

INTERIOR BOARD OF LAND APPEALS

State of Alaska, Department of Transportation and Public Facilities

140 IBLA 205 (September 12, 1997)

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STATE OF ALASKA
DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

IBLA 92-566

Decided September 12, 1997

Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring right-of-way A-064033 null and void as to lands within Native allotment A-062458, Parcel C.

Reversed.

1. Administrative Procedure: Generally—Alaska: Native Allotments—Appeals: Generally—Res Judicata—Rules of Practice: Appeals: Generally

Where, pursuant to a protest against a Native allotment application filed by the State of Alaska under section 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1994), BLM adjudicates the application pursuant to the Alaska Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970), and, thereafter, BLM issues a decision approving the allotment and dismissing the State's protest, the subsequent dismissal of an appeal filed by the State for failure to submit a statement of reasons bars a subsequent challenge by the State to any of the predicate facts necessarily determined by BLM in its initial decision.

2. Alaska: Native Allotments

Prior to the passage of section 905(d) of ANILCA, 43 U.S.C. § 1634(d) (1994), lands included within powersite withdrawals were not subject to the initiation of use and occupancy under the Native Allotment Act. Therefore, the preference right which vests upon the completion of 5 years use and occupancy and the timely filing of an application for a Native allotment will not relate back to use and occupancy initiated while land was withdrawn for powersite purposes to invalidate an intervening right-of-way otherwise correctly issued.

APPEARANCES: E. John Athens, Jr., Esq., Assistant Attorney General, Fairbanks, Alaska, for the State of Alaska, Department of Transportation and Public Facilities; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The State of Alaska, Department of Transportation and Public Facilities (State), has appealed from a determination of the Alaska State Office, Bureau of Land Management (BLM or the Bureau), issued on June 29, 1992, declaring channel change right-of-way grant A-064033 null and void to the extent it embraces land within Alaska Native allotment A-062458, Parcel C.

On December 9, 1965, the State filed an application for a channel change right-of-way pursuant to the Federal Highway Act, 23 U.S.C. § 317 (1994), seeking to use approximately 4.534 acres of public land in the E½ sec. 34, T. 2 S., R. 4 E., Copper River Meridian, Alaska, for the construction of dikes in the vicinity of the Tonsina River Bridge of the Copper River Highway to effect channel changes for the prevention or lessening of erosion near the bridge abutments. Because the requested land had been withdrawn on July 20, 1953 (Power Project No. 2138), and on August 13, 1956 (Power Project No. 2215), for proposed development of the Wood Canyon site on the Tonsina River, BLM requested and, on October 17, 1966, received a determination by the Federal Power Commission (FPC) that the power value of the lands would not be injured or destroyed by the proposed channel change right-of-way, subject to the provisions of section 24 of the Federal Power Act, 16 U.S.C. § 791 (1994). On November 8, 1966, BLM issued channel change right-of-way grant A-064033 to the State, pursuant to 23 U.S.C. § 317 (1994). The grant was issued subject to all valid rights existing on the date of the grant.

On August 11, 1971, the Bureau of Indian Affairs (BIA) filed amended Native allotment application A-062458, Parcels B and C, on behalf of Joe J. Goodlataw, Sr., pursuant to the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (Native Allotment Act), repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1994), subject to applications then pending. 1/ Goodlataw claimed use and occupancy of 4.54 acres of surveyed land (Parcel B - U.S. Survey No. 3735, Alaska) and

1/ As filed with BLM, the amended application designated these parcels as Tracts A and B. However, inasmuch as Goodlataw had, on July 8, 1968, received a certificate of allotment for the 37.56 acres of surveyed land requested in his original May 19, 1965, Native allotment application A-062458, BLM denominated that patented land, described as lot 4, sec. 9, T. 3 N., R. 1 W., Copper River Meridian, Alaska, as Parcel A of Native allotment application A-062458 and holographically changed the amended application to identify the added lands as Parcels B and C, respectively.

approximately 100 acres of unsurveyed land adjacent to the Tonsina River (Parcel C) in sec. 34, T. 2 S., R. 4 E., Copper River Meridian, commencing in August 1954. Goodlataw listed a home and store as improvements on Parcel B and stated that he had used the land in Parcel C for trapping and timber. By memorandum dated December 14, 1971, BIA certified to BLM, pursuant to the provisions of 43 C.F.R. § 2094.2(b), that the lands covered by Goodlataw's application extending more than 160 rods along the shoreline of the Tonsina River were not necessary for harborage, landing, and wharf purposes and that waiver of the 160-rod limitation would not injure the public interest. ^{2/}

By letter dated April 18, 1974, BLM advised Goodlataw that the lands embraced by his amended application were not vacant and unreserved either on the date he filed his application or on the date he initiated use and occupancy because they had been withdrawn on July 20, 1953, by Power Project No. 2138, and on August 13, 1956, by Power Project No. 2215. These power projects, BLM stated, reserved the covered lands from entry, location, or other disposal under the public land laws, including the Native Allotment Act. Notwithstanding the foregoing, BLM granted Goodlataw 30 days in which to provide additional evidence in support of his claimed use and occupancy. Goodlataw responded by submitting additional affidavits describing his and his wife's use and occupancy of the land, noting *inter alia*, that, while his use of the land did not commence until 1954, the land had "been in my wife's family since 1910."

By letter dated June 26, 1974, BLM notified Goodlataw that its April 18, 1974, letter had been premature since it was in the process of finalizing an agreement with Ahtna, Inc., concerning the possible revocation of the Woods Canyon Power Project withdrawal to allow Native allotments. Therefore, BLM informed him, additional action on his application would be withheld pending clarification of that agreement. Processing of Goodlataw's application was further delayed, BLM explained in an April 6, 1977, letter responding to a status inquiry by Senator Ted Stevens, due to a July 8, 1974, instruction to suspend action on all allotment applications located within the Woods Canyon Power Project withdrawal pending receipt of procedural instructions from the Department, instructions which had not yet been issued.

Thereafter, in a January 28, 1981, letter replying to an inquiry from Ahtna, Inc., about Goodlataw's allotment application, BLM indicated that, pursuant to section 905(d) of the newly enacted Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(d) (1994),

^{2/} Although BLM initially rejected Goodlataw's amended allotment application on Oct. 30, 1973, on the ground that the July 11, 1968, issuance of the allotment certificate for Parcel A had extinguished his right to an allotment, *see note 1, supra*, BLM's decision was vacated by the Board on appeal, and the allotment application was remanded to BLM for further consideration. *See Joe J. Goodlataw*, 14 IBLA 199 (1974).

lands described in a Native allotment application which were located within areas withdrawn, reserved, or classified for powersite or power project purposes would be considered vacant, unappropriated, and unreserved within the meaning of the Native Allotment Act, and if the land was not part of a licensed power project or then used to generate power, the powersite withdrawal would not prohibit approval of the Native allotment application. The Bureau advised, however, that although the powersite withdrawal was no longer an obstacle to ultimate approval of Goodlataw's application, the fact that the application did not describe land which was unreserved on December 13, 1968, precluded the application from being legislatively approved pursuant to section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1994), and mandated its adjudication under the provisions of the Native Allotment Act.

On June 1, 1981, pursuant to section 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1994), the State protested Goodlataw's amended allotment application, averring that the land described in the application conflicted with an existing highway and trail and formed the only reasonable access to publicly-owned resources. In accordance with that section of ANILCA, the State's protest would independently prevent legislative approval and necessitate adjudication of the allotment application.

The BLM examined both parcels identified in Goodlataw's amended application and concluded that he had satisfied the requirements of the Native Allotment Act and implementing regulations. The field report documenting the investigation of the allotment claim acknowledged that the State's right-of-way embraced part of the land within Parcel C but indicated that, except for Power Project No. 2138, Goodlataw's use predated all withdrawals, selections, and other appropriations, including right-of-way A-064033. The report also found no reason why the 160-rod limitation on shore space could not be waived.

By decision dated January 19, 1982, BLM approved Goodlataw's amended application, specifically determining that Goodlataw's use of the land sought satisfied the use and occupancy requirements of the Native Allotment Act. The Bureau also dismissed the State's protest at that time. The State's Department of Transportation and Public Facilities appealed BLM's decision on February 18, 1982. ^{3/} However, by Order dated August 17, 1982, the Board dismissed the appeal for failure to file a statement of reasons.

On July 16, 1991, BLM issued a decision purportedly confirming legislative approval of Goodlataw's Native allotment application for Parcels B and C. The decision also rejected various State, Village, Regional, and Native Group selections to the extent they conflicted with Parcels B and C.

^{3/} The notice of appeal was submitted on behalf of the Director, Design and Construction, Interior Region, Right of Way Division of the Department of Transportation and Public Facilities, and was signed by an individual identified as a right-of-way agent.

The Bureau issued Goodlataw a Supplemental Native Allotment (Certificate No. 50-92-0003) for the previously surveyed 4.54 acres included within Parcel B of his amended allotment application on October 21, 1991.

In the June 29, 1992, determination under appeal, BLM held that channel change right-of-way grant A-064033 was null and void as to lands within Parcel C of Goodlataw's Native allotment. The Bureau noted that the grant had been issued subject to all valid rights existing on its November 8, 1966, issuance date. The Bureau stated that Goodlataw's allotment application, which claimed use and occupancy of Parcel C beginning in August 1954, had been approved on January 19, 1982, pursuant to both the Native Allotment Act and ANILCA. Because Goodlataw's use and occupancy of the lands had begun prior to the December 9, 1965, filing of the State's right-of-way application and the right-of-way grant had been issued subject to valid existing rights, BLM determined that the State's grant was null and void to the extent it included lands within Goodlataw's Parcel C.

In its statement of reasons for appeal (SOR), the State argues that its right-of-way grant is a valid existing right to which Goodlataw's Native allotment is subject. The State insists that BLM had full authority to issue the right-of-way notwithstanding a claim of prior occupancy, and that the relation back of Goodlataw's allotment to 1954 fails to defeat the broad Federal power over public lands because occupancy claims, including inchoate Native allotment preference rights, cannot preempt the plenary disposing power of Congress. Given the expansive Federal control over public lands and the Secretary of the Interior's longstanding and broad right-of-way authority, the State contends that the Board's decisions in State of Alaska, 110 IBLA 224 (1989), appeal dismissed, State of Alaska v. Lujan, Civ. No. F90-006 (D. Alaska May 19, 1993), aff'd, 38 F.3d 1068 (9th Cir. 1994), and Golden Valley Electric Association (On Reconsideration) (GVEA (On Reconsideration)), 98 IBLA 203 (1987), are erroneous and must be overruled.

According to the State, despite the contrary holding in State of Alaska, legislative approval of an allotment application does not prevent inquiry into the sufficiency of a Native's use and occupancy pertaining to the lands covered by its right-of-way grant. The State alleges that the sufficiency of Goodlataw's use and occupancy has never been adjudicated, the opportunity for an evidentiary hearing on his use and occupancy has never been afforded the State, and no evidence supporting a claim of exclusive use and occupancy by Goodlataw of the land within the State's right-of-way appears in the record. The State argues that, under these circumstances, prohibiting exploration into the adequacy of Goodlataw's use and occupancy under the guise of legislative approval denies the State fundamental fairness. This unfairness is exacerbated, the State avers, by the fact that, during the time period ANILCA required protests of Native allotments to be filed, the State had no reason to suspect that Goodlataw's allotment might jeopardize its right-of-way grant.

Moreover, the State argues that, even were the Board to uphold State of Alaska and GVEA (On Reconsideration), those decisions should not be given retroactive effect since application of the new rules of law announced in those decisions would deprive it of important property rights without due process and an opportunity to contest critical facts. Instead of divesting the State of its right-of-way grants based on an uncontestable mere allegation of prior use and occupancy, the State suggests that the Board construe right-of-way grants to be valid existing rights until specifically cancelled by BLM. Any BLM decision to cancel a grant due to a Native's prior use and occupancy, the State submits, would then be subject to challenge by the State on the issue of the Native's qualifying use and occupancy.

The State also charges that BLM and Goodlatow are estopped to deny the validity of the right-of-way grant, that BLM's failure to consider the public need for the right-of-way constitutes an abuse of discretion, and that the land within the right-of-way grant was not available for entry by Goodlatow because it was reserved as shore space, citing the 160-rod shore limit found in 43 C.F.R. § 2094.0-3.

In response, BLM submits that the arguments raised in the State's SOR have been previously resolved by Board decisions holding that a later-issued right-of-way is void when there exists a valid Native allotment on the same land and the use and occupancy upon which the allotment application rests predates the right-of-way. The Bureau also contends that administrative finality has attached to BLM's earlier unchallenged related decisions, thus precluding the State from now disputing the validity of those decisions. The Bureau requests, however, that we vacate the decision voiding the State's right-of-way grant and remand the case to it because its review of the record has revealed that it has not considered the effect of the various power project withdrawals on Goodlatow's Native allotment and resolution of this issue could affect the validity of the State's right-of-way grant.

The State has filed a qualified opposition to BLM's motion to vacate and remand, asserting that the motion contains insufficient information for the State to assess whether there exists any likelihood that the withdrawals would change BLM's decision and suggesting that BLM be directed to supplement its motion with further data regarding the withdrawals. For reasons set forth below, we decline to remand the matter pursuant to BLM's request since, upon review of the issues presented, we conclude that the issue presented by this appeal can be finally adjudicated at this time.

[1] At the outset, however, we believe it appropriate to address BLM's assertion that the State's challenge to certain factual underpinnings of the 1991 decision appeal herein is barred by application of the doctrine of administrative finality inasmuch as the State failed to prosecute its appeal of BLM's 1981 determination rejecting the State's protest of Goodlatow's allotment application.

As we have observed in numerous decisions, the principle of administrative finality is generally considered to be the administrative counterpart of *res judicata*. See, e.g., United States v. Stone, 136 IBLA 22, 26 (1996). As such, it is a jurisprudential concept which normally precludes reconsideration in a later case of matters finally resolved for the Department in an earlier appeal. See, e.g., Laguna Gatuna, Inc., 131 IBLA 169, 172 (1994). However, given the fact that the 1982 adjudication did not touch upon right-of-way A-064033, ^{4/} the concept of *res judicata* clearly does not come into play inasmuch as there has been no previous adjudication of the validity of the right-of-way. See generally United States v. Knoblock, 131 IBLA 48, 78-79 (1994). What may be involved, however, is application of the related concept of collateral estoppel.

Application of the concept of collateral estoppel essentially provides that, when a party had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was ultimately affirmed, matters decided therein may not be relitigated in subsequent proceedings involving the same parties and related or associated matters, absent a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent a demonstrable injustice. See Mary Sanford, 129 IBLA 293, 298 (1994), and cases cited. Since the parties are the same and the issues obviously related, it seems clear that the principle of collateral estoppel could properly be invoked.

Appellant has failed to provide any compelling reason why the principle of collateral estoppel should not be applied herein with respect to any challenge to matters relating to Goodlatow's compliance with the requirements of the 1906 Act. The State, specifically the Department of Transportation and Public Facilities which filed the appeal of BLM's 1982 approval decision, had the opportunity to challenge before the Board all facets of the 1982 decision, but it elected not to take advantage of that option by allowing its appeal to lapse. The State cannot now successfully complain that it has been denied fundamental fairness when its own actions brought about the result it decries.

This does not end the present matter, however. In our recent decision in Eva Wilson Davis, 136 IBLA 258 (1996), we noted that collateral estoppel shared with *res judicata* the limitation that it only applies to matters "distinctly put in issue and directly determined." Id. at 263, quoting Montana v. United States, 440 U.S. 147, 153 (1979). Application of collateral estoppel thus necessitates a delineation of those matters which were put in issue and directly determined and which are, therefore, no longer subject to relitigation in the present appeal.

^{4/} Not only did the 1982 decision make no mention of this right-of-way, it did not even serve as a basis for the 1981 State protest, and its existence was only mentioned in passing in the Field Report.

In rejecting the State's 1981 protest of Goodlataw's allotment application with respect to Parcels B and C, the Chief, Branch of Land and Mineral Operations found:

Based on a recent review of the application, it has been determined that Mr. Goodlataw has used the land for which he applied to satisfy the use and occupancy requirements of the Act of 1906. Therefore, Native allotment application A-062458 is approved and the protest is dismissed. Certificate will be issued on surveyed Parcel B and survey will be requested for Parcel C when this decision becomes final.

The foregoing constitutes the total factual findings of the 1982 decision. A review of the application shows that Goodlataw had asserted use and occupancy of the subject parcels commencing in August 1954, a claim which he apparently reiterated to the field investigator in 1981. It seems to us that any of the predicate findings necessary to justify an allotment of Parcel C to Goodlataw are no longer subject to collateral attack by the State. Thus, the State may no longer challenge the fact that Goodlataw commenced his use and occupancy of Parcel C in 1954, or that his occupancy from 1954 to the present was sufficient, when conjoined with his application, to vest in him a preference right to an allotment, nor may it challenge the appropriateness of waiving the 160-rod shore limitation. ^{5/} But, as shall be made clear *infra*, the fact that the State may be precluded from challenging the matters adjudicated in the 1982 decision is not ultimately dispositive of the matters raised in this appeal, since nothing in the 1982 decision dealt directly with the validity of right-of-way A-064033.

The State argues that, even if it is determined that Goodlataw's entitlement to an allotment of Parcel C is no longer subject to collateral attack, the validity of its right-of-way grant is unimpaired since it constituted a valid existing right to which the allotment was subject. On this point, given the factual situation in which this appeal arises, we must agree.

We note that both the State and BLM view the Board's previous decisions in State of Alaska and GVEA (On Reconsideration), as central to the

^{5/} Moreover, while the State devotes a significant portion of its SOR to its contention that BLM unfairly voided the State's right-of-way grant without first adjudicating the adequacy of Goodlataw's use and occupancy of Parcel C to satisfy the requirements of the Native Allotment Act or affording the State the opportunity to dispute the sufficiency of that use and occupancy, the record demonstrates that, not only did BLM thoroughly investigate Goodlataw's use and occupancy of Parcel C and issue a decision on Jan. 19, 1982, approving the allotment based on its adjudication of Goodlataw's compliance with the Native Allotment Act, but also that the State has presented virtually no evidence to rebut the assertions of record as to the fact of Goodlataw's occupancy after 1954.

matters raised on appeal. In this, we believe they are both mistaken. Regardless of the continuing efficacy of these two precedents, ^{6/} they are simply not applicable herein. Those decisions dealt with the question of the effect of legislative approval under section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1994), on subsequent challenges to cancellations of rights-of-way previously granted. It was ultimately asserted in State of Alaska that, where a Native allotment had been legislatively approved under section 905(a), the effect of the approval was to bar any further inquiry into the factual assertions made in the application because, in effect, the rights of the Native allotment applicant related back to the initiation of use and occupancy claimed by the applicant.

In the instant case, however, notwithstanding the assertions made in BLM's 1991 and 1992 decisions, Parcels B and C of the Goodlatow allotment application were not legislatively approved but rather were approved in an adjudication conducted pursuant to section 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1994). ^{7/} Thus, regardless of any controversy concerning the continuing precedential status of the decision in State of Alaska, its holding has no controlling relevance herein. Moreover, as explained below, even if legislative approval had occurred, the instant appeal presents an issue which is not controlled by the rationale employed in State of Alaska.

[2] The starting point of any substantive analysis is that, under section 905(a)(1), approval of Native allotment applications is expressly made subject to "valid existing rights." The State argues that right-of-way A-064033 was a "valid existing right" at the time of the 1982 adjudication of Parcel C. We agree.

Admittedly, right-of-way A-064033 was, itself, issued subject to "all valid rights existing on the date of the grant" and, as we noted above,

^{6/} Indeed, these two decisions have been the subject of criticism within the Board and, at least in some aspects, their continuing validity has been undermined. See, e.g., State of Alaska (Irene Johnson), 133 IBLA 281, 286-90 (1995); State of Alaska, 131 IBLA 121, 126-27 (1994); State of Alaska, 124 IBLA 386, 393-98 (1992) (concurring opinion).

^{7/} Moreover, notwithstanding certain Board decisions such as Myrtle Jaycox, 64 IBLA 97 (1982), David E. Stevens, 64 IBLA 72 (1982), and Wayne C. Williams (On Reconsideration), 61 IBLA 181 (1982), we believe that there is substantial question whether this allotment was eligible for legislative approval even in the absence of a State protest. As noted above, the filing of the State protest rendered § 905(d) inapplicable. However, even if § 905(d) were applicable, it is unclear, because of the interplay between § 905(a)(1) and § 905(d), whether an allotment application within a powersite withdrawal, withdrawal was in existence prior to Dec. 13, 1968, could properly be subject to legislative approval. We need not decide this question at the present time since the State's protest clearly prevented legislative approval from attaching. See generally United States v. Galbraith, 134 IBLA 75, 91-96 (1995).

the State can no longer contest the assertion by Goodlataw that in August 1954 he had commenced use or occupancy of Parcel C in a manner which was in conformity with the requirements of the Native Allotment Act, i.e., a use or occupancy which was substantially continuous and potentially exclusive of others. Be that as it may, it is equally clear that this occupancy and use was initiated after the land had been withdrawn from appropriation under the Allotment Act on July 20, 1953, for Power Project No. 2138. See generally Carmel J. McIntyre (On Reconsideration), 67 IBLA 317, 322 (1982); Juliet Marsh Brown, 64 IBLA 379, 381 (1982). Since Native settlement on land which was closed to entry afforded no cognizable rights, see Akootchook v. United States Department of the Interior, 747 F.2d 1316, 1320 (9th Cir. 1984); Carmel J. McIntyre (On Reconsideration), *supra*, at 325-28; Magnel E. Drabek, 41 IBLA 219, 222 (1979); Milton R. Pagano, 41 IBLA 214, 217 (1979), Goodlataw's occupancy did not constitute a "valid existing right" in 1966 when the right-of-way issued, and the right-of-way was, accordingly, not subject thereto.

It is, of course, true, as the Board noted in United States v. Flynn, 53 IBLA 208 (1981), that, when qualifying use or occupancy was conjoined with an application, a vested preference right to an allotment arose which would normally relate back to the initiation of use and occupancy and defeat all intervening attempts to acquire rights adverse to the allotment application. One of the essential premises of this rule, however, is that the qualifying Native use and occupancy must be under color of law. Thus, Native occupancy of land which was commenced when the land was not subject to appropriation under the Allotment Act, traditionally §/ afforded an allotment applicant no rights thereto, and the subsequent opening of the land to entry resulted in no retroactive validation of occupancy prior to the opening. See, e.g., Magnel E. Drabek, *supra*; Herman Haakanson, 23 IBLA 54, 57-58 (1975); Serafina Anelon, 22 IBLA 104, 105 (1975).

The instant case is comparable to the situation which this Board has examined with respect to lands containing valuable deposits of gravel. See State of Alaska (Irene Johnson), 133 IBLA 281 (1995); State of Alaska, 131 IBLA 121 (1994); Ahtna, Inc., 100 IBLA 7 (1987). In those cases, the Board was faced with application of section 905(a)(3) of ANILCA, 43 U.S.C. § 1634(a)(3) (1994), which expressly provided that, as used in the Native Allotment Act, 43 U.S.C. § 270-1 (1970), the term "nonmineral" would include lands "valuable for deposits of sand or gravel."

The Board initially held in Ahtna, Inc., *supra*, that, notwithstanding the provisions of section 905(a)(3) of ANILCA, prior to the adoption of ANILCA, lands containing valuable deposits of gravel had been deemed to be mineral lands, not available for Native allotment. *Id.* at 15-17. Given this analysis, we subsequently held in State of Alaska (Irene Johnson),

§/ It is clear that the effect of § 905(d) of ANILCA, 43 U.S.C. § 1634(d) (1994), was to retroactively modify this rule with respect to powersite withdrawals. However, as explained in the text of this decision, this modification is, itself, subject to valid existing third-party rights.

supra, and State of Alaska, 131 IBLA 121 (1994), that while the fact that a parcel of land was valuable for deposits of gravel would no longer bar allowance of an allotment application as a present fact, Native use and occupancy of such land could not relate back to the initiation of settlement because, in the period between the initiation of Native use and occupancy and the Congressional removal of the statutory impediment to allowance of an allotment, a third party (the State) had acquired adverse rights under a material site right-of-way. In essence, we held that, since the allotment applicant had no legal basis for barring the issuance of the material site right-of-way at the time it occurred because the allotment applicant's attempted appropriation of the land was then contrary to the law, the subsequent removal of the statutory prohibition against granting lands valuable for gravel under the Native Allotment Act could not result in a retroactive invalidation of a right-of-way which was in conformity with the law when it issued.

We believe that the same principle is properly applicable herein. When Goodlataw commenced his occupancy of Parcel C in 1954, it was not then available for use and occupancy by him since it had been withdrawn for a powersite project. Thereafter in 1966, the State, in conformity with section 24 of the Federal Power Act, 16 U.S.C. § 791 (1994), properly obtained a channel change right-of-way covering part of the land in Parcel C. Subsequently, in 1980, Congress determined in section 905(d) of ANILCA that, under certain circumstances, the fact that Native use and occupancy had commenced when the land had been withdrawn for powersite purposes would no longer constitute an automatic bar to allowance of an allotment. Whatever effect that provision may have on the present allowability of Goodlataw's allotment application, it could not retroactively invalidate a previously granted right-of-way which was valid when it issued. Goodlataw's allotment application for Parcel C could only properly be approved subject to right-of-way A-064033, and the decision cancelling this right-of-way was in error.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed.

James L. Burski
Administrative Judge

I concur.

R.W. Mullen
Administrative Judge