MEMORANDUM State of Alaska

Department of Law

TO: John Miller, P.E.
Chief, Right-of-Way
DOT/PF, Northern Region

DATE: April 26, 1993

FILE NO: 225-89-0143

TEL. NO.: 451-2811

FROM: E. John Athens, Jr.
Assistant Attorney General

SUBJECT: Native allotment/
Right-of-Way Conflicts

CONFIDENTIAL - ATTORNEY/CLIENT COMMUNICATION

We just received an Order from the Board of Land Appeals which stated that the Board was going to reconsider its past rulings on the issue of whether a right-of-way grant is defeated by Indian occupancy even though no allotment application had been filed at the time of the BLM grant to the state. Although the Order was in a particular case (Evelyn Foster), if the Board does end up reversing itself the ruling would potentially be applicable to many of the Native allotment/right-of-way conflicts that exist.

We had been pushing the Board to re-examine this issue for about six years now. I had really just about given up hope that the Board would reconsider its past rulings. I view it as a major accomplishment that the Board has now decided to reconsider. I am sure that there are some worried and unhappy campers at the Solicitor's Office and Alaska Legal Services.

The Board ordered the state to submit a brief within 30 days, and the adverse parties to respond within 60 days of that. Therefore, I believe that it will be six months to a year before the Board will issue its decision. I will keep you posted.

Attached is a copy of the Board's order.

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eja\foster.mm2

	CHIEF R/W AGENT
✓	PRE AUDIT
✓	ENGINEERING
	TITLE
	PLANS
	MATERIALS
	APPRAISALS
✓	NEGOTIATIONS
✓	Relocation/Prop. Mgmt.
✓	AIRPORTS
✓	RETURN TO: Airports
	FILE

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

IN REPLY REFER TO:

APR 19 1993

IBLA 89-474	:	Anchorage 052629
STATE OF ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES	:	Right-of-Way
	:	Reconsideration Granted: Briefing Scheduled

ORDER

The State of Alaska Department of Transportation and Public Facilities has filed a timely petition for reconsideration of our decision in State of Alaska, 125 IBLA 291 (1993) that raises substantial questions about whether we have erred in past applications of two Federal cases dealing with Native allotment claims that conflict with State right-of-way applications. See Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alaska 1985), aff'd sub nom. Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir.1987), and Aguilar v. United States, 474 F. Supp 840 (D. Alaska 1979). The decision from which reconsideration is now sought by the State applied those cases consistent with past practice by the Board, finding that the State was estopped to deny the validity of Native allotment application AA-7791 filed by Evelynn C. Foster. The State now argues that the possessory rights of Native claimants are insufficient, prior to filing of a Native allotment application, to establish a right prior to the State's right to claim a Federal highway right-of-way. Authority not previously considered involving occupancy claims is cited for the proposition that our past practice in this area has been in error.

We find that, as the State contends, our past decisions have not directly considered the authorities now raised by the petition filed by the State. Accordingly, we grant reconsideration pursuant to 43 CFR 4.403 and direct that the parties brief this issue raised by the petition for reconsideration. The State is allowed 30 days from receipt of this order to supplement the brief filed with the petition for reconsideration. The Bureau of Land Management and counsel for Evelynn C. Foster shall answer the State's brief within 60 days following receipt thereof. Thereafter,

the matter shall be considered to be submitted for decision.

Franklin D. Arness
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

APPEARANCES:

E. John Athens, Jr. Esq.
Office of the Attorney General
State of Alaska
Key Bank Building
100 Cushman St. Suite 400
Fairbanks, Alaska 99701-4679

Dennis J. Hopewell, Esq.
Office of the Regional Solicitor
U.S. Department of the Interior, Alaska Region
4230 University Drive, Suite 300
Anchorage, Alaska 99508-4626

Michael C. Roebuck, Esq.
Alaska Legal Services Corp.
1016 W. Sixth Ave., Suite 200
Anchorage, Alaska 99501

810 N Street
Anchorage, Alaska 99501

February 16, 1993

Mr. James L. Burski, Administrative Judge
Interior Board of Land Appeals
Office of Hearings and Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

Re: The aftermath of Golden Valley Electric Association (On Reconsideration), 98 IBLA 203 (1987)
Our File No.: 9999-100

Dear Judge Burski:

I have read with interest your concurring opinions in the recent IBLA cases of Eddie S. Beroldo, et al., 123 IBLA 156 (1992) and State of Alaska, DOTPF, 124 IBLA 386 (1992) regarding the legal effect (if any) of "legislative approval" of an Alaska Native allotment under Section 905(a) of ANILCA, 43 U.S.C. § 1634(a), upon the opportunity of a party to determine, as a factual matter, whether a Native allotment claim is valid under the Allotment Act. I personally believe that you are on the right track, but the problem presented by the above-referenced Golden Valley case and the various recent State of Alaska decisions from the Interior Board of Land Appeals goes somewhat deeper, as I will attempt to illustrate.

By way of preface, I must emphasize that the views expressed in this letter are personal to me. They are not intended to represent or advance the interests of any client, and are not made on behalf of any present client. I have practiced law in Alaska since 1971, in both the public and

private sectors, and my areas of professional concentration during this entire time have been in federal and state public lands and natural resources. I am intimately familiar with the related IBLA cases of State of Alaska, 90 IBLA 14 (1985), Golden Valley Electric Association (On Reconsideration), 98 IBLA 203 (1987), and State of Alaska, 110 IBLA 224 (1989).

I did not represent the State of Alaska in any of the above administrative appeals when they were before the Interior Board of Land Appeals. However, I have represented the State and its agency, the Department of Transportation and Public Facilities, during their appeal of the final IBLA decision in State of Alaska, 110 IBLA 224, to the U.S. District Court for Alaska, in the case styled State of Alaska v. Lujan, Civ. No. F90-006. By a substitution of counsel dated October 26, 1992, the State of Alaska resumed its own representation in that federal court case, and I no longer am involved in that pending litigation.[1]

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[1] As indicated, the case of State of Alaska v. Lujan, No. F90-006, is presently pending in the U.S. District Court for Alaska. The case has been fully briefed on the federal defendants' motion for dismissal, and is awaiting decision. The recent IBLA decisions of State of Alaska, DOTPF, 124 IBLA 386 (December 10, 1992) and State of Alaska, 125 IBLA 21 (December 21, 1992), erroneously refer to the State of Alaska v. Lujan case as follows:

> State of Alaska, 110 IBLA 224 (1989), stipulation for dismissal filed, State of Alaska v. Lujan, No. F90-006 (D. Alaska June 22, 1992).

These incorrect references are found at 124 IBLA 389 and 125 IBLA 22. There has been no stipulation for dismissal filed in the Lujan litigation, the issues are very much contested and have been fully briefed, and they await oral argument and the District Court's decision.

I am also intimately familiar with the U.S. District Court cases which the IBLA found controlling in Golden Valley Electric Association (On Reconsideration) and subsequent IBLA decisions which adhere to the Board's changed position in the Golden Valley case. I was counsel to the State of Alaska in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), in which the State was dismissed as a defendant on Eleventh Amendment grounds prior to entry of the Court's judgment. I was also counsel to the State of Alaska and the private plaintiffs/condemnors in Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alaska 1985); aff'd., 831 F.2d 1440 (9th Cir. 1987), otherwise known as the "Arctic John Etalook" litigation.

In my opinion, beginning with the case of Golden Valley Electric Association (On Reconsideration), 98 IBLA 203 (1987), the Board has incorrectly applied the U.S. District Court's decisions in Aguilar v. United States, and State of Alaska v. 13.90 Acres. It has applied them uncritically and too broadly, given the status of prior decisonal law (including several U.S. Supreme Court cases). The issue which was common to several IBLA decisions beginning with the Golden Valley case, and which was involved in both the Aguilar and the 13.90 Acres court decisions, is this: What rights does a Native allotment claimant acquire against the United States by the mere occupancy of unreserved federal public land, before the filing of an allotment application under the 1906 Native Allotment Act?

In Aguilar the allotment claimants, through the United States, asserted that they had actually occupied federal land but had not filed allotment applications before the State of Alaska selected the same land under authority of Section 6 of the Alaska Statehood Act, 48 U.S.C. Note prec. § 21. The District Court there held that Alaska's land selections could not take precedence over inchoate, unfiled Native allotment occupancy claims (and were thus invalid land selections) due to the effect of the broad disclaimer provision in Section 4 of the Alaska Statehood Act, which limits and qualifies all land selections filed by the State under that Act. That disclaimer states in relevant part,

> As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: . . .

See also the recent Opinion of the Interior Solicitor regarding Alaska Native village powers, dated January 12, 1993, at pp. 71-73.

Building upon the decision in Aguilar, supra, the U.S. District Court in the Etalook case held that the trans-Alaska oil pipeline, whose right-of-way was granted under 30 U.S.C. Section 185(b)(1), did not take precedence over the inchoate occupancy claim of an Alaska Native who did not file for his allotment until after the right-of-way was granted.

This result, it must be noted, fits within the doctrine first articulated by the court in the Aguilar case, since 30 U.S.C. § 185(b)(1) does not permit a federal oil pipeline right-of-way to be granted over federal lands (held in trust for an Indian or Indian tribe". This limitation is similar in its intent, through not in its breadth, to the disclaimer provision of the Alaska Statehood Act at Section 4.

However, I believe it is not correct to apply the Etalook and Aguilar holdings in the manner in which they have been applied to the IBLA cases beginning with Golden Valley Electric Association (On Reconsideration), 98 IBLA 203 (1987). In the case of an inchoate Native occupancy which did not become the subject of a formal application until after the United States had granted highway or powerline rights-of-way to third parties, no statutory qualifications limit the United States' ability to grant valid third-party rights over lands burdened by the inchoate, unfiled occupancy claim of any person, including a Native allotment claimant.

In other words, the federal right-of-way grants which were the subject of the Golden Valley case, the subsequent State of Alaska case, 110 IBLA 24, and the recent cases of State of Alaska, DOTPF, 124 IBLA 386, and State of Alaska, 125 IBLA 21, were made subject, if at all, only to "valid rights existing on the date of the grant". This restriction cannot include an inchoate land occupancy claim which could only ripen into an asserted "valid existing right" after the filing of a formal application with the federal government. Certainly, the federal highway grants involved in State of Alaska, 110 IBLA 224, presently on appeal to the U.S. District Court in State of Alaska v. Lujan, supra, were made subject only to "valid rights existing on the date of the grant". The underlying federal right-of-way authority, 23 U.S.C. § 317, contains no language which subordinates the United States' plenary land authority to inchoate but unfiled land occupancy claims of third persons, when it makes highway right-of-way grants to states.

The entire subject of the United States' land management authority in the face of third-party occupancy or pre-emption claims was thoroughly litigated long ago, and is dealt with in several U.S. Supreme Court decisions, none of which has been analyzed (or even cited) in the various IBLA decisions referred to earlier. This issue came into focus for me personally as I prepared the State of Alaska's reply brief regarding the federal motion to dismiss in State of Alaska v. Lujan, which is the appeal of State of Alaska, 110 IBLA 224 (and in which, I have earlier noted, I am no longer counsel of record).

The United States had asserted in Alaska v. Lujan that the federal highway rights-of-way which the United States had issued to Alaska were invalid when they were issued due to the presence of the inchoate, unfiled occupancy claim of Dinah Albert, and that ". . . since Ms. Albert's allotment was a vested right which predated the State's rights-of-way, the government's right to convey any interest in this land to a third party ended before the State even applied for the rights-of-way . . ." (quoting from page 27 of the federal brief). In the State's reply brief, this contention was responded to at length. I include with this letter that excepted portion of Alaska's reply brief in the District Court.

In summary, it was my position before the District Court on behalf of the State that the mere occupancy of federal public land did not deprive the United States of authority to grant rights, including rights-of-way, to a state unless the statutory authority under which such grants were to be made specifically subordinated the federal land management power or the state's land application to the inchoate, unfiled occupancy or pre-emption claim of a third party (as the relevant land-grant or right-of-way statutes did in Aguilar, supra, and 13.90 Acres of Land, supra). However, without a specific statutory limitation, the plenary power of the United States to manage federal public land, as upheld in Hutchings v. Low, the "Yosemite Valley Case", 82 U.S. (15 Wall.) 77, 21 L. Ed. 82 (1873), must govern the outcome of the dispute. That doctrine, as stated at 82 U.S. 85, is quite simply that,

> . . . under the pre-emption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to pre-emption, do not confer upon the settlor any right in the land occupied, as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper; and that the power of regulation and disposition, conferred upon Congress by the Constitution, only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, . . . have been performed by the settlor. When these prerequisites have been complied with, the settlor for the first time acquires a vested interest [against the United States] in the premises occupied by him, of which he cannot be subsequently deprived.

See also, Frisbie v. Whitney, 76 U.S. (9 Wall.) 187, 19 L. Ed. 688 (1870); Russian-American Packing Company v. United States, 199 U.S. 579, 26 S. Ct. 157 (1905); Akootchook v. United States, 747 F.2d 1316 (9th Cir. 1984).

The Akootchook case, in particular, is a modern reaffirmation of the plenary land management power of the United States with regard to inchoate Native land occupancy, and it applies the doctrine of the Yosemite Valley pre-emption cases in the context of unfiled Alaska Native allotment claims.

Of course, since the Court's decision has not yet been rendered in the Lujan case (and may turn on any one of a number of legal issues), it would be foolish for me to speculate on the outcome. Nevertheless, without repeating further the briefing which was filed in September of last year in the pending Lujan case, I urge that you and your fellow Board members give full consideration to the issues raised in that brief to insure that the course of development of

administrative law first announced by the Board in Golden Valley Electric Association (On Reconsideration), 98 IBLA 203 (1987), is consistent with both the unique factual and legal circumstances of the Aguilar and 13.90 Acres of Land cases, and with longstanding U.S. Supreme Court precedent, as recently reiterated by the Ninth Circuit in the Akootchook case.

I wish to thank you for this opportunity to express my personal views on the above subject, in the interest of a consistent, logical and legally-defensible development of administrative precedent regarding federal public land decisions.

Sincerely yours,

/s/

Thomas E. Meacham

TEM/75/dmd
Enclosure