treated as having practical significance, there is confusion in the law as to whether the allotments are issued in trust, or are issued merely subject to restrictions. *See* CASE & VOLUCK, *supra* note 21, at 123-25. Foster's Allotment Certificate, issued in 1998, includes the restrictions required by

QTA waives sovereign immunity in actions involving title to real property, the QTA expressly excepts "trust or restricted Indian lands."[50] The district court concluded that a Native allotment constitutes such Indian land.[51] The Ninth Circuit affirmed.[52]

Because her allotment remains subject to the 1961 material site, Foster's victory before the IBLA and the Ninth Circuit has been of little benefit to her. The Parks Highway is still on the land she claims, and she is powerless to do anything about it since the highway is also on the material site. Foster has no standing to complain about Alaska's use of its material site;[53] only the BLM has standing to complain about Alaska's use of the material site for a highway, which it has not done.[54]

The practical effect of the Ninth Circuit decision is that it maintains the status quo: Alaska possesses and controls the Parks Highway where it crosses Foster's allotment claim, and Foster cannot oust Alaska. The title question is left unresolved, since a dismissal on the basis of sovereign immunity is not a decision on the merits.[55]

The federal government's strategy of raising the defense of sovereign immunity is questionable given Alaska's possession and control of the disputed highway right-of-way. The federal government owes a trust obligation to protect Foster's Native allotment.[56]

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regulation, but states nothing about the allotment being issued "in trust," notwithstanding 43 U.S.C. § 1634(a)(1).

50. 28 U.S.C. § 2409a(a) (2000).

51. *Foster*, No. F93-038 CV, slip op. at 5; Alaska v. Babbitt (Foster), 75 F.3d 449, 452 (9th Cir. 1995); *see also* Foster v. State, 34 P.3d 1288, 1290 n.17 (Alaska 2001).

52. *Foster*, 75 F.3d at 454.

53. Alaska v. Norton, 168 F. Supp. 2d 1102, 1108 n.14 (D. Alaska 2001) (citing S. Idaho Conf. of Seventh Day Adventists v. United States, 418 F.2d 411, 415-16 (9th Cir. 1969)).

54. Since the BLM granted Alaska the 1961 material site for the purpose of constructing and maintaining the Parks Highway, it follows that using it for the highway is consistent with the grant. Furthermore, the BLM may be reluctant to take action against the grant because it issued the grant and may have potential liability to Alaska. *See* United States v. Wilson, 707 F.2d 304, 311-12 (8th Cir. 1982); *see also infra* note 71. The BLM never complained about the Parks Highway being within the material site.

55. *See* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 12.30 (3d ed. 1997) ("Dismissal for lack of subject matter jurisdiction is not a judgment on the merits, and it therefore has no claim preclusive or res judicata effect.") (citing Thompson v. County of Franklin, 15 F.3d 245, 253 (2d Cir. 1994)).

56. *See* Aguilar v. United States, 474 F. Supp. 840, 846 (D. Alaska 1979) (stating that the U.S. government has trust obligations to Native Americans).

However, its assertion of sovereign immunity prevents resolution of the conflict.[57] The highway remains on the property Foster claims, she has no control over it, and her title remains clouded.

After the Ninth Circuit decision, Foster sued Alaska in state court for ejectment and trespass under state law.[58] The federal government was not a party and did not participate in the suit. Because Foster's action concerned a dispute over title to federal trust property held for an Alaska Native, the Alaska Supreme Court held that Alaska state courts have no jurisdiction under 28 U.S.C. § 1360(b), which proscribes state court adjudication of disputes involving property held in trust by the federal government for Indians.[59]

Foster and the federal government may have chosen not to bring an ejectment and trespass action in federal court because such action would waive sovereign immunity and open the door to an unfavorable ruling on the merits. If sovereign immunity were waived, Alaska would proceed with its action for judicial review of the *Foster* IBLA decision. The federal government is aware of Alaska's arguments on the merits from prior litigation, which resulted in two recent federal decisions suggesting that Alaska's highway right-of-way would be paramount to Foster's allotment claim.[60]

As a result of the federal and state court decisions, neither party can have its claim adjudicated to have the title question resolved,[61] and a stalemate now exists.

III. WHERE THE NINTH CIRCUIT WENT WRONG

The Ninth Circuit's strained interpretation of the QTA, beginning with *Alaska v. Babbitt (Albert)*, and reaffirmed in *Alaska v.*

57. *See* Block v. North Dakota, 461 U.S. 273, 291-92 (1983) (Where sovereign immunity prevents the merits of a title dispute from being resolved, "[n]othing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on the merits.").

58. Foster v. State, 34 P.3d 1288, 1290 & n.12 (Alaska 2001).

59. *Id*. at 1290-91.

60. Alaska v. Babbitt (Bryant), 182 F.3d 672, 676-77 (9th Cir. 1999); Alaska v. Norton, 168 F. Supp. 2d 1102, 1106-09 (D. Alaska 2001). *Norton* is the reported decision on the *Bryant* remand.

61. Due to the Eleventh Amendment bar, Foster cannot herself maintain a suit against Alaska in federal court. *See* Harrison v. Hickel, 6 F.3d 1347, 1353-54 (9th Cir. 1993). However, Foster does have the litigation option of suing the federal government for failing to fulfill its trust responsibility to protect her allotment. *See id*. at 1353-54.

Babbitt (Foster) and other decisions,[62] creates a jurisdictional vacuum. IBLA decisions that concern the creation of Indian trust land and divest Alaska's long held rights in that land granted by the federal government should and must be subject to judicial review.

In its decisions interpreting the QTA and holding that judicial review is not available to Alaska, the Ninth Circuit apparently overlooked its decision in *Pence v. Kleppe*,[63] which held that "there is no evidence of legislative intent to cut off judicial review," rather, "the opposite should be inferred."[64] *Pence* considered the same allotment act as in *Albert* and *Foster*, and concerned judicial review of administrative decisions made under the Act.[65]

Had the Ninth Circuit considered *Pence* in *Albert*, it may have reconsidered its conclusion that, in allotment cases, "the waiver of sovereign immunity must be found, if at all within the QTA."[66] Given that the *Pence* court held that the Allotment Act permits judicial review of secretarial decisions,[67] it is difficult to argue that the QTA precludes review, especially since the QTA is silent concerning judicial review of secretarial decisions under the Allotment Act.

The court in *Albert* may have attempted to distinguish *Pence* on the basis that *Pence* predicated judicial review of allotment decisions on 25 U.S.C. § 345, which waives sovereign immunity where Indians sue for issuance of allotments. The QTA Indian lands exception was not an issue in *Pence* because the Secretary had determined that the land in question was not Indian land. However, an attempt by the *Albert* court to distinguish *Pence* on the basis of § 345 would create an equal protection problem: allowing judicial review of allotment decisions for Natives whose Fifth Amendment rights are violated by those decisions,[68] while denying judicial review to similarly situated non-Natives is disparate treatment. *Morton v. Mancari*[69] held that statutes favoring Indians are based on the "political status" of Indians, and are therefore subject only

62. *See generally Bryant,* 182 F.3d 672; Alaska v. Babbitt (Foster), 75 F.3d 449 (9th Cir. 1995); Alaska v. Babbitt (Foster), 67 F.3d 864 (9th Cir. 1995); Alaska v. Babbitt (Simmonds), 41 F.3d 1513 (9th Cir. 1994); Alaska v. Babbitt (Albert), 38 F.3d 1068 (9th Cir. 1994).

63. 529 F.2d 135 (9th Cir. 1976).

64. *Id.* at 140.

65. *Id.* at 137.

66. *Albert*, 38 F.3d at 1073.

67. *Pence,* 529 F.2d at 138-39.

68. *Id.* at 140-41.

69. 417 U.S. 535 (1974).

to "rational basis" review under the Equal Protection Clause.[70] Nevertheless, it would be difficult to demonstrate a rational basis for granting judicial review to vindicate the Fifth Amendment rights of Natives seeking allotments while denying review to non-Natives whose Fifth Amendment property interests are voided by allotment decisions.[71] The difference between the political status of claimants is not sufficient to justify permitting judicial review to Natives, but denying it to non-Natives in similar situations. This constitutionally unjustified disparity of treatment could have been avoided if the Ninth Circuit had concluded that the QTA's Indian lands exception to the waiver of immunity did not apply to judicial review of administrative decisions.[72]

A. The Relevance of the Quiet Title Act

The Ninth Circuit determined that the Indian trust land exception to the QTA did not waive immunity for actions for judicial review of IBLA decisions involving Native allotments.[73] Although Alaska sought review under the Administrative Procedure Act (APA) and 43 U.S.C. § 1632(a), the Ninth Circuit found that the Indian trust land exception of the QTA "forbids the relief which is sought."[74] Citing to the U.S. Supreme Court decision in *Block v.*

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70. *Id.* at 554-55. While the State of Alaska may not be entitled to equal protection of the laws, conflicting claims to the same land frequently arise between non-Native individuals and entities and Native allotment applicants. *See, e.g.*, Alyeska Pipeline Serv. Co., 127 IBLA 156 (1993); Kootznoowoo, Inc. v. Johnson, 109 IBLA 128 (1989); United States v. Flynn, 53 IBLA 208 (1981); Evelyn Alexander, 45 IBLA 28 (1980). The *Albert* and *Foster* decisions would no doubt be cited as precedent to deny judicial review to non-Native persons seeking review of allotment decisions that void their competing claims to the same land.

71. Although Alaska may not enjoy equal protection of the laws, it would be entitled to just compensation under the Fifth Amendment for the inverse taking of its interest in the Parks Highway. United States v. 50 Acres of Land, 469 U.S. 24, 31 (1984); Block v. North Dakota, 461 U.S. 273, 291 (1983); Armijo v. United States, 663 F.2d 90, 93-94 (Ct. Cl. 1981).

72. *See* City of Sault Ste. Marie v. Andrus, 458 F. Supp. 465, 472 (D.D.C. 1978) (rejecting argument that Indian lands exception of QTA requires dismissal of suit); *see infra* note 85 and accompanying text.

73. Alaska v. Babbitt (Foster), 75 F.3d 449, 451-52 (9th Cir. 1995); Alaska v. Babbitt (Albert), 38 F.3d 1068, 1072-76 (9th Cir. 1994). However, where Indian trust or restricted lands are not involved, federal courts do have jurisdiction to review IBLA decisions pursuant to the Administrative Procedure Act, 5 U.S.C. § 702 (2000). *Albert*, 38 F.3d at 1072; Harrison v. Hickel, 6 F.3d 1347, 1353 (9th Cir. 1993).

74. *Albert*, 38 F.3d at 1072 (citing 5 U.S.C. § 702 (2000)). Section 702 of the APA is a general grant of federal jurisdiction for judicial review of final agency

North Dakota,[75] the Ninth Circuit held that the QTA is the "exclusive means by which adverse claimants [can] challenge the United States' title to real property,"[76] and that one could not "avoid the limitations of the QTA by bringing an action under the APA."[77] The Ninth Circuit relied upon *Block* in *Foster* and other cases where Alaska sought judicial review of an IBLA decision that approved a Native allotment and simultaneously nullified a right-of-way conflicting with the allotment.[78]

The Ninth Circuit incorrectly assumes that an action for judicial review of an agency decision *initially creating* Indian trust land should be treated the same under the QTA as a civil action involving title to property that *already is* Indian land as a result of a treaty or legislation creating a reservation.[79] There is nothing in the QTA to suggest Congress intended to bar judicial review of an administrative decision that initially creates Indian land. The Ninth Circuit did not recognize this distinction, and did not consider precedent that suggested the QTA is inapplicable.[80]

Referring to the QTA's legislative history, *Albert* recognizes that the purpose of the Indian land exception in the QTA was to protect "specific commitments to the Indian people through written treaties and through informal and formal agreements."[81] The legislative history demonstrates that the Indian land exception of the QTA is unrelated to judicial review of agency adjudications of claims by Indians that result in the creation of Indian land.[82] There is no treaty or agreement involved in the application for an allot-

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decisions. However, the statute also provides that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id.* The court in *Albert* relied on this latter provision to circumvent the APA's otherwise unequivocal grant of jurisdiction, holding that the QTA was an "other statute" that forbade judicial review. *Id.* at 1072-73.

75. 461 U.S. 273 (1983).

76. *Albert*, 38 F.3d at 1073 (quoting *Block*, 461 U.S. at 286 n.22).

77. *Id.*

78. *Foster*, 75 F.3d at 452-53.

79. *See Albert*, 38 F.3d at 1072-73, 1072 n.4. The court makes no mention of this distinction in the court's discussion.

80. *See, e.g.,* City of Sault Ste. Marie v. Andrus, 458 F. Supp. 465, 472 (D.D.C. 1978).

81. *Albert*, 38 F.3d at 1072 n.4 (citations omitted).

82. *See* H.R. REP. NO. 92-1559, at 22 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4547, 4556-57; *see also* Akootchook v. United States, 747 F.2d 1316, 1318 (9th Cir. 1984) (characterizing the interest under the Allotment Act as "the right to apply for allotments," and that Native Americans "have no general right to obtain an ownership interest in the land" they use and occupy).

ment. The QTA was not meant to protect agency decisions creating new claims by Indians or converting public lands into Indian trust lands.[83] The Ninth Circuit failed to recognize this critical distinction, and in doing so misinterpreted the QTA.[84]

In other jurisdictions discussed below, courts have held that the Indian lands exception of the QTA does not bar judicial review of agency decisions that initially give rise to the claim that the property is Indian land. For example, one court found that the argument for immunity based on the QTA must fail "[i]n the interests of 'fairness and accountability in the administrative machinery of the Government.'"[85] Another court stated: "[w]e doubt whether the Quiet Title Act precludes APA review of agency action by which the United States *acquires* title."[86] The Ninth Circuit never addressed this authority.

B. Giving Preclusive Effect to the IBLA Decision

Either the land in *Albert* and *Foster* is Indian trust land because of the agency decision, or it is not Indian trust land under the QTA. If it is Indian trust land because of the agency decision, then under Ninth Circuit precedent the agency decision may not be used to preclude judicial review of that decision.[87]

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83. Although the purpose of the Indian lands exception of the QTA is to protect Indian lands, the exception nevertheless does not prevent a state from condemning Native allotment land under a state's eminent domain powers. 25 U.S.C. § 357 (2000); *see also* Etalook v. Exxon Pipeline Co., 831 F.2d 1440, 1443-44 (9th Cir. 1987). It makes little sense for the Ninth Circuit to bar judicial review of Native allotment adjudications on the basis of non-waiver of sovereign immunity under the QTA, where the state can proceed in federal court to condemn that land.

84. *Albert*, 38 F.3d at 1072-73, 1072 n.4.

85. *Andrus*, 458 F. Supp. at 472 (D.D.C. 1978) (quoting legislative history of the 1976 APA amendments, found at H.R. REP. NO. 94-1654, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6130).

86. South Dakota v. United States Dep't of Interior, 69 F.3d 878, 881 n.1 (8th Cir. 1995), *vacated by* 519 U.S. 919 (1996). In addition to vacating the Eighth Circuit's decision, the Supreme Court ordered the court of appeals to remand the issue "to the Secretary of the Interior for reconsideration of [the] administrative decision" in light of new regulations being promulgated. *South Dakota*, 519 U.S. at 919; *see also* Connecticut v. Babbitt, 899 F. Supp. 80, 83 n.8 (D. Conn. 1995) (stating that there must be judicial recourse against arbitrary initial trust land decisions by a federal agency).

87. Wehrli v. County of Orange, 175 F.3d 692, 694-95 (9th Cir. 1999). *Wehrli* follows United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-23 (1966) (discussing when administrative decisions have been given preclusive effect). *See also* Convalescent Ctr. of Bloomfield, Inc. v. Dep't of Income Maintenance, 544 A.2d 604, 608-10 (Conn. 1988) (collecting available authority on this

The Ninth Circuit did not articulate that it gave preclusive effect to the agency decisions in *Albert* and *Foster*, but its reliance on the IBLA decisions is evident.[88] In *Albert*, the Ninth Circuit stated that it is the filing of an allotment application that makes the land Indian trust land,[89] a holding relied on by the *Foster* court.[90] The holding in *Albert*, however, is not supportable;[91] the agency decision is the only way there could be a determination that the land is Indian trust land.

Albert's holding that the land becomes trust land upon the filing of an allotment application is based on *Alaska v. 13.90 Acres of Land*.[92] *13.90 Acres of Land* held that the United States holds the land in trust for the allottee once the allotment has vested, which

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issue and concluding "that, without the availability of judicial review, neither the decision of an administrative agency nor that of a court is ordinarily entitled to be accorded preclusive effect in further litigation").

88. In *Albert*, the court concluded that the underlying IBLA decision was based upon a "reasoned interpretation" of judicial precedent. *Albert*, 38 F.3d at 1076. In *Foster*, the court was more equivocal about its reliance on the underlying administrative decision, but stated that the court was "bound" to follow *Albert*. Alaska v. Babbitt (Foster) 75 F.3d 449, 452, 454 (9th Cir. 1995). Conversely, in *Bryant*, the court determined that the land was *not* Indian trust land because the IBLA had reversed the administrative interpretation on which it had based its initial decision approving the Bryant allotment. Alaska v. Babbitt (Bryant), 182 F.3d 672, 677 (9th Cir. 1999).

89. *Albert*, 38 F.3d at 1073.

90. *Foster*, 75 F.3d at 452 ("Here, as in *Albert*, because the allotment remains unpatented, the government has a trust interest in the disputed property . . . ."). The court in *Foster* may have realized there were significant problems with dating the trust interest from the time of the allotment application. However, rather than confront the issue head-on, the court instead opted to dodge it by merely stating that there is a trust interest as long as the allotment remains unpatented. Since a patent (Allotment Certificate) is not issued until after the agency decision approving the allotment, the *Foster* court conveniently conforms with *Albert*, but avoids facing the reality that *Albert* is simply wrong. Only the federal government can create Indian trust land; there must be affirmative action on the part of the government. By following *Albert*, the court in *Foster* improperly cedes that governmental prerogative to individual Natives.

91. Neither *Albert*, *Foster*, nor *Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315 (D. Alaska 1985), mentions the relevant regulatory provisions, which provide that the filing of an application does nothing more than segregate the land and protect it from future conflicting applications. 43 C.F.R. § 2561.1(e)(f) (2002). Under the regulations, the filing of an application does not make the land Indian trust land, although it does have a similar effect insofar as it protects the applicant's use and occupancy of the land. *Id.*

92. *Albert*, 38 F.3d at 1073 (citing *13.90 Acres of Land*, 625 F. Supp. at 1319-20, 1320 n.7).

occurs when the application is filed.[93] In that case, it appears that the allotment was approved without objection, and there was no legal impediment to the issuance of the allotment certificate.[94] The issue was whether legislation enacted *subsequent* to the filing of the allotment application could affect the allottee's title.[95] The court correctly held it could not.[96] The court did not consider the question of whether an appropriation by the United States *before* the application is filed would be a legal impediment to the allotment, thereby preventing the allottee from gaining title. In fact, the allottee cannot gain title to appropriated land.[97] A prior appropriation by the federal government means that the land does not and cannot become Indian trust land merely by the filing of an allotment application.[98] The ruling in *13.90 Acres of Land* that land becomes Indian trust land upon the filing of an application is, therefore, incorrect. The court in *Albert* failed to recognize that the *13.90 Acres of Land* holding does not apply where the land is appropriated by the federal government *before* the filing of an allotment application.

It makes little sense that the mere filing of an application can change the status of public domain land to Indian trust land where the Allotment Act provides many conditions for the approval of a Native allotment and vests the Secretary with discretion to approve an allotment.[99] There is nothing for the federal government to hold in trust until equitable title passes to the applicant, which does not happen until all conditions for an allotment have been satisfied,[100]

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93. *13.90 Acres of Land*, 625 F. Supp. at 1319.

94. *Id*. at 1317.

95. *Id*. at 1320.

96. *Id.*

97. *See supra* note 33, *infra* notes 109, 124, 125 and accompanying text.

98. *Id.*

99. Under 42 U.S.C. § 270-1 (Supp. V 1965-1969) (repealed 1971), an allotment was limited to "one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land," and the applicant must have been "the head of a family, or [have been] twenty-one years of age." *See* Pence v. Kleppe, 529 F.2d 135, 140 (9th Cir. 1976) (noting that the 1906 Alaska Native Allotment Act "defines the types of land available for allotment and . . . sets the requirements that an applicant must meet in order to qualify"). Furthermore, the BLM regulations, 43 C.F.R. subpt. 2561 (2001), set forth detailed regulatory requirements.

100. Degnan v. Hodel, 16 Ind. L. Rptr. 3037, 3038 (D. Alaska Feb. 15, 1989); *see also* Anne Lynn Purdy (On Reconsideration), 128 IBLA 161 (1994). Normally, equitable title will pass when the BLM issues a decision approving an allotment application. However, where the required use and occupancy preceded the filing of an application, equitable title will be deemed to have passed upon both the filing of the application and acceptable proof of qualifying use and occupancy. *Id*. at 164.

including Bureau of Indian Affairs (BIA) certification.[101] Thus, it does not follow that the status of a parcel of land suddenly changes to Indian trust land upon the filing of the application with the BLM. Satisfaction of the conditions for an allotment is confirmed and equitable title passes when the agency approves the allotment.[102] Without the approval, there would be nothing rational on which a federal court could base its Indian trust land determination. Undoubtedly, if the final agency decision were denial of the allotment application, the land would not be considered Indian trust land simply due to the filing of an application.

The Ninth Circuit's more recent decision in *Alaska v. Babbitt (Bryant)*[103] highlights the court's error in *Albert* and *Foster*.[104] To decide that the QTA Indian lands exception did not apply, the *Bryant* court had to ignore *Albert's* holding that a Native allotment becomes Indian trust land when the allotment application is filed.[105] Obviously *Albert's* holding would not work in *Bryant*, where the court held that the land was not Indian trust land under the QTA in spite of Bryant's allotment application.[106] However, rather than openly confronting this inconsistency, the court instead simply chose to treat *Bryant* as harmonious with *Albert* (perhaps hoping that no one would notice the contradiction).[107] The inconsistency between *Albert* and *Bryant* underscores the Ninth Circuit's faulty determination that the QTA applies because the land is Indian trust land. If the determination in *Albert* and *Foster* that the land is Indian trust land comes from the court's use of the agency decision approving the allotment, which it must, then the preclusion principles of the court are violated. The disparity between the *Bryant*

101. 43 C.F.R. § 2561.1(d) (2001).

102. *Degnan*, 16 Ind.L.Rptr. at 3038 ("[T]he court declares that plaintiffs acquired equitable title to their allotments when the Secretary granted interim approval of their respective allotment applications in 1975.").

Another gauge for when the status changes to Indian trust land is when the BIA assumes authority over the land. Once the allotment is administratively approved by the BLM, or is found to qualify for legislative approval, the BIA assumes full authority over the allotment with respect to the granting of less than fee interests in the land (such as right-of-way interests) and protecting the land against trespass. CASE & VOLUCK, *supra* note 21, at 125-30. This change of authority over the land is memorialized in a Memorandum of Understanding between the BLM and the BIA. BLM Agreement No. AK-950-AG9-323 (1979).

103. Alaska v. Babbitt (Bryant), 182 F.3d 672 (9th Cir. 1999).

104. *Id*. at 674-76.

105. *Id.* (citing to Alaska v. Babbitt (Albert), 38 F.3d 1068, 1073 (9th Cir. 1994)).

106. *Id*.

107. *Id*. at 677.

decision and the *Albert* and *Foster* decisions on this issue also opens the court to criticism that cases are decided on the basis of the desired outcome, rather than on the basis of a reasoned application of precedent and law.

The filing of an allotment application protects Indian occupancy of the land, including subsequent disposals or appropriations by the federal government.[108] Contrary to the decision in *Albert*, however, mere application does not change the land into Indian trust land.[109] The status of the land is not changed until there is an administrative decision approving the allotment (or determining that it qualifies for legislative approval).[110] Under its precedent, the Ninth Circuit may not give effect to the agency decision for the purpose of concluding that the land is Indian land and then refuse judicial review of this same agency decision, as it did in *Albert* and *Foster*.[111]

C. The Waiver of Sovereign Immunity by 43 U.S.C. § 1632(a)

The *Foster* court summarily dismissed Alaska's argument that 43 U.S.C. § 1632(a) waived sovereign immunity.[112] Without stating or commenting on the language of the statute, the court concluded that it is only a statute of limitations and cannot be interpreted to

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108. 43 C.F.R. § 2561.1(e) (2001); *see also* Jonas Ningeok, 109 IBLA 347, 351 (1989).

109. *See Jonas Ningeok*, 109 IBLA at 351 (explaining that, without application, open and notorious use and occupancy of the land will protect the Native's rights to the land, except for disposals or appropriations by the federal government, but that where no application is filed, use and occupancy of land claimed for an allotment gives no rights as against the United States); *see also* State of Alaska (Johnson & Craig), 133 IBLA 281, 290 n.11 (1995) (stating that Congress has "plenary authority to dispose of public land" regardless of whether a Native qualifies under the Native Allotment Act); United States v. Flynn, 53 IBLA 208, 234 (1981). Until Foster filed her application for a Native allotment, the federal government was free to appropriate the land to other uses, which it did. Foster did not file her application until 1971—long after Alaska received its right-of-way in 1969 for the Parks highway and long after Alaska received its material site in 1961. State of Alaska (Foster), 125 IBLA 291, 292-93 (1993). Under Secretarial Policy of June 6, 1973, an allotment may not be granted on lands that are appropriated at the time of filing the allotment application. BUREAU OF LAND MANAGEMENT, BLM ALASKA HANDBOOK 1991, NATIVE ALLOTMENT APP. 2, at 2 (1991).

110. *See supra* note 102 and accompanying text.

111. Wehrli v. County of Orange, 175 F.3d 692, 694-95 (9th Cir. 1999). Although decided after *Albert* and *Foster*, *Wehrli* follows the principles announced by the U.S. Supreme Court in 1966 in *United States v. Utah Construction & Mining Co*., 384 U.S. 394, 421-23 (1966). *See supra* note 87 and accompanying text.

112. Alaska v. Babbitt (Foster), 75 F.3d 449, 451 n.2 (9th Cir. 1995).

be an "unequivocally expressed" waiver of sovereign immunity.[113] In view of the statute's express language, the court's brusque treatment of this issue appears designed to reach a result the court wanted.[114] Section 1632(a) is undoubtedly a statute of limitations, as is stated in the statute's title.[115] However, it also expressly provides, albeit in the negative, that agency decisions are subject to judicial review as long as the party seeking review first exhausts administrative appeal rights.[116] The statute cannot be reasonably interpreted otherwise. Further, a statute of limitations written in terms applying to all parties is superfluous if judicial review is barred by sovereign immunity for everyone other than the allotment applicant. In fact, the statute is written to apply[117] to all parties, both in terms of being a statute of limitations and in terms of allowing judicial review. The Ninth Circuit has effectively nullified this statute with respect to Alaska and other third parties.

There is nothing in the legislative history of 43 U.S.C. § 1632(a) that suggests a different interpretation than a plain reading of the statutory language.[118] The language of the legislative history and the statute itself suggest an underlying assumption that judicial review is available to all parties. In view of the express waiver of sovereign immunity in the APA for judicial review of administrative decisions,[119] and the QTA's silence on the waiver of sovereign immunity for judicial review of agency decisions,[120] it undoubtedly did not occur to the drafters of 43 U.S.C. § 1632 that anything more need be stated about waiving sovereign immunity.[121] Given that Congress imposed a statute of limitations for judicial review of agency decisions, and that there is no intimation in the legislative

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113. *Id*.

114. In relevant part 43 U.S.C. § 1632(a) (2000) provides:

> [A] decision of the Secretary . . . shall not be subject to judicial review unless such action is initiated before a court of competent jurisdiction within two years after the day the Secretary's decision becomes final or December 2, 1980, whichever is later: *Provided*, That the party seeking such review shall first exhaust any administrative appeal rights.

115. 43 U.S.C. § 1632 is entitled "Statute of limitations on decisions of Secretary and reconveyance of land by Village Corporation."

116. 43 U.S.C. § 1632(a).

117. *Id*.

118. S. REP. NO. 96-413, at 292 (1980).

119. 5 U.S.C. § 702 (2000).

120. *See* 28 U.S.C. § 2409(a) (2000).

121. Further, prior to enactment of 43 U.S.C. § 1632(a) in 1980, the Ninth Circuit had held that judicial review was available on administrative decisions approving allotment applications. Pence v. Kleppe, 529 F.2d 135, 138 (9th Cir. 1976). The drafters of this legislation would naturally assume this would remain the law.

history that sovereign immunity is not waived, the court's interpretation in *Albert* strains credulity. The Ninth Circuit's illogic is possible only because it misinterprets the QTA.

D. Jurisdiction to Adjudicate a Constitutional Claim

The federal government's initial approval of Foster's allotment claim was also a violation of the Property Clause of the U.S. Constitution.[122] The Property Clause gives the Secretary of the Interior the authority to dispose of public lands to the extent authorized by Congress.[123] By statute, the Secretary is authorized to approve allotments only on "unappropriated" land.[124] Alaska's 1961 material site on Foster's allotment claim is defined as "appropriated" land.[125] Therefore, the Secretary's decision approving an allotment of land to Foster is a violation of both the Allotment Act and the Property Clause.

Foster held that sovereign immunity barred consideration of Alaska's constitutional claim.[126] The court reasoned that suits against the federal government "alleging actions [by a government official] that are . . . unconstitutional" are officer's suits, and therefore subject to the sovereign immunity of the federal government.[127] The court reached this conclusion by equating officer's suits with *ultra vires* suits (actions against government officials based on statutory or constitutional violations).[128] The court then concluded

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122. U.S. CONST. ART. IV, § 3, cl. 2.

123. The Supreme Court interprets the Property Clause as granting exclusive authority to Congress to dispose of public lands. Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917). The Property Clause prohibits both the courts and the executive agencies of government from disposing of public lands contrary to an Act of Congress. United States v. California, 332 U.S. 19, 27 (1947).

124. 43 U.S.C. § 270-1 (Supp. V 1965-1969) (repealed 1971); State of Alaska (Johnson & Craig), 133 IBLA 281, 289 (1995) ("[T]he [BLM's] authority to allot Federal lands to Alaskan Natives under the Act of May 17, 1906, is limited to 'vacant, unappropriated, and unreserved nonmineral land.'"); *see* Alaska v. Babbitt (Bryant), 182 F.3d 672, 676-77 (9th Cir. 1999) (discussing the Alaska Native Allotment Act and the Highway Act); *see also* Alaska v. Norton, 168 F. Supp. 2d 1102, 1106-09 (D. Alaska 2001).

125. 23 U.S.C. § 317(b) (2000) (stating that if a proposed appropriation of land for use as a highway right-of-way is not "contrary to the public interest or inconsistent with the purposes for which such land . . . [is] reserved," then such lands may be appropriated). *See Bryant*, 182 F.3d at 677.

126. Alaska v. Babbitt (Foster), 75 F.3d 449, 452-53 (9th Cir. 1995).

127. *Id*.

128. *Id.*

that because *Block v. North Dakota*[129] held that the artifice of officer's suits against the federal government was proscribed by the QTA, this necessarily barred Alaska's claim that the Secretary acted *ultra vires* by his violation of the Constitution.[130]

In making this ruling the *Foster* court ignored earlier Ninth Circuit decisions holding that the court had jurisdiction to entertain an action for judicial review of an agency decision based on the agency's *ultra vires* and unconstitutional action.[131] The court's statement in *Foster* that it is bound to affirm the dismissal of Alaska's suit on the basis of *Albert*[132] is more than moderately disingenuous. If *Foster* had truly followed *Albert* on its *ultra vires* holding, and not just the part of *Albert* concerning the QTA, the *Foster* court would have had to reverse the district court's decision dismissing Alaska's action for judicial review.[133]

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129. 461 U.S. 273 (1983).

130. *Foster*, 75 F.3d at 453 (citing *Block*, 461 U.S. at 286).

131. Alaska v. Babbitt (Albert), 38 F.3d 1068, 1076 (9th Cir. 1994); United States v. Yakima Tribal Court, 806 F.2d 853, 859-60 (9th Cir. 1986) ("Any claim" asserting constitutional violations by a government officer is a "per se divestiture of sovereign immunity."); Donnelly v. United States, 850 F.2d 1313, 1318 (9th Cir. 1988) (holding that there is jurisdiction apart from the QTA to review an agency decision where *ultra vires* conduct by the government is alleged, and that *Block* is inapplicable because "no independent administrative wrongdoing [i.e. no *ultra vires* action] was alleged in *Block*," while such wrongdoing is at the heart of the Donnellys' claims).

132. *Foster*, 75 F.3d at 454.

133. The result-oriented nature of the *Foster* opinion is also evident from the Ninth Circuit's earlier version of its opinion, reported as *Alaska v. Babbitt (Foster)*, 67 F.3d 864 (9th Cir. 1995). The earlier *Foster* decision held, on the basis of *Albert*, that an action based on the *ultra vires* conduct of the government agency was not subject to a bar of sovereign immunity. *Id*. at 867. Nevertheless, the earlier *Foster* decision affirmed that Alaska's *ultra vires* action had been appropriately dismissed by the district court because the IBLA had properly applied the relation back doctrine to defeat Alaska's highway grant. *Id*. at 868. The court observed that "Foster's preference right was deemed to relate back to 1964. As of that date, the disputed land was, in fact, 'unappropriated,' and 23 U.S.C. § 317(b) therefore does not preclude a 43 U.S.C. § 270-1 allotment." *Id*.

Had the court been correct with the facts, its rationale and conclusion in the earlier *Foster* opinion would arguably have been sound. However, the court had overlooked the 1961 material site. This oversight was critical because it meant that the land had already been appropriated by 1964, and therefore was *not* available for an allotment under the Allotment Act or the Property Clause. In a petition for rehearing, Alaska pointed out the court's mistake which, when corrected, should have required reversal under the court's *ultra vires* holding. The Ninth Circuit's response was to deny the petition for rehearing, and issue the new *Foster*

The Ninth Circuit reaffirmed in *Bryant* that it meant what it said in *Foster*: "The *ultra vires* argument has to be rejected in this case because it would be no more than the old officers' suit in new words."[134] Interestingly, *Bryant* fails to explain that Alaska's *ultra vires* argument is a claim that the BLM violated the Property Clause of the Constitution by allotting public land in violation of an act of Congress. The court labeled Alaska's claim as merely an *ultra vires* claim, and did not disclose the allegation of a constitutional violation.[135]

The interpretation of *Block* by the Ninth Circuit is unique. No other court has held that federal jurisdiction is lacking to adjudicate a claim that federal officials violated the U.S. Constitution.[136] *Foster's* holding is also at odds with Supreme Court precedent.[137] If the court in *Foster* were correct in its interpretation, one would expect the Supreme Court in *Block* to have stated something directly in regard to the government's immunity from suit on claims based on unconstitutional action by a government official.[138] The Court, however, did not intimate that its intention was to make such a ruling.[139] Nothing in *Foster* indicates an awareness on the Ninth Circuit's part of the "serious constitutional question" its interpretation of *Block* creates.[140] Instead, *Foster* simply rejected Alaska's constitutional argument without even commenting on the contrary

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opinion, disavowing its *ultra vires* holdings in *Albert* and its previous opinion in *Foster* and ignoring Alaska's constitutional claim. 75 F.3d at 449.

134. Alaska v. Babbitt (Bryant), 182 F.3d 672, 674-75 (9th Cir. 1999).

135. *Id*.

136. *See, e.g.*, Florida v. United States Dep't of Interior, 768 F.2d 1248, 1251-52 (11th Cir. 1985) (holding that there is no sovereign immunity where action of government official is challenged as unconstitutional); Kozera v. Spirito, 723 F.2d 1003, 1008 (1st Cir. 1983).

137. *See* Davis v. Passman, 441 U.S. 228, 242 (1979) (holding that constitutional rights are to be enforced through the courts unless it is "textually demonstrable" that it is committed to a coordinate political department).

138. *See* Johnson v. Robison, 415 U.S. 361, 373 (1974) (holding that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear, and supported by "clear and convincing" evidence). Such intent is not to be found in the QTA.

139. *See also* Webster v. Doe, 486 U.S. 592, 603 (1988) (ruling, post-*Block*, that a "serious constitutional question . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim") (internal quotations omitted).

140. Alaska v. Babbitt (Foster), 75 F.3d 449, 453 (9th Cir. 1995) (holding that Alaska may not use the *ultra vires* exception to sovereign immunity to divest the United States of immunity).

U.S. Supreme Court precedent.[141] For our constitutional system to work, the court must have jurisdiction to consider claims of constitutional violations by the government as a check on the executive branch's misuse of power.

E. Sovereign Immunity as a Sword to Defeat Property Rights

Albert and *Foster* did not affect the Ninth Circuit decision in *Pence v. Kleppe*,[142] which allows judicial review to allotment applicants.[143] Therefore, the Ninth Circuit's interpretation of the QTA leaves Native allotment applicants with the right to have judicial review of administrative adjudications affecting their allotment claims. However, Alaska and other third parties who may have their long-standing property interests extinguished in these administrative adjudications are barred from having such agency decisions judicially reviewed.[144] The Ninth Circuit makes no attempt to justify this disparity of treatment. There is nothing in any relevant statute, or the legislative history of any relevant statute, that indicates that Congress intended such an outcome.

The allotment claimant therefore can nullify third-party interests in an agency proceeding, and if the allotment claimant is successful at the agency level, he or she can bar judicial review of the agency decision. If unsuccessful, the allotment claimant can proceed to have the agency decision reviewed in federal court, thus having another opportunity to defeat third-party interests.[145] This situation is inherently unfair. Further, it is the federal government that initiates the agency process to adjudicate the allotment claim and validity of third-party interests in the land.[146] In regard to In-

141. *Id*.

142. 529 F.2d 135 (9th Cir. 1976).

143. Other federal cases from Alaska have also entertained actions brought by allotment applicants for judicial review of IBLA decisions denying Native allotment applications. *See, e.g.*, Akootchook v. United States, 271 F.3d 1160 (9th Cir. 2001); Silas v. Babbitt, 96 F.3d 355 (9th Cir. 1996); Shields v. United States, 698 F.2d 987 (9th Cir. 1983); Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985).

144. Most IBLA decisions concerning Native allotments where Alaska is a party illustrate that agency adjudication involves the adjudication of interests that conflict with the allotment claim. *See, e.g.*, Sinyon & Mohamad, 124 IBLA 386 (1992). Such interests can be trade and manufacturing sites (43 C.F.R. subpt. 2562), homesites (43 CF.R. subpt. 2563), airport land (43 C.F.R. subpt. 2640), appropriations (23 U.S.C. § 317), state selections (Alaska Statehood Act, Pub. L. No. 85-508 § 6(b), 72 Alaska Stat. 339 (1958)), and interests under many other laws.

145. *See generally Silas*, 96 F.3d 355.

146. CASE & VOLUCK, *supra* note 21, at 125-30.

dian lands, the purpose of sovereign immunity is to protect such land from encroachment. Its purpose is not as an offensive weapon to be used to defeat vested property rights of third parties that, in the case of Alaska, were granted by the sovereign in the first place.

Where Indian trust land is created by an agency decision that nullifies third-party interests in the land, a bar to judicial review is inappropriate.[147] Not only may there be valid existing rights in the land prior to Indian occupancy and application for an allotment, but the land may also have been appropriated by the federal government prior to application for an allotment, thus precluding the allotment as a matter of law.[148] The Ninth Circuit's label of the land as Indian trust land under the QTA allows an agency to divest third parties and Alaska of their long-standing interests, with no possible judicial review of the divestiture.[149] There is no compensation provided for the land interests that are taken and lost, there is no judicial check on the disposal of public land by an agency, and there is no judicial oversight on the fairness of the administrative process.

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147. Alaska frequently has multiple interests, some of which may overlap, in land claimed for an allotment. The BLM may adjudicate these interests in separate decisions in the same proceeding, as it did in the *Foster* adjudication in which there are four BLM decisions. Alaska's different interests include several overlapping material sites, as well as the 1962 and 1969 highway right-of-way grants that overlap the 1961 material site. A court must take care before it reaches a conclusion that an agency decision created Indian trust land. If an agency decision leaves a competing interest to the allotment unadjudicated, then the land may not be Indian trust land. This is especially true if the competing interest is an appropriation, which renders the land unavailable for allotment, as in *Foster*. Therefore, while the 1979 BLM decision in the *Foster* adjudication approved her allotment claim, the land cannot be Indian land because the 1979 decision left unadjudicated Alaska's material sites which covered the land. *See supra* notes 124, 125, *infra* note 158 and accompanying text.

148. *See supra* notes 124, 125 and accompanying text.

149. The United States waives its immunity when it initiates an action against a property interest. United States v. Martin, 267 F.2d 764, 769 (10th Cir. 1959). In *Albert*, the court rejected Alaska's argument that the United States waived immunity by attacking Alaska's interests in the disputed lands at the agency level. Alaska v. Babbitt (Albert), 38 F.3d 1068, 1075 (9th Cir. 1994). The court held that this argument was "misguided" because it was Alaska that appealed from the adverse administrative ruling. *Id*. The court's reasoning is disingenuous. The federal government initiated the administrative proceeding to invalidate Alaska's right-of-way interest. While Alaska does indeed file the complaint for judicial review, that is but an intermediate "appellate" review process, which directly flows from the proceeding started by the federal government to divest Alaska of a valid existing right.

The Ninth Circuit's interpretation of the QTA also creates a conflict with 43 U.S.C. § 1634(a)(1), which requires that legislatively approved Native allotment applications be made "subject to valid existing rights."[150] State highway rights-of-way granted by the BLM are recognized as valid existing rights.[151] If judicial review of IBLA decisions which fail to make allotments subject to valid existing rights is denied under the QTA, then the Ninth Circuit has effectively given the IBLA veto power over an act of Congress[152] with respect to legislatively approved allotments. No statute or legislative history exists that suggests Congress intended this result.

F. The "Colorable Claim" Test for Application of the QTA

While the Ninth Circuit is adamant that the QTA generally does not waive sovereign immunity for purposes of judicial review of IBLA decisions concerning Native allotment claims, it has always recognized one exception. The QTA does waive sovereign immunity where the claim of Indian trust lands is not "colorable."[153] In *Bryant*, the court held that the federal district court had jurisdiction to consider the merits of Alaska's action for judicial review of the IBLA decision because a "new administrative position eviscerates the basis for the earlier IBLA decision."[154] *Bryant* held that this new administrative position "necessarily means that the claim that the land at issue is Indian land is not 'colorable,' so the exception to the Indian lands exception demarcated in *Foster*, *Albert*, and *Wildman*[155] applies, and there is jurisdiction under the [QTA]."[156]

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150. *Albert*, 38 F.3d at 1075 (where the subject allotment had been legislatively approved). This contrasts with *Foster*, where the allotment was administratively approved by a 1979 BLM decision. Alaska v. Babbitt (Foster), 75 F.3d 449, 451-52 (9th Cir. 1995). While this distinction means that 43 U.S.C. § 1634 is not applicable to *Foster*, such administratively approved allotments must nevertheless be made subject to valid existing rights. Alaska v. Norton, 168 F. Supp. 2d at 1102, 1106 (D. Alaska 2001); *see also* CASE & VOLUCK, *supra* note 21, at 119 (discussing the distinction between administratively and legislatively approved allotments).

151. *Norton*, 168 F. Supp. 2d at 1106; *see also* State of Alaska (Goodlataw), 140 IBLA 205, 213 (1997); State of Alaska (Johnson & Craig), 133 IBLA 281, 290 (1995) ("[The state's] right-of-way is a 'valid existing right' . . . under section 905(a)(1) of ANILCA."); *see also* Myers v. United States, 210 F. Supp. 695, 700 (D. Alaska 1962) ("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."), *aff'd* 323 F.2d 580 (9th Cir. 1963).

152. 43 U.S.C. § 1634(a)(1) (2000).

153. Alaska v. Babbitt (Bryant), 182 F.3d 672, 674-75 (9th Cir. 1999).

154. *Id.* at 676.

155. Wildman v. United States, 827 F.2d 1306, 1309 (9th Cir. 1987).

Although *Bryant* perhaps signals a new willingness of the Ninth Circuit to consider judicial review of IBLA decisions involving Native allotments, the court's continued reliance on the QTA hardly gives Alaska solace. The court approved the language of *Albert* that "the Indian lands sovereign immunity applies whether the government is right or wrong."[157] *Bryant* also agreed with *Albert* that "judicial inquiry extends no further than 'a determination that the government had some rationale,' and that its position 'was not undertaken in either an arbitrary or frivolous manner.'"[158] The conclusion one must draw from *Bryant* is that judicial review will be allowed only if the decision of the IBLA is dramatically inconsistent with IBLA precedent. There will be no judicial review based on constitutional claims, statutory claims, or factual claims, as long as the government can identify some rationale, even an incorrect one, for the agency decision. Without a bright line definition of "colorable claim," the federal government will be compelled by its trust duty to protect Native allotments to seek

156. *Bryant*, 182 F.3d at 676.

157. *Id.* at 675.

158. *Id*. (quoting Alaska v. Babbitt (Albert), 38 F.3d 1068, 1076 (9th Cir. 1994)). The looseness of such a standard is evident in *Foster*. The court held that the administrative determination approving the allotment was not "arbitrary or frivolous," and therefore was "colorable" on the basis of the 1979 approval by the BLM of Foster's application, notwithstanding the 1961 material site. Alaska v. Babbitt (Foster), 75 F.3d 449, 452 (9th Cir. 1995). *Foster* states that Alaska could have raised the issue of the 1961 material site grant in 1979 or during the subsequent administrative process. *Id.* This rationale is superficial. The BLM decision recognizing and making Foster's allotment subject to the 1961 material site grant means that she cannot have a "colorable" claim that the property is Indian land. The 1961 grant appropriated the land and made it unavailable for an allotment.

Moreover, the 1979 BLM decision did not take action against any grant issued to Alaska by the BLM—neither the 1961 material site grant nor the 1969 Parks Highway right-of-way grant. No administrative action was ever taken against a grant until a much later BLM decision with respect to the highway grant, which Alaska appealed. State of Alaska (Foster), 125 IBLA 291, 291 (1993). Alaska had no reason to believe the 1979 approval had any effect on its highway grant. Under 43 C.F.R. section 2234.1-5(a) (1965), right-of-way grants could be cancelled or terminated only by a specific order of cancellation. S. Idaho Conf. Ass'n of Seventh Day Adventists v. United States, 418 F.2d 411, 414-15, 415 n.7 (9th Cir. 1969); State of Alaska, (Johnson & Craig), 133 IBLA 281, 287 & n.8 (1995). Since the BLM never took action against the 1961 material site grant, the land covered by this grant could never be, as a matter of law, Indian trust land. *See supra* notes 124, 125 and accompanying text.

dismissal on the basis of the Indian lands exception of the QTA of virtually any claim filed by Alaska, no matter how meritorious.[159]

IV. CONCLUSION

Wedded to precedent, the Ninth Circuit has resisted correcting the interpretation of the QTA it made in *Albert*.[160] Perhaps the *Albert* court felt a particular outcome was warranted based on its perception of social justice. Whatever the reason for the misinterpretation, the jurisdictional vacuum must be filled. The parties are entitled to have their conflict over ownership of the land settled. It is a conflict that arises from application of federal law, and it is apparent that it will need to be settled by new federal law. One solution would be an amendment to 43 U.S.C. § 1632(a)[161] providing that "sovereign immunity is waived where any adversely affected party seeks judicial review, notwithstanding any law to the contrary." Further, Alaska should be given one year to initiate an action for judicial review of any IBLA decision made since 1980,

159. Alaska v. Babbitt (Odinzoff), F94-0016-CV (D. Alaska 1994), is a good example. This case was generated by the federal government's refusal to correct the land description in an Allotment Certificate caused by a BLM surveyor's mistake. The allotment approved by the BLM did not conflict with an Alaska interest. However, because of the BLM surveyor's mistake, the property description in the Allotment Certificate contained an error that caused the allotment to encroach on a local airport owned by Alaska. What should have been a simple clerical correction of a conceded mistake by the surveyor turned into costly litigation. The federal government insisted on defending on the basis of sovereign immunity, using the QTA and other arguments.

160. There has been criticism within the Ninth Circuit concerning the court's reluctance to acknowledge its mistakes and correct its decisions. For example, in a concurring opinion, Judge O'Scannlain wrote:

> I believe we do ourselves little credit, and the lawyers and litigants who practice before us little good, when we ignore an irreconcilable conflict in our decisions . . . . The law of this circuit, in short, is far more likely to develop in a rational fashion when we acknowledge our mistakes and move quickly to correct them than when we contrive to disavow them.

Koff v. United States, 3 F.3d 1297, 1300 (9th Cir. 1993) (O'Scannlain, J., concurring); *see also* United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993) (Kleinfeld, J., dissenting from the order rejecting suggestion for rehearing *en banc*). In his dissent in *Weitzenhoff*, Judge Kleinfeld acknowledged the practice of the Ninth Circuit of generally not reviewing panel decisions of the court *en banc*, even when it feels them to be mistaken. *Weitzenhoff*, 35 F.3d at 1293. Rather, he observed that *en banc* review is "generally reserved for conflicting precedent within the circuit . . . and only where there are egregious errors in important cases." *Id.* It is submitted that the Ninth Circuit should relax its criteria for *en banc* review of cases so that more mistaken panel decisions, such as *Foster*, may be corrected.

161. 43 U.S.C. § 1632(a) (2000).

when § 1632 was enacted, provided the IBLA decision was not previously judicially reviewed on the merits.

Additional amending legislation should also be considered to end the litigation over conflicts between Native allotment claims and right-of-way grants made to Alaska pursuant to 23 U.S.C. § 317. Most of these grants were appropriated in the 1960s and the highways have long since been built. All Native allotment applications must have been filed by 1971,[162] yet there has been constant litigation as a result of the retroactive application of the 1987 and 1989 *GVEA* decisions.[163] The IBLA now recognizes that, as a result of more recent decisions, the "continuing validity [of the *GVEA* decisions] has been undermined."[164] Moreover, the plenary power of the United States over public land allowed the BLM to make highway grants to Alaska, regardless of Indian occupancy where there was no allotment application.[165] It is long past time to put an end to the legal wrangling between Alaska, the allotment applicant, and the federal government. This can be done by legislation clarifying that the "subject to valid existing rights" clause of 43 U.S.C. § 1634(a)(1) includes right-of-way grants issued pursuant to 23 U.S.C. § 317 prior to the date of the allotment application. This does nothing more than make clear what was undoubtedly the intent of § 1634(a)(1) in the first place.

Though the Ninth Circuit may have erred again in *Foster,* Congress can still correct the court's mistake. Even the judiciary must be checked and balanced on occasion by another branch of government. Where an agency approves an allotment on public land, and in the process nullifies long-standing prior rights of others in that land, it is not only fair but necessary that judicial review of the agency decision be allowed. The Ninth Circuit's interpretation of the Quiet Title Act to bar judicial review is strained and unfortunate. With respect to *Foster*, the result of the court's interpretation is only to preserve the status quo: Alaska is left in possession and control of the Parks Highway right-of-way, and Foster is left with merely her assertion that the land should be hers. The controversy between the parties is left unresolved despite many years of litigation. In short, no one benefits from the jurisdictional vacuum created by the Ninth Circuit.

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162. *Id*. § 1617(a). In 1995, however, a narrow exception was created for Alaska Native Veterans. *See id*. § 1629(g).

163. *See supra* notes 14, 20 and accompanying text.

164. State of Alaska (Goodlataw), 140 IBLA 205, 213 n.6 (1997).

165. *See supra* notes 34, 109 and accompanying text.