United States Government Accountability Office

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Report to the Chairman, Committee on Appropriations, U.S. Senate

September 2004

ALASKA NATIVE ALLOTMENTS

Conflicts with Utility Rights-of-way Have Not Been Resolved through Existing Remedies

GAO-04-923

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GAO Accountability • Integrity • Reliability

Highlights

Highlights of GAO-04-923, a report to the Chairman, Committee on Appropriations, U.S. Senate

Why GAO Did This Study

In 1906, the Alaska Native Allotment Act authorized the Secretary of the Interior to allot individual Alaska Natives (Native) a homestead of up to 160 acres. The validity of some of Copper Valley Electric Association's (Copper Valley) rights-of-way within Alaska Native allotments is the subject of ongoing dispute; in some cases the allottees assert that Copper Valley's electric lines trespass on their land. The Department of the Interior's (Interior) Bureau of Land Management (BLM) and Bureau of Indian Affairs (BIA) are responsible for granting rights-of-way and handling disputes between allotees and holders of rights-of-way.

GAO determined (1) the number of conflicts between Native allotments and Copper Valley rights-of-way and the factors that contributed to these conflicts, (2) the extent to which existing remedies have been used to resolve these conflicts, and (3) what legislative alternatives, if any, could be considered to resolve these conflicts.

What GAO Recommends

GAO recommends that BIA develop a training module for its realty service providers in Alaska on the types of evidence that should be developed before pursuing an alleged trespass involving rights-of-way.

Interior agreed with GAO's recommendation.

www.gao.gov/cgi-bin/getrpt?GAO-04-923.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Barry T. Hill at (202) 512-3841 or hillbt@gao.gov.

What GAO Found

There are 14 cases where conflict exists regarding Copper Valley's rights-of-way within Native allotments. In most of these cases, Copper Valley has been found by Interior to be in trespass because its rights-of-way have been determined to be invalid. The root of some of these conflicts is Interior's application of the so-called "relation back" doctrine. In these instances, Interior invalidated Copper Valley rights-of-way because it found that allottees' rights to the land began when they first used or occupied the land, predating when Copper Valley obtained its right-of-way and when the allotment application was made. Federal courts have dismissed legal challenges to the relation back doctrine because the U.S. government has not allowed itself to be sued with regard to this issue. In other cases, conflict exists because Interior does not recognize state issued rights-of-way that fall within certain highway easements granted to the state by the federal government. There are another 4 cases where a BIA realty service provider has requested that Copper Valley obtain rights-of-way even though GAO believes it lacks evidence that the electric lines are in trespass. While BIA has recognized the need to provide realty training, its March 2004 training course did not include information on the types of evidence that should be developed before pursuing an alleged trespass involving rights-of-way.

While a resolution to a number of these conflicts has been intermittently pursued since the mid-1990s, only a few cases have been resolved using existing remedies. Copper Valley has three remedies to resolve these conflicts: (1) negotiating rights-of-way with Native allottees in conjunction with BIA; (2) relocating its electric lines outside of the allotment; or (3) exercising the power of eminent domain, also known as condemnation, to acquire the land. Copper Valley has ceased trying to resolve these conflicts because it maintains that the existing remedies are too costly, impractical, and/or potentially damaging to relationships with the community. More importantly, Copper Valley officials told GAO that on principle they should not have to bear the cost of resolving conflicts that they believe the federal government caused by applying the relation back doctrine and by not recognizing their state issued rights-of-way.

Several legislative remedies have been identified to resolve these conflicts, including legislation to: (1) change Interior's application of the relation back doctrine so that the date an allotment application is filed, rather than the date an allottee claimed initial use and occupancy of the land, is used to determine the rights of allottees and holders of rights-of-way; (2) allow the U.S. government to be sued regarding Alaska Native allotments so that legal challenges can be heard in federal court; (3) ratify the rights-of-way granted by the State of Alaska within federally granted highway easements; or (4) establish a federal fund to pay for rights-of-way across Native allotments. While GAO did not determine the financial costs or the legal ramifications on the property rights of the Alaska Native allottees associated with any of these options, the costs and legal ramifications would need to be assessed.

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Abbreviations

ANILCA	Alaska National Interest Lands Conservation Act
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
IBLA	Department of the Interior's Board of Land Appeals
PLO	Public Land Order

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United States Government Accountability Office
Washington, D.C. 20548

September 7, 2004

The Honorable Ted Stevens
Chairman, Committee on Appropriations
United States Senate

Dear Mr. Chairman:

For over a century, there have been continuing issues regarding the status and use of lands involving Alaska Natives (Native). In 1906, Congress passed the Alaska Native Allotment Act, which authorized the Secretary of the Interior to allot individual Alaska Natives a homestead of up to 160 acres of land.[1] The 160 acres could be composed of multiple parcels of land. Initially, the Native Allotment Act was little used by Alaska Natives. It was primarily in the early 1970s that roughly 10,000 Alaska Natives applied for over 16,000 parcels of land. The Department of the Interior's Bureau of Land Management (BLM) is still processing many of these applications. As these allotment applications have been processed over the last three decades, conflicts have arisen between the property rights of Alaska Natives and the holders of certain types of rights-of-way.

The Department of the Interior (Interior) and the State of Alaska have granted rights-of-way in Alaska for a variety of uses such as electrical transmission lines, oil and gas pipelines, and highways.[2] Some of these rights-of-way cross Native allotments giving rise to conflicts between Alaska Natives and holders of rights-of-way. In these conflicts, some Native allottees claim that utility companies' rights-of-way are invalid and that the utility is trespassing on the allotment. Conversely, the utilities frequently claim that they are not in trespass and that they have a valid right-of-way to use the land. The issue of whether utility companies hold valid rights-of-way within Native allotments is important because it raises fundamental questions about equity and fairness for owners of Native allotments who may not be receiving just compensation for use of their land and for utility companies that believe they constructed facilities in good faith under valid rights-of-way.

[1]Act of May 17, 1906, ch. 2469, 34 Stat. 197 (1906). *Repealed by* Pub. L. No. 92-203, § 18(a), 85 Stat. 688, 710 (1971).

[2]The terms right-of-way and easement are used interchangeably to describe the right of one party to use a specific part of the land of another for certain designated purposes, such as building, using, or maintaining a road or utility line.

Two agencies within Interior—the Bureau of Land Management (BLM) and the Bureau of Indian Affairs (BIA)—as well as the Interior Board of Land Appeals (IBLA) have key responsibilities with regard to Native allotments in Alaska. These responsibilities include adjudicating applications for Native allotments,[3] granting rights-of-way on federal lands, and handling disputes between Native allottees and holders of rights-of-way. BLM is responsible for adjudicating applications for Native allotments and granting rights-of-way on BLM lands. BLM's decisions concerning Native allotments and rights-of-way can be appealed administratively to the IBLA.[4] The IBLA, among other things, decides appeals by Natives whose allotment applications have been denied and disputes concerning the validity of rights-of-way within Native allotments. Once BLM passes title to an Alaska Native allottee, BIA assumes some management responsibility for the allotment, including approving any rights-of-way through Native allotments. BIA also contracts with regional nonprofit corporations or other Native entities to perform realty services for owners of Native allotments such as sales, leases, mortgages, and rights-of-way. The Alaska Realty Consortium (Alaska Realty) provides realty services for over 160 Native allotments in south-central Alaska.

Since 1987, when addressing disputes concerning the validity of rights-of-way within Native allotments, Interior has applied the "relation back" doctrine and invalidated utility companies' rights-of-way across certain Native allotments. Under this legal principle, Interior grants priority to allottees if the date of the allottee's claimed initial use and occupancy of available land predates other uses and rights-of-way, even if the allotment application was submitted after the right-of-way was issued. The rights of Alaska Native allottees relate back to when they first started using the land, not when the allotment was filed or granted. Prior to 1987, Alaska Native allotments generally were subject to rights-of-way existing when they were approved.[5] Federal courts have dismissed legal challenges to Interior's use of the relation back doctrine because the U.S. government has not allowed itself to be sued with regard to Alaska Native allotments.

[3]Adjudication in this context is the administrative process for determining a Native applicant's entitlement to an allotment.

[4]43 C.F.R. § 4.410.

[5]*See, e.g.*, *Golden Valley Electric Ass'n*, 85 IBLA 363 (1985), *vacated*, 98 IBLA 203 (1987).

One holder of rights-of-way within Native allotments is the Copper Valley Electric Association (Copper Valley), a rural nonprofit electric cooperative that was formed in 1955, and currently provides electricity to about 4,000 members in Alaska's Valdez and Copper River Basin areas. As early as 1958, Copper Valley obtained rights-of-way permits from Interior, and later from the State of Alaska, to construct and maintain electric lines. The validity of some Copper Valley rights-of-way within Native allotments is the subject of ongoing dispute. Conflicts exist where Interior and/or Alaska Realty have determined that Copper Valley is trespassing or allegedly trespassing across Native allotments. In this context, we determined (1) the number of conflicts that exist between Copper Valley rights-of-way and Alaska Native allotments and the factors that contributed to these conflicts, (2) the extent to which existing remedies have been used to resolve these conflicts, and (3) what legislative alternatives, if any, could be considered to resolve these conflicts.

To address these objectives, we reviewed all 34 Native allotments identified by Copper Valley and Alaska Realty where conflicts were suspected to exist. To determine whether there was an actual conflict between a Native allotment and Copper Valley's right-of-way, we examined BLM allotment adjudication files and all of the rights-of-way permits (seven federal and two State of Alaska) issued to Copper Valley for these allotments. We interviewed representatives from BLM, BIA, and Interior's Alaska Office of the Solicitor. We also met with officials and reviewed records from Alaska Realty, Copper Valley, the State of Alaska, and Alaska Natives. We conducted our work between November 2003 and June 2004 in accordance with generally accepted government auditing standards. Appendix I provides further details about the scope and methodology of our review.

Results in Brief

There are 14 cases where conflict exists regarding Copper Valley's rights-of-way within Native allotments. In most of these cases, Interior has found that Copper Valley is currently trespassing because either its rights-of-way have been determined to be invalid or it never obtained a right-of-way. These conflicts stem from three principal sources. First, in 5 cases, conflict exists because BLM and Alaska Realty have applied the relation back doctrine to invalidate or question Copper Valley's rights-of-way in cases where the Native allottee's use and occupancy of the land predates the right-of-way. In these instances, Copper Valley obtained rights-of-way and built electric lines before the land was awarded as an allotment. Federal courts have dismissed legal challenges to Interior's use of the relation back doctrine because the U.S. government has not allowed

itself to be sued with regard to this issue. Second, conflict exists in 6 instances because Interior does not recognize rights-of-way granted by the State of Alaska to Copper Valley to install electric lines within certain highway easements granted to the state by the federal government. Interior's Alaska Office of the Solicitor has taken the position that the federal government did not convey to the State of Alaska the authority to grant rights-of-way for utilities within certain highway easements. As a result, Alaska Realty maintains that Copper Valley is trespassing on the allotment because it installed electric lines without acquiring a federal right-of-way across these allotments. Finally, we found 3 instances where conflict exists because Copper Valley constructed electric lines even though they were never issued a right-of-way. There are another 4 cases, where Alaska Realty is requesting that Copper Valley obtain rights-of-way, where we do not believe that it has evidence that Copper Valley's electric lines are in trespass. In the majority of these cases, it appears that Copper Valley is not in trespass. While BIA has recognized the need to provide realty training, its March 2004 training course did not include information on the types of evidence that should be developed before pursuing an alleged trespass involving rights-of-way. To prevent escalating these disputes unnecessarily, we are recommending that BIA develop, as part of its training and technical assistance provided to its realty service providers in Alaska, a training module on the types of evidence that should be developed before pursuing an alleged trespass involving rights-of-way.

While the resolution of a number of these conflicts has been intermittently pursued since the mid-1990s, only a few cases have been resolved using existing remedies. Copper Valley currently has three remedies available to it to resolve conflicts. It could (1) negotiate rights-of-way with Native allottees in conjunction with BIA; (2) relocate its electric lines outside of the allotment; or (3) exercise the power of eminent domain, also known as condemnation, to acquire the land. Since the mid-1990s, Copper Valley has negotiated rights-of-way for 3 Native allotments; however, it has not relocated any of its electric lines and has been reluctant to exercise eminent domain to resolve other conflicts. With respect to the first option, Copper Valley began discussions with Alaska Realty in the mid-1990s to obtain rights-of-way for 13 Native allotments. Copper Valley surveyed 9 of the allotments, the first step in obtaining a right-of-way. Ultimately, 7 were appraised, and Copper Valley was able to reach an agreement for rights-of-way across 3 allotments. The other 4 cases that were appraised remain in conflict, and Copper Valley and the Native allottees have been unable to agree on the terms of the proposed right-of-way. Copper Valley has stopped trying to resolve these conflicts because it maintains that the

existing remedies are too costly, impractical, and/or potentially damaging to relationships with the community. More importantly, Copper Valley officials told us that on principle they should not have to bear the cost of resolving conflicts that they believe the federal government caused by applying the relation back doctrine and by not recognizing their state issued rights-of-way. Copper Valley is now seeking legislation to resolve these conflicts. In addition to the remedies currently available to Copper Valley, the federal government has the option of forcing the resolution of these conflicts by bringing trespass actions on behalf of the allottees against Copper Valley to require that it relocate its electric lines and pay damages to the allottee. However, according to Interior's Alaska Office of the Solicitor, the federal government is unlikely to take this course of action because it would provide Copper Valley the opportunity to raise its concerns about the relation back doctrine and other legal issues in federal court.

Several legislative alternatives could be considered to resolve conflicts over the validity of Copper Valley rights-of-way within Alaska Native allotments. Copper Valley representatives, Alaska Native advocates, and GAO have identified alternatives including legislation to:

- *Alternative 1*: Change Interior's application of the relation back doctrine to Alaska Native allotments so that the date an allotment was filed, rather than the date an allottee claimed initial use and occupancy of the land, is used to determine the rights of allottees and holders of rights-of-way.

- *Alternative 2*: Allow the U.S. government to be sued with regard to Alaska Native allotments so that legal challenges to the relation back doctrine and other legal issues can be heard in federal court.

- *Alternative 3*: Ratify the rights-of-way granted by the State of Alaska within federally granted highway easements, to provide for a valid right-of-way dating back to the time the state right-of-way was granted.

- *Alternative 4*: Establish a federal fund to pay for rights-of-way across Alaska Native allotments.

We do not hold an opinion as to which, if any, of these alternatives might be preferable. Further, while we did not determine the financial costs or the legal ramifications on the property rights of the Alaska Native allottees associated with any of these options, these costs and legal ramifications

would need to be assessed. For example, implementing alternatives one or three would likely benefit Copper Valley by favoring the holders of rights-of-way over Native allottees. Furthermore, implementing either of these alternatives may result in legal challenges by Native allottees claiming that such legislation constitutes a taking of their property that requires federal compensation. Finally, alternative four would benefit both Native allottees and Copper Valley, but the federal government and taxpayers would bear the entire cost of resolving the conflicts. However, the cost of alternative four would be similar to the combined cost of alternatives one and three if they are determined to be takings that require federal compensation.

We received comments on a draft of this report from Interior, the State of Alaska and Copper Valley. The three entities generally agreed with the report's contents. Interior and Copper Valley agreed with the report's recommendation for BIA to develop, as part of its training and technical assistance provided to its realty service providers in Alaska, a training module on the types of evidence that should be developed before pursuing an alleged trespass involving rights-of-way. The State of Alaska did not specifically comment on our recommendation. The State of Alaska commented on each of the alternatives, and expressed its support for alternative three. Copper Valley also commented on each of the alternatives and specifically expressed support for alternatives one and three. Written comments from these three entities are included in appendixes IV through VI.

Background

For over a century, there have been controversies surrounding the status and use of lands involving Alaska Natives. For generations, Alaska Natives have used the land to hunt, fish, and gather wild plants for food. Land use was seasonal, and the intensity of its use depended on the availability of these subsistence resources. The 1867 Treaty of Cession transferred all of the lands and waters of Alaska from Russia to the United States and made them public domain. However, the treaty failed to clearly define the status of Alaska Natives, their rights, or their ownership of land.[6]

[6]Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all Russias to the United States of America. Article III states that "[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." 15 Stat. 539, 542 (1867).

In 1906, Congress passed the Alaska Native Allotment Act, which authorized the Secretary of the Interior to allot individual Alaska Natives a homestead of up to 160 acres of land. The 1906 Act stated:

"That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres."[7]

Under Interior's regulations, the 160 acres may be in separate parcels that need not be contiguous, but each separate tract should be in reasonably compact form.[8] In a 1956 amendment to the act, Congress required that "[n]o allotment shall be made to any person under [the 1906] Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years."[9] Initially, the Native Allotment Act was little used by Alaska Natives. However, before the law's repeal with passage of the Alaska Native Claims Settlement Act on December 18, 1971, roughly 10,000 Alaska Natives applied for over 16,000 parcels of land.[10] The provision that repealed the Native Allotment Act preserved any pending Native allotment applications "before" Interior as of December 18, 1971. While Interior has processed most of the Native allotment applications, as of March 2004, applications for about 3,000 parcels remain to be processed.

[7]Act of May 17, 1906, ch. 2469, 34 Stat. 197 (1906).

[8]43 C.F.R. § 2561.0-8.

[9]Act of August 2, 1956, ch. 891, 70 Stat. 954 (1956). The 1956 Act also authorized Native allotees, or their heirs, to sell their allotments.

[10]Pub. L. No. 92-203, § 18(a), 85 Stat. 688, 710 (1971). However, under what is commonly called the Alaska Native Vietnam Veterans Allotment Act (Pub. L. No. 105-276, § 432, 112 Stat. 2461, 2516-2518 (1998), as amended by Pub. L. No. 106-559, § 301 114 Stat. 2778, 2782 (2000), codified at 43 U.S.C. § 1629g), Congress allowed certain Alaska Native Vietnam-era veterans who missed applying for an allotment due to military service, to apply for a Native allotment under terms of the 1906 Native Allotment Act. Subsequently, there were an additional 743 applications for about 1,000 allotment parcels submitted before the January 2002 deadline.

Interior's policies in the early 1970s required clear, physical evidence to support a Native's use and occupancy of an allotment claim. Since traditional Native land uses, such as hunting, fishing, and gathering, did not leave much physical evidence, Interior questioned the legitimacy of many allotment applications and eliminated or reduced the size of many allotments. In response, many Natives appealed Interior's decisions regarding their allotment applications. In 1976, Interior was compelled by a federal appeals court decision to provide hearings before denying any allotment application for factual reasons.[11] In addition to providing hearings for pending applications, Interior, as a result of this decision, reopened cases for applicants that had been denied a hearing in the past, slowing the allotment adjudication process. Also, in 1979, an Alaska district court ruled that a Native's right to the land was deemed to have vested as of the date of first use and occupancy, rather than at the time the allotment was approved.[12] Therefore, a Native's use of an allotment took priority over other land selections made by the State of Alaska under the Alaska Statehood Act of 1958.[13] This case also slowed down the allotment adjudication process, because BLM had to recover land from the state and other entities so it could be reconveyed as Native allotments. Also, BLM reopened and readjusted cases that had been denied in the past due to conflicts with other land selections.

In 1980, in an attempt to get the allotment adjudication process moving forward again, Congress legislatively approved all pending allotment applications (with certain exceptions) without regard to the applicant's actual use of the land, as part of the Alaska National Interest Lands Conservation Act (ANILCA).[14] Section 905(a)(1) of ANILCA states that, "Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the [1906 Alaska Native Allotment Act] which were pending before the Department of the Interior on or before December 18,1971… are hereby approved…"[15] Although ANILCA reduced the need for factual investigations and hearings regarding a Native's use and occupancy of an allotment approved under the act, conflicting interpretations of the

[11]*Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976).

[12]*Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979).

[13]Pub. L. No. 85-508, § 6(a)-(b), 72 Stat. 339, 340 (1958).

[14]Pub. L. No. 96-487, § 905(a), 94 Stat. 2371, 2435-36 (1980).

[15]94 Stat. 2435, codified at 43 U.S.C. § 1634.

wording and intent of the statute continued to hamper the allotment adjudication process. In particular, differing interpretations of the phrase "valid existing rights" with regard to rights-of-way, set the stage for conflicts between Native allotees and holders of rights-of-way and resulted in numerous legal appeals.

Process for Awarding Allotments, Adjudicating Disputes, and Granting Rights-of-way

Two agencies within Interior—BLM and BIA—as well as the IBLA have key responsibilities with regard to Native allotments in Alaska. These responsibilities include adjudicating applications for Native allotments, granting rights-of-way on federal lands, and handling disputes between Native allottees and holders of rights-of-way. BIA is responsible for the administration and management of Alaska Native allotments on behalf of the United States. BLM is responsible for adjudicating applications for Native allotments and granting rights-of-way on BLM lands. BLM's decisions concerning Native allotments and rights-of-way can be appealed to the IBLA. The IBLA makes decisions for Interior on appeals related to actions taken by Interior officials relating to the use and disposition of public lands. In Alaska, hundreds of BLM's Native allotment decisions have been appealed to the IBLA, including those concerning the validity of rights-of-way within Native allotments.

The allotment adjudication process begins when an Alaska Native files an application with BLM. The allotment application requires the applicant to designate the land's location, state his or her age or head of household status, and specify how and when the land was used. BIA then certifies that the applicant is an Alaska Native and is qualified to make an application under the provisions of the 1906 Native Allotment Act. Following BIA certification, BLM is responsible for the remainder of the application review process. BLM's basic responsibilities are to (1) determine whether the lands were available for selection at the time use and occupancy began; (2) perform a field examination to locate the claimed land and collect information to determine whether the applicant meets the eligibility requirements; (3) approve or disapprove the application; (4) if the application is approved, survey the land; and (5) issue a certificate of allotment. For allotments legislatively approved under ANILCA, BLM does not need to perform the field examination and verify the Native's use and occupancy of the allotment. But BLM would still have to determine whether the allotment is qualified for legislative approval. Until it has surveyed an allotment, BLM cannot transfer legal title to the applicant.

Once BLM approves an allotment and passes title to an Alaska Native, BIA, which has a fiduciary responsibility for Native lands, assumes some management responsibility for Native allotments. BIA is generally the first point of contact for an Alaska Native regarding the administration of their allotment. They provide realty services such as providing advice regarding sales, leases, granting rights-of-way, and investigating trespass claims. As authorized by the Indian Self-Determination and Education Assistance Act, as amended, BIA also contracts with regional nonprofit corporations or other Native entities to perform realty services for owners of Native allotments. Under the act, as amended, BIA's ability to impose specific performance standards is limited and, in some cases, prohibited.[16] The Aleutian/Pribilof Islands Association, Inc.; Chugachmiut, Inc.; and the Copper River Native Association, Inc.; are three Native regional nonprofits in Alaska that have assumed management of the realty function from BIA for selected villages within their respective regions. In 1995, these three regional nonprofits formed Alaska Realty to provide realty services. Alaska Realty is responsible for about 260 Native allotments across the three regions, including over 160 allotments in the Copper River area.

Since BIA grants or approves actions affecting Native title on Native allotments, an applicant must work with BIA or its contractor (realty service provider) to obtain a right-of-way through an approved Native allotment. BIA's right-of-way application process generally takes at least 24 months to complete and begins when the applicant contacts the BIA, or its realty service provider, for permission to survey the Native allotment. The BIA, or its realty service provider, would then contact the owners of the allotment to obtain consent to survey. After surveying the allotment, the applicant submits the right-of-way application. The application includes maps, survey field notes, the landowner's written consent, and requests for the appraisal report. Other requirements such as timber permits and other regulatory permits may be necessary. After the appraisal is conducted, the BIA, or its realty service provider, will negotiate with the allottees and the right-of-way applicant to discuss the settlement terms. Under federal regulations, the BIA may not approve or grant a right-of-way for less than

[16]The act, as amended, directs Interior at the request of a Native entity, to contract with Indian tribes or tribal organizations to carry out the services and programs the federal government provides to Indians. Interior must accept a tribal organization's contract proposal unless the Secretary makes certain specific findings that the organization cannot adequately carry out the program or function. Pub. L. No. 93-638, 88 Stat. 2203, 2206 (1975), as amended by Pub. L. No. 103-413, 108 Stat. 4250, 4270 (1994), codified at 25 U.S.C. § 450f and 25 U.S.C. § 458cc, respectively.

the fair market value unless when waived in writing by the allotment owner and approved by Interior.[17] A right-of-way is issued after BIA had concurred with and approved the settlement agreement.

For rights-of-way applications within pending Native allotments, BLM grants the right-of-way after coordinating with BIA. Since BLM has administrative jurisdiction while the Native allotment is under adjudication, the applicant would apply through BLM in the survey and appraisal process to obtain a right-of-way. Under a 1979 Memorandum of Understanding between BLM and BIA, BLM coordinates with BIA when processing right-of-way applications for pending Native allotments, and BIA assumes responsibility for Native allotments once BLM approves the allotment.

Conflicts Have Emerged Over the Status of Utility Rights-of-way within Native Allotments

As allotment applications have been processed over the last three decades, conflicts have arisen between the property rights of Alaska Natives and the holders of rights-of-way. Interior and the State of Alaska have granted rights-of-way in Alaska for a variety of uses such as electrical transmission lines, oil and gas pipelines, and highways. Some of these rights-of-way cross Native allotments, giving rise to conflicts between Alaska Natives and holders of rights-of-way, which in many cases are utilities. In some of these conflicts, electric utilities and other holders of rights-of-way have had their rights-of-way across Native allotments invalidated.

[17] 25 C.F.R. § 169.12.

Prior to 1987, Alaska Native allotments were generally subject to rights-of-way existing when they were approved.[18] However, in 1987, the IBLA began applying the relation back doctrine to declare certain existing rights-of-way null and void. Under the relation back doctrine, the IBLA gives priority to an allottee if the allottee's claimed initial use and occupancy of the land predated other uses and rights-of-way, even if the allotment application was submitted after the right-of-way was issued.[19] Legal challenges to Interior's use of the relation back doctrine in federal court have been dismissed because the U.S. government has not waived its sovereign immunity and allowed itself to be sued with regard to Alaska Native allotments.[20] Sovereign immunity is a legal doctrine that precludes bringing suit against the government without its consent. Congress has enacted various statutes setting out the circumstances under which the U.S. government has consented to be sued. Under the Quiet Title Act, the U.S. government has waived its sovereign immunity for certain land issues; however, the waiver in the act does not apply to "trust or restricted Indian lands." Since Alaska Native allotments are "restricted Indian lands," federal courts have ruled that they do not have jurisdiction to review the IBLA's decisions concerning the application of the relation back doctrine to rights-of-way over Native allotments. Appendix II provides further analysis of the relation back doctrine.

Copper Valley Electric Association's Rights-of-way and Native Allotments

One holder of rights-of-way within Native allotments is Copper Valley, a rural nonprofit electric cooperative that was formed in 1955 and currently provides electricity to about 4,000 members in Alaska's Valdez and Copper River Basin areas via 500 miles of distribution and transmission lines. There are dozens of Native allotments within Copper Valley's service area.

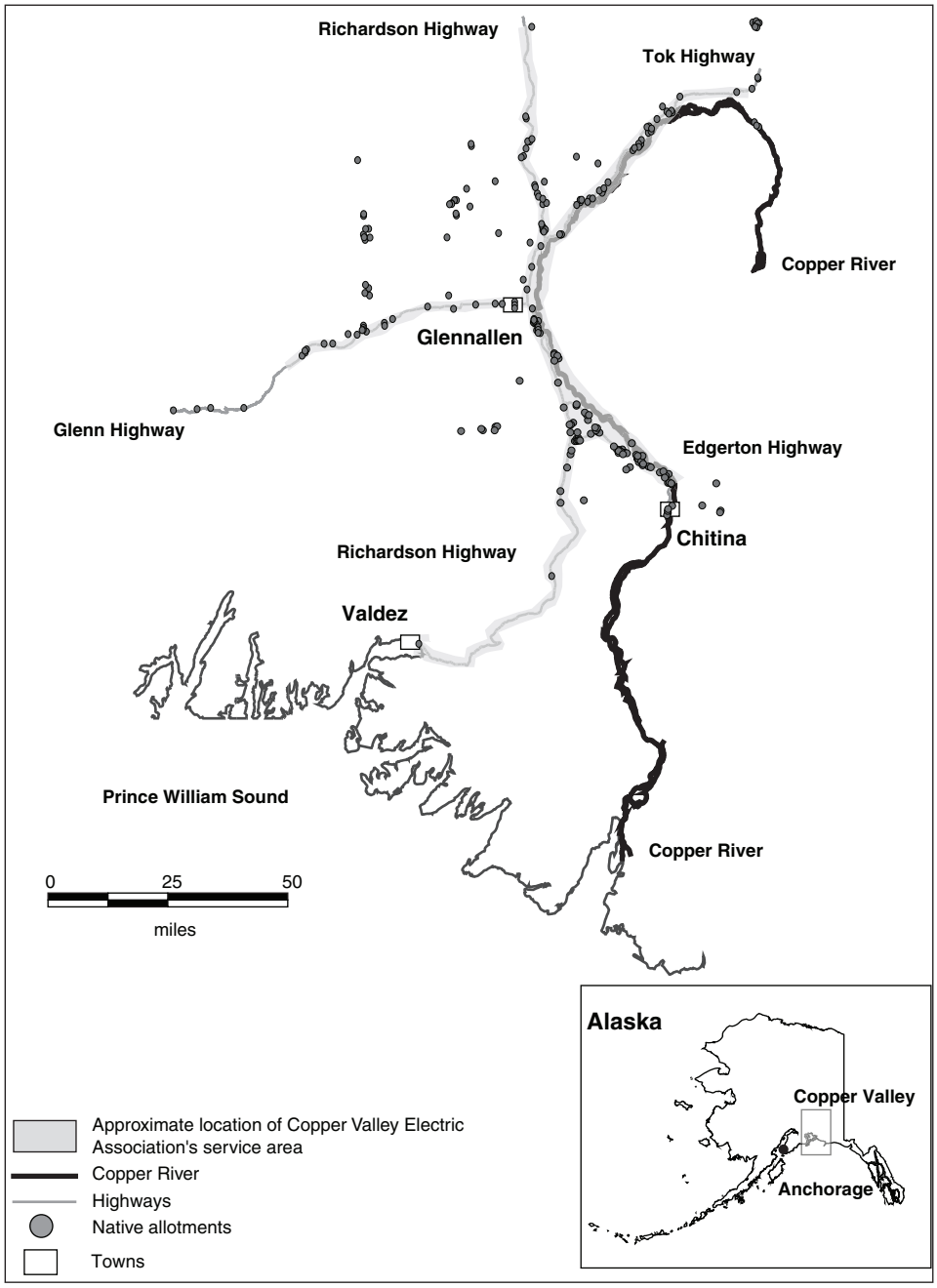
[18]*See, e.g., State of Alaska v. Heirs of Dinah Albert (Albert Allotment)*, 90 IBLA 14 (1985) and *Golden Valley Electric Ass'n (Irwin Allotment)*, 85 IBLA 363 (1985), *citing United States v. Flynn*, 53 IBLA 208 (1981). According to the IBLA opinion on the Albert allotment, the State of Alaska had represented in a brief that where state right-of-way grants preceded the filing of an allotment application, but postdated the alleged use and occupancy, BLM had, in the past, issued allotment certificates subject to such state rights-of-way. 90 IBLA at 19, n.7. On reconsideration of the *Golden Valley Electric* case, the IBLA shifted its policy and adopted the relation back rule, voiding the rights-of way. 98 IBLA 203 (1987).

[19]*See, e.g., Golden Valley Electric Ass'n (On Reconsideration)*, 98 IBLA 203, 207 (1987); *State of Alaska, Golden Valley Electric Ass'n*, 110 IBLA 224 (1989).

[20]*See, e.g., Alaska v. Babbit (Foster)*, 75 F.3d 449 (9th Cir. 1995); *Alaska v. Babbit (Albert)*, 38 F.3d 1068 (9th Cir. 1994).

(See fig.1.) As early as 1958, Copper Valley obtained rights-of-way permits from Interior, and later from the State of Alaska, to construct and maintain electric power lines. Copper Valley built some of these transmission lines in the 1960s. Some conflicts later arose when BLM approved some Native allotments containing Copper Valley's transmission lines. Historically, cooperative utilities in Alaska, as in much of the United States, do not purchase easements from cooperative members and, in the case of Copper Valley, its bylaws prohibit the utility from doing so. Rural electric cooperatives, like Copper Valley, are nonprofit, member-owned utilities that provide electric service to predominantly rural areas and were originally formed solely to provide electricity to their members at cost. Currently, possible conflicts exist regarding the validity of Copper Valley's rights-of-way within Native allotments.

Figure 1: Map of Copper Valley Electric Association's Service Area and Location of Native Allotments



Source: BLM.

Conflicts Exist in 14 Cases and Alaska Realty Is Pursuing Four Other Cases without Evidence of a Trespass

There are 14 cases where conflict exists regarding the validity of Copper Valley's rights-of-way within Native allotments.[21] (See table 1 and fig. 2.) In each of these cases, BIA and/or the allottee believes that Copper Valley has failed to obtain permission for electric lines on Native property. These conflicts exist for three reasons. First, in 5 cases BLM and Alaska Realty have applied the relation back doctrine to invalidate or question Copper Valley's rights-of-way. Second, conflict exists in 6 cases because Interior does not recognize rights-of-way to install electric lines granted by the State of Alaska to Copper Valley within certain highway easements that were issued by the federal government to the state. Third, conflict exists in 3 cases because Copper Valley constructed electric lines across Native allotments even though they were never issued a right-of-way. Additionally, there are 4 other cases where Alaska Realty is requesting that Copper Valley obtain rights-of-way without evidence that Copper Valley is in trespass.

[21]See appendix III for the status of all 34 Native allotments that Alaska Realty and Copper Valley identified as having possible conflicts.

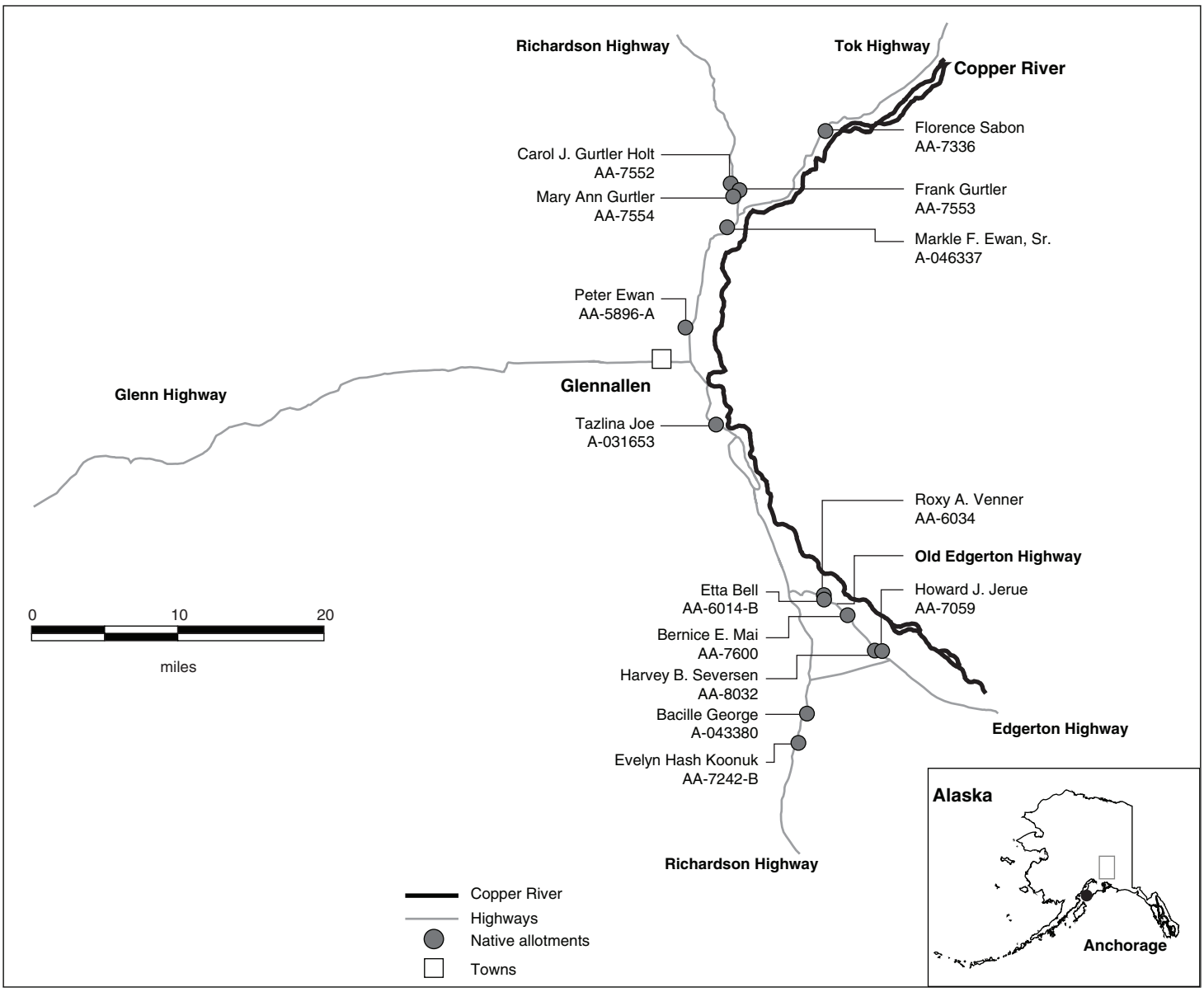
Table 1: Cases Where Conflict Exists between Native Allotments and Copper Valley's Electric Lines

Name of Native allotment applicant	Native allotment serial number
BLM and Alaska Realty have applied the relation back doctrine	
Markle F. Ewan, Sr.	A-046337
Peter Ewan[a]	AA-5896-A
Evelyn Hash Koonuk	AA-7242-B
Carol J. Gurtler Holt	AA-7552
Tazlina Joe	A-031653
State issued utility rights-of-way within federally granted highway easements	
Etta Bell	AA-6014-B
Bacille George	A-043380
Howard J. Jerue	AA-7059
Bernice E. Mai	AA-7600
Harvey B. Severseen	AA-8032
Roxy Venner	AA-6034
Copper Valley was never issued a right-of-way	
Frank Gurtler	AA-7553
Mary Ann Gurtler	AA-7554
Florence Sabon	AA-7336

Sources: GAO analysis of BLM, BIA, Copper Valley, and Alaska Realty data.

[a]This parcel encompasses 29.02 acres. In 1992, BLM reinstated a claim by Peter Ewan for an adjoining 130 acres, designated as Parcel B (AA-5896-B). As of April 2004, BLM was working with the State of Alaska for a reconveyance of this property. Depending on the specific terms of the reconveyance from the state, Parcel B may eventually have the same right-of-way conflict as Parcel A.

Figure 2: Location of the 14 Cases Where Conflict Exists between Native Allotments and Copper Valley's Electric Lines



Source: BLM.

BLM and Alaska Realty Have Applied the Relation Back Doctrine

Conflict exists in five cases where BLM and Alaska Realty have invalided or questioned Copper Valley rights-of-way because a Native allottee's use and occupancy of the land predated the right-of-way. (See table 2.)

Table 2: Native Allotments Where Conflicts Exist Because BLM and Alaska Realty Have Applied the Relation Back Doctrine

Name of Native allotment applicant	Native allotment serial number	Claimed use and occupancy	Right-of-way granted	Native allotment application filed	Native allotment certificate issued	BLM action to null and void right-of-way
BLM applied the relation back doctrine[a]						
Evelyn Hash Koonuk	AA-7242-B	1962	1965	1972[b]	1996	1992
Carol J. Gurtler Holt	AA-7552	1964	1976	1972[b]	1995	1995
Alaska Realty applied the relation back doctrine						
Markle F. Ewan, Sr.	A-046337	1947	1958	1958	1975	No action
Peter Ewan	AA-5896-A	1936	1958	1970	1983	No action
Tazlina Joe	A-031653	1936	1958	1955	1960	No action

Sources: GAO analysis of BLM and Alaska Realty data.

[a]In 1991 and 1992, BLM also applied the relation back doctrine to declare null and void Copper Valley rights-of-way across the Howard Adams (AA-6726) and Jack Tenas (AA-7164) Native allotments, respectively. However, the conflicts created by BLM's actions in these two cases have been resolved by actions taken by Native allottees and Copper Valley.

[b]Evelyn Hash Koonuk and Carol J. Gurtler Holt signed their Native allotment applications in 1971. However, their applications were not received by BLM until 1972.

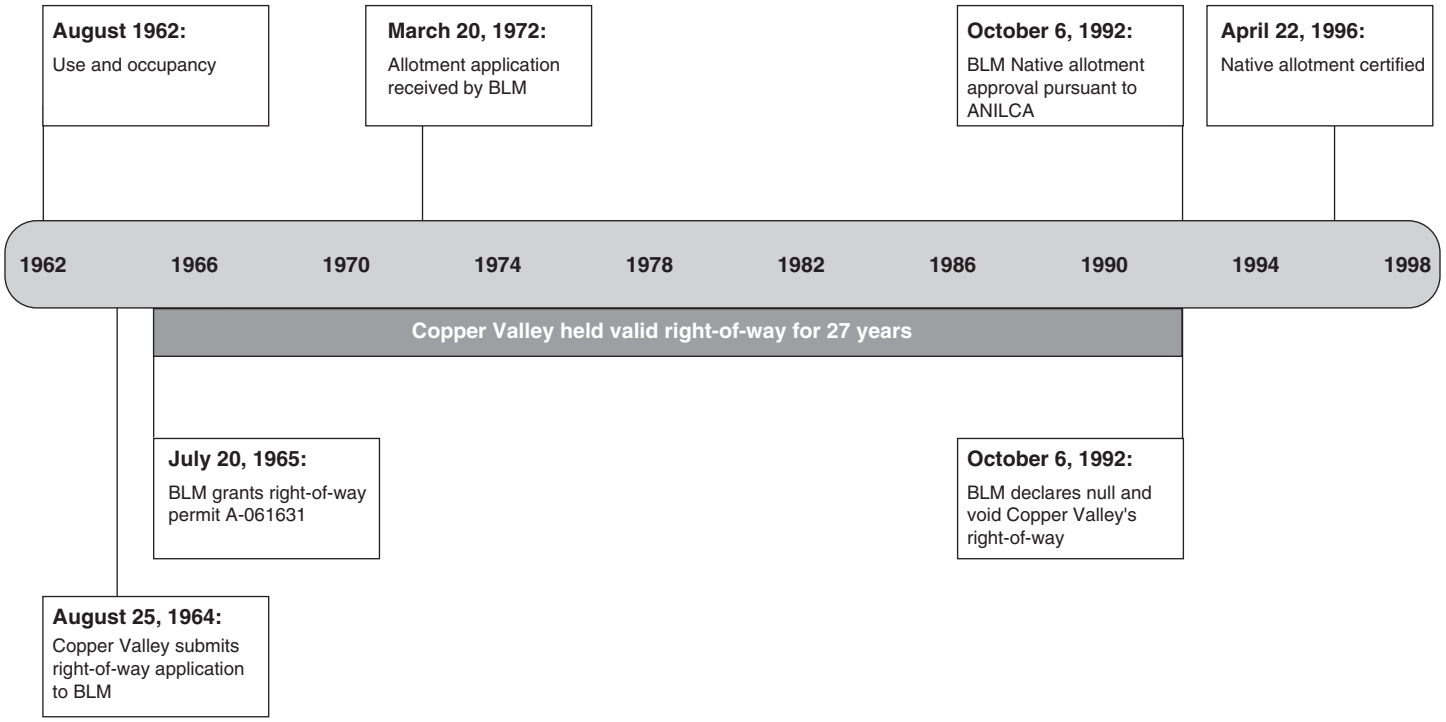
In two of these cases, conflict exists between Native allotments and Copper Valley because BLM has applied the relation back doctrine to declare Copper Valley rights-of-way null and void. For example,

- In 1992, BLM voided Copper Valley's right-of-way across Evelyn Hash Koonuk's allotment that Copper Valley held for over 27 years. BLM determined that even though her application for the allotment was not filed until almost 7 years after the right-of-way was issued her use and occupancy predated the right-of-way. (See fig. 3.)

- In 1995, BLM voided Copper Valley's right-of-way across Carol Holt's allotment that it held for 19 years. Based on the date of use and occupancy claimed in Carol Holt's application, BLM determined that she had rights prior to Copper Valley. (See fig. 4.)

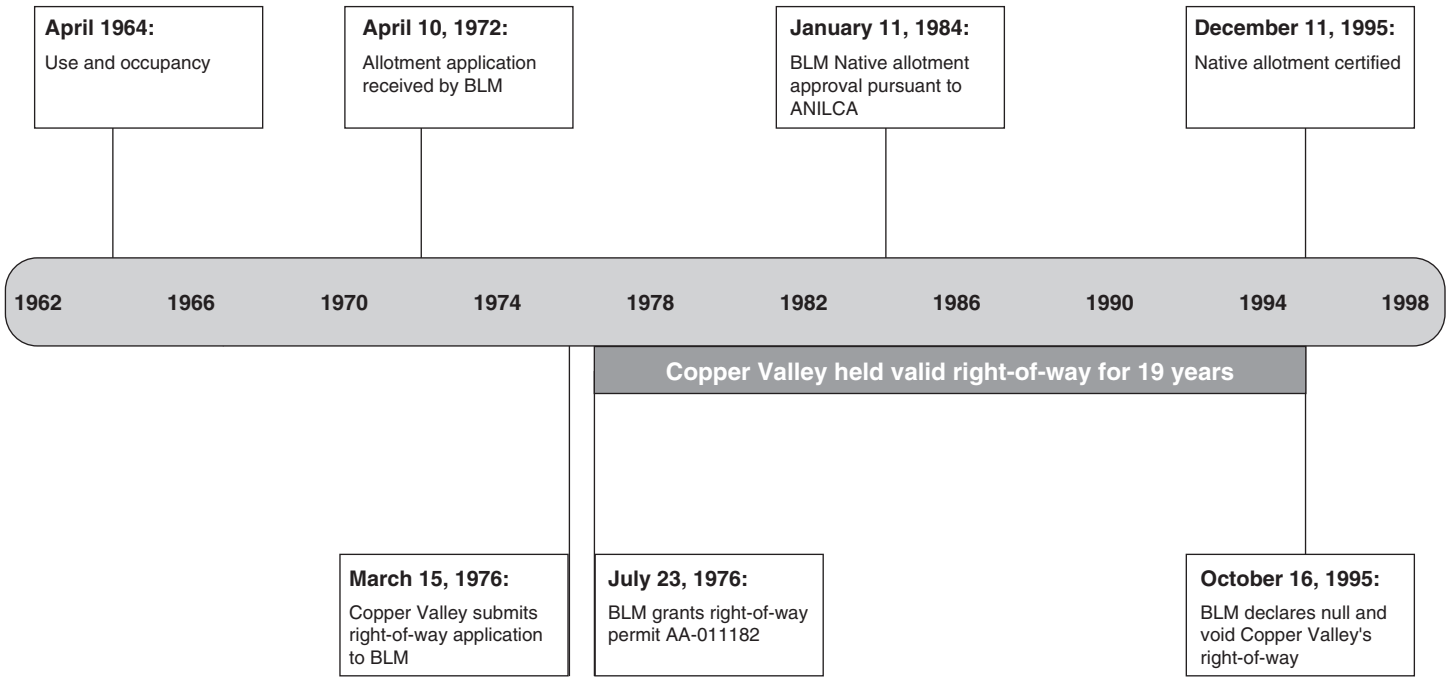
Both of these allotments were legislatively approved under ANILCA. In these two cases, officials from Copper Valley stated that they believe that the relation back doctrine has, in effect, voided the requirement in ANILCA that Native allotments are to be approved subject to valid existing rights. In Copper Valley's view, their rights-of-way are valid rights, existing at the time the Native allotment applications were approved. Copper Valley also believes that the relation back doctrine should be repealed, or at the very least, that an allottee's claimed date of use and occupancy should not be used to declare their rights-of-way null and void.

Figure 3: Key Milestones for Evelyn Hash Koonuk's Native Allotment and Copper Valley's Right-of-way



Source: GAO analysis of BLM data.

Figure 4: Key Milestones for Carol J. Gurtler Holt's Native Allotment and Copper Valley's Right-of-way



Source: GAO analysis of BLM data.

In three other cases conflict exists where Alaska Realty considers Copper Valley's rights-of-way invalid because it has applied the relation back doctrine to grant priority to Native allottees whose use and occupancy of the land began before the right-of-way was issued. In these three cases, the allotments were certified prior to the IBLA's introduction of the relation back doctrine in 1987. Additionally, the applications for these allotments were adjudicated under the 1906 Act; they were not legislatively approved under ANILCA. To date, BLM has only used the relation back doctrine to invalidate rights-of-way within Native allotments that were certified after 1987 and has not gone back to re-examine rights-of-way across allotments that already have been certified. However, in these cases, a BIA official told us that because the allottees' use and occupancy of the land predated Copper Valley's right-of-way, Alaska Realty does not recognize the right-of-way across Markle Ewan and Tazlina Joe's allotments as valid. In the case of Peter Ewan's allotment, a 1988 letter from BIA to Copper Valley stated the following, "While [Copper Valley] was granted a [right-of-way] across the subject lands in 1958, this office believes it was granted

erroneously, since Mr. Ewan had by this time already established his use and occupancy." (See fig. 5.) Alaska Realty is requesting that Copper Valley obtain a new right-of-way across these allotments. However, according to Interior's Alaska Office of the Solicitor, Alaska Realty does not have the authority to require utility companies to obtain a new right-of-way until Interior has taken the administrative action to declare an existing right-of-way null and void. Interior has yet to take this action.[22]

Figure 5: Copper Valley's Right-of-way Crossing Graves on Peter Ewan's Native Allotment (May 2004)

Source: GAO.

In addition to the five cases with conflicts discussed earlier, BLM has also applied the relation back doctrine to declare Copper Valley's rights-of-way within two other Native allotments null and void. However, the conflicts created by BLM's actions in these two additional cases have been resolved

[22]There is precedent for Interior to readjudicate Native allotment land conveyances. After the district court's decision in *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979) (when Interior finds that an Alaska Native is entitled to an allotment that has been conveyed to a third party, it has a duty to initiate proceedings to recover title to the land), Interior has held "Aguilar hearings" to determine whether land was inappropriately conveyed, and if so, to recover title to the land.

by actions taken by Native allottees and Copper Valley. In one case, in 1992, BLM voided Copper Valley's right-of-way across Jack Tenas' allotment that it held for 34 years. Six years after BLM's decision, Jack Tenas' allotment was deeded to a non-Native, therefore ending the dispute between Copper Valley and the Native allottee. According to BIA officials, when a Native allotment is sold to a non-Native, BIA no longer has a fiduciary responsibility; including pursuing damages for past trespass actions. In the second case, BLM declared Copper Valley's right-of-way across Howard Adams' allotment null and void 7 years after it was granted. However, following BLM's decision, Copper Valley used BIA procedures to negotiate a valid right-of-way with the Native allottee. In contrast to the Evelyn Hash Koonuk and Carol Holt allotments, where BLM also applied the relation back doctrine, the Jack Tenas and Howard Adams allotments were adjudicated under the 1906 Act, because they did not meet the criteria for legislative approval under ANLICA.

Finally, while conflicts created by using the relation back doctrine to declare Copper Valley rights-of-way null and void are relatively few, the possibility exists that future applications of the doctrine will create additional conflicts. First, approximately 3,000 Native allotment applications are still pending. Some of these pending allotments may give rise to additional conflicts in the Copper River area. Second, Interior has not systematically re-examined all the allotments certified before 1987, to determine if the relation back doctrine is applicable. Although a few cases have been identified so far in the Copper River area, others may exist. Officials we spoke with at the Office of the Solicitor in Alaska stated that Interior is not precluded from taking action under the relation back doctrine to void rights-of-way for allotments certified prior to 1987.

Interior Does Not Recognize Copper Valley's State Issued Rights-of-way within Certain Federally Granted Highway Easements

There are six cases where conflict exists regarding the status of Copper Valley's rights-of-way within Native allotments because Copper Valley has a state—but not a federal—right-of-way within a highway easement granted by the federal government to Alaska. (See table 3.) The federal government transferred the easements for the Richardson and Old Edgerton Highways to the State of Alaska under the 1959 Alaska Omnibus Act.[23]

[23]Pub. L. No. 86-70, 73 Stat. 141 (1959).

Table 3: Cases with State Issued Utility Rights-of-way within Federally Granted Highway Easements That Cross Native Allotments

Name of Native allotment applicant	Native allotment serial number	Federally granted highway easement	State right-of-way granted
Bacille George	A-043380	Richardson Highway	1962
Etta Bell	AA-6014-B	Old Edgerton Highway	1983
Howard J. Jerue	AA-7059	Old Edgerton Highway	1983
Bernice E. Mai	AA-7600	Old Edgerton Highway	1983
Harvey B. Seversen	AA-8032	Old Edgerton Highway	1983
Roxy Venner	AA-6034	Old Edgerton Highway	1983

Sources: GAO analysis of BLM and Copper Valley data.

Note: Five of the six allotment certificates contain a reservation for a highway easement. Howard J. Jerue's allotment certificate does not contain a reservation for the Old Edgerton Highway. However, his use and occupancy began in 1966, 7 years after the federal government conveyed the highway easement to the State of Alaska. For two of the six allotments—Bacille George and Etta Bell—the use and occupancy predated all, or a portion of, the road withdrawals for the Richardson and Old Edgerton Highways. According to a 1982 opinion by Interior's Alaska Office of the Solicitor, when a Native's use and occupancy predates the road withdrawal the federal government must seek a reconveyance of the road easement from the State of Alaska under *Aguilar* procedures. In these circumstances, the road easement would be voided and the Native allottee would be awarded an allotment without any reservation for a road easement. However, the allottees for Bacille George's and Etta Bell's Native allotments agreed to have their allotments made subject to the highway easement rather than forcing a reconveyance from the state.

In 1962 and 1983, the State of Alaska granted Copper Valley utility rights-of-way within these federally granted highway easements. For example, in 1983, the State of Alaska granted Copper Valley a utility right-of-way within the Old Edgerton Highway easement that crosses Howard Jerue's allotment. (See fig. 6.) Then in 1989, 30 years after Alaska became a state and was granted the highway easements from the federal government, Interior's Alaska Office of the Solicitor issued an opinion concerning whether a federal grant of a highway easement to the State of Alaska authorized the state to grant a right-of-way within the highway easement to a utility.[24] The Solicitor concluded that federal, not state, law governed the issue and that under federal law, certain federally granted highway easements did not convey to the state the authority to grant rights-of-way for utility lines because they are not structures necessary for the use of highway easements but are new uses being imposed on the land. The Solicitor relied on a decision of the Court of Appeals for the Ninth

[24]The utility in this case was Copper Valley.

Circuit, holding that a right-of-way issued under Revised Statute 2477[25] does not include the right to install utility lines.[26] The Solicitor's opinion stated that the utility must apply for a federal right-of-way—in this case from BIA because the power lines crossed a Native allotment.

Figure 6: Copper Valley's Underground Electric Line Crossing Howard Jerue's Native Allotment (May 2004)

Source: GAO.

Relying on the Solicitor's opinion, Alaska Realty is now requesting that Copper Valley apply for rights-of-way from BIA on behalf of the allottee where their electric lines are located within highway easements that cross

[25]Revised Statue 2477 (R.S. 2477) provided that: "the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Congress repealed R.S. 2477 as part of its enactment of the Federal Land Policy and Management Act of 1976 (Pub. L. No. 94-579, § 706(a), 90 Stat. 2793 (1976)), but it expressly preserved R.S. 2477 rights-of-way that already had been established.

[26]*United States v. Gates of the Mountains Lakeshore Homes, Inc.*, 732 F.2d 1411 (9th Cir. 1984).

Native allotments. Alaska Realty has taken the position, supported by Interior, that Copper Valley is trespassing on the allotment because it installed electric lines without acquiring a federal right-of-way across these allotments. Copper Valley, however, maintains that its state issued utility easements are sufficient. Officials from Copper Valley told us that they believe that their rights-of-way across these six allotments are adequate, pointing to a 1983 Alaska Supreme Court decision that found electric line construction was an incidental and subordinate use of a highway easement and that an additional right-of-way from the landowner was not necessary.[27]

Copper Valley Constructed Electric Lines Even Though They Were Never Issued a Right-of-way

In three cases conflict exists because Copper Valley built an electric line across Native allotments where a right-of-way had not been issued. (See table 4.) In 1965, Copper Valley filed a right-of-way application with BLM for an electric distribution line, which was built 2 years later. However, it took BLM until 1982, or 17 years, to act on Copper Valley's application. In the meantime, several Native allotment applications were filed where Copper Valley had constructed its electric lines. BLM received Native allotment applications from Frank Gurtler, Mary Ann Gurtler, and Florence Sabon in 1972, and they were subsequently approved in 1983 and 1984. In addition, in 1979, BLM and BIA signed a Memorandum of Understanding that clarified jurisdictional responsibilities for granting rights-of-way across pending Native allotments. Under this memorandum and in accordance with BLM state director policy, Copper Valley was to have obtained BIA concurrence before BLM could grant a right-of-way across a pending Native allotment. As such, in 1982 when BLM acted on Copper Valley's right-of-way application it determined that Copper Valley's right-of-way application for the existing electric line would be held for rejection where it crossed the land of Frank Gurtler, Mary Ann Gurtler, and Florence Sabon unless Copper Valley received BIA approval to cross lands that were, at the time, pending approval as Native allotments.[28]

[27]*Fisher v. Golden Valley Electric Ass'n, Inc.*, 658 P.2d 127 (Alaska 1983).

[28]BLM's 1982 action also covered Nicolas Tyone's (AA-6495) unapproved Native allotment. However in 1987, Copper Valley applied to BIA for a right-of-way across this allotment, which was granted in 1996.

Table 4: Native Allotments in Which Copper Valley Was Never Issued a Valid Right-of-way

Name of Native allotment applicant	Native allotment serial number	Claimed use and occupancy	Native allotment application filed[a]	Native allotment approved	Native allotment certificate issued
Frank Gurtler	AA-7553	1963	1972	1984	1984
Mary Ann Gurtler	AA-7554	1964	1972	1983	1984
Florence Sabon	AA-7336	1954	1972	1983	Pending

Sources: GAO analysis of BLM, BIA, Alaska Realty, and Copper Valley data.

Note: In 1982, BLM determined that Copper Valley's right-of-way application for the existing electric line would be held for rejection where it crossed Nicolas Tyone's (AA-6495) unapproved Native allotment unless Copper Valley received BIA approval to cross land that was, at the time, pending approval as a Native allotment. Because Copper Valley did not obtain BIA approval, BLM's decision to reject Copper Valley's application where the right-of-way crossed Nicolas Tyone's Native allotment took effect. However in 1987, Copper Valley applied to BIA for a right-of-way across this allotment, which was granted in 1996.

[a]Florence Sabon, Frank Gurtler, and Mary Ann Gurtler signed their Native allotment applications in 1971. However, their applications were not received by BLM until 1972.

According to BIA officials and Interior records, Copper Valley did not obtain BIA approval for a right-of-way across these pending allotments. Because Copper Valley did not obtain BIA approval, BLM's decision to reject Copper Valley's application where the right-of-way crossed the three Native allotments took effect. Following BLM's 1982 decision, the applications for the three Native allotments were approved by BLM.[29] Since BLM never granted Copper Valley a right-of-way through these allotments, Alaska Realty is requesting that Copper Valley obtain a valid utility right-of-way for these electric lines.

Copper Valley officials noted that even if BLM had promptly granted the right-of-way prior to the filing of the Native allotment applications, the relation back doctrine could presumably now have been applied to invalidate their right-of-way. The claimed use and occupancy for the three allotments all predate Copper Valley's 1965 right-of-way application. However, since Copper Valley was not granted a right-of-way across these allotments they are not examples of the relation back doctrine. In 1982,

[29]Florence Sabon's allotment, however, has yet to be certified. Additionally, it should be noted in the case of Florence Sabon's allotment, that while Copper Valley never obtained a right-of-way for the electric line across the allotment, BLM nevertheless, applied the relation back doctrine to declare the nonexistent right-of-way null and void. As a result, the Florence Sabon allotment is generally considered an example of the relation back doctrine rather than as an allotment for which Copper Valley never obtained a valid right-of-way. Copper Valley has appealed BLM's decision; the appeal is currently before the IBLA (IBLA 98-351).

BLM told Copper Valley to obtain BIA concurrence to cross the pending Native allotments. Over 20 years later, that is still essentially what Copper Valley needs to do. Alaska Realty maintains that Copper Valley needs to obtain a right-of-way for its electric lines across these allotments in accordance with BLM and BIA regulations and policies.

Alaska Realty Is Pursuing Four Other Cases Against Copper Valley without Evidence of a Trespass

In four cases, Alaska Realty has requested that Copper Valley obtain rights-of-way even though we believe Alaska Realty lacks evidence that the company's electric lines cross a Native allotment. Since 1996, through correspondence and in-person meetings, Alaska Realty has requested that Copper Valley resolve conflicts over four allotments despite having insufficient evidence that a Copper Valley right-of-way was in conflict with a Native allotment. (See table 5.) Over the years, Alaska Realty contractors developed a list of Native allotments where it maintains that Copper Valley needs to negotiate rights-of-way. Representatives from Alaska Realty told us that they did not know what criteria were used to place allotments on the list; however, some of the allotments were added to the list because Copper Valley had requested a right-of-way.

Table 5: Native Allotments for Which Alaska Realty Has Requested Copper Valley Obtain Rights-of-way without Conclusive Evidence of Trespass

Name of Native allotment applicant	Native allotment serial number	Status
Adam Bell	AA-2068-A	Conflict does not exist
Verina Estes	AA-8250	Conflict does not exist
Derira George	A-023391	Appears to be no conflict
Caroline L. Mackey	AA-7102	Insufficient evidence if conflict exists

Sources: GAO analysis of Alaska Realty, BLM, and Copper Valley data.

Without proper surveys of Copper Valley electric lines, Native allotment boundaries, and highway rights-of-way it is impossible to determine whether Copper Valley is in trespass. In all four cases, Alaska Realty was unable to demonstrate that it had investigated and documented the location of electric lines and relevant allotment boundaries. For example, Alaska Reality has pursued Copper Valley to obtain a right-of-way across Derira George's allotment even though Alaska Realty cannot document that it performed an investigation to determine if Copper Valley's rights-of-way conflict with the Native allotment. Based on our review of the Master Title

Plat, discussions with BLM, and an inspection of the land, it appears that an electric line does not cross this allotment and, therefore, that a conflict does not exist. A professional survey would be required to confirm our preliminary determination.

In two other cases, Alaska Realty is requesting that Copper Valley obtain rights-of-way even though electric lines do not cross Native allotments. Although Copper Valley first initiated the effort to obtain rights-of-way across Adam Bell and Verina Estes's Native allotments, Alaska Realty did not investigate to determine if Copper Valley was in trespass. We reviewed the BLM's adjudication file for Adam Bell's allotment and found a 1999 BLM decision concluding that the boundary of Adam Bell's allotment ended at the highway right-of-way; therefore, the highway right-of-way does not cross the allotment. In addition, our examination of the allotment found that Copper Valley's electric lines appeared to be within the highway right-of-way. A similar review of Verina Estes' BLM adjudication file found that Copper Valley's electric lines do not cross the Native allotment. Evidently, the original Master Title Plat for this allotment shows Copper Valley's electric lines traversing a portion of the allotment. However, in 1989, BLM realized that the Master Title Plat for this Native allotment was inaccurate and that the electric lines do not conflict with Verina Estes' allotment.

In the final case, Alaska Realty has requested that Copper Valley obtain a right-of-way across Caroline Mackey's allotment without evidence of the electric line's exact location. Alaska Realty's file has a 1987 BIA appraisal report that adequately documents an electric line within the allotment without a valid right-of-way. However, in 1996, the Native allotment was partitioned in half and divided equally between a Native heir and a non-Native heir. The east side of the allotment belongs to a Native heir and remains under BIA oversight, while the west side of the allotment was transferred into private ownership and is not under BIA oversight. Alaska Realty is currently requesting Copper Valley to obtain a right-of-way for this allotment even though there is no evidence, such as a survey, to show the precise location of the electric line within the former Caroline Mackey Native allotment. This type of documentation is important because if the electric line is within the unrestricted side of the allotment, Alaska Realty has no authority to pursue Copper Valley for trespass.

Due to the frequent turnover of staff among its realty service providers in Alaska and the specialized nature of Native land transactions, BIA has recognized the need to provide realty training and technical assistance for

its realty service providers. In March 2004, BIA's Alaska Region Realty Office held a basic realty training course for its realty service providers in the state. The agenda for the training course covered the basic processes and procedures of realty transactions, such as sales, mortgages, rights-of-way, leases, and trespass. According to the BIA's Alaska Regional Realty Office, this was the first year that BIA offered the basic realty training course. The course's section on trespass included a discussion of the types of trespass, how to conduct a site visit and investigation of the alleged trespass, a field examination checklist, and notices to the trespasser about the unauthorized use of the land. While BIA's training materials provided general information on trespass, the materials did not provide specific information on trespasses involving rights-of-way. For example, the training materials did not include information on the types of evidence that should be obtained to determine if a conflict exists involving rights-of-way, such as the exact location of electric lines, and the boundaries of Native allotments and highway easements.

Existing Remedies Available to Resolve Disputes over the Validity of Copper Valley Rights-of-way within Native Allotments Have Produced Limited Results

While the resolution of a number of these conflicts has been intermittently pursued since the mid-1990s, only a few cases have been resolved using existing remedies. Copper Valley currently has three remedies available to it to resolve conflicts. It could (1) negotiate rights-of-way with Native allottees in conjunction with BIA or its realty service provider; (2) relocate its electric lines outside of the Native allotment; or (3) exercise the power of eminent domain, also known as condemnation, to acquire the land. Since the mid-1990s, Copper Valley has negotiated rights-of-way for three Native allotments; however, it has not relocated any of its electric lines outside of allotments and has been reluctant to exercise eminent domain to resolve other conflicts. Finally, in addition to remedies available to Copper Valley, the federal government could force the resolution of these conflicts by bringing trespass actions against Copper Valley.

Since the mid-1990s, Few Cases Have Been Resolved Using Existing Remedies

While there are several options currently available to resolve conflicts between Native allotments and Copper Valley rights-of-way, these remedies have produced limited results. Under the first option, Copper Valley can negotiate with Alaska Realty to secure a right-of-way across a Native allotment. Using this remedy, Copper Valley was able to negotiate and reach an agreement for rights-of-way across 3 of 13 Native allotments on

which it had begun negotiations.[30] Copper Valley officials noted that historically, cooperative utilities in Alaska do not purchase rights-of-way or easements from members. According to Copper Valley's bylaws and tariffs, as a condition of service, members or the legal property owner shall without charge to Copper Valley "execute an easement providing for a suitable right-of-way for the Association distribution lines crossing the owner's property and providing service to the consumer."

Since the mid-1990s, Copper Valley began discussions with Alaska Realty to obtain rights-of-way within 13 Native allotments.[31] Copper Valley had 9 of these Native allotments surveyed, the first step in obtaining a right-of-way grant. Ultimately, BIA appraised 7 of these allotments, and Copper Valley was able to reach an agreement for rights-of-way across only 3 Native allotments. The other 4 cases that were appraised remain in conflict, and Copper Valley and the Native allottees have been unable to agree on the terms of the proposed right-of-way. For example, we spoke with heirs or allottees from Mary Ann Gurtler's and Carol Holt's allotments who said that for several years they had been negotiating with BIA, Alaska Realty, and Copper Valley in an attempt to get electric service to their homes and a right-of-way for the electric lines that cross their allotments. The allottees claim that Copper Valley is denying them electric service because of all of the unresolved conflicts with-the rights-of-way in the area. They also noted that, at this point in time, all they want is to get electric service and that they are willing to waive compensation for a right-of-way. Copper Valley in its comments to us disagreed with the allottees' statements and noted that the association has the goal of servicing all potentially eligible customers in its service area.

While the amount paid to an allottee for the use of the land in a right-of-way is generally a couple of thousand dollars, the process for obtaining a right-of-way can be costly and time consuming. Copper Valley claims that the cost of negotiating rights-of-way and compensating the allottees ranges from $10,000 to $30,000 in surveying, legal, and other administrative costs per allotment and may take several years to complete. Copper Valley is

[30]The three cases in which Copper Valley was able to negotiate a right-of-way and compensate Native allottees for use of the land are: Howard Adams (1998 right-of-way), Delores Lausen (1997 right-of-way), Nicolas Tyone (1996 right-of-way).

[31]Not included in the 13 cases, are several Native allotments where Copper Valley had initiated the right-of-way process for a new line to be constructed along the Old Edgerton Highway. This proposed line has not yet been built.

concerned that purchasing rights-of-way across Native allotments will, over time, increase electric rates for members. It is also concerned that purchasing rights-of-way from select members would alienate members who are not compensated yet have to pay a higher electric bill for those who do.

Under the second option—relocating its electric lines outside of Native allotments—Copper Valley officials noted that they had not removed electric lines from Native allotments as a way to resolve conflicts over rights-of-way. Removing electric power lines from a Native allotment and relocating them elsewhere raises cost and environmental concerns. Relocating electric lines would scar the land and possibly damage the surrounding areas due to heavy equipment traversing through the allotment. Copper Valley does not view this option as very practical given that, in many areas, Native allotments border the highway on both sides, leaving few options for where to relocate the lines.

Under the third option, Copper Valley has the authority to resolve conflicts through condemnation pursuant to 25 U.S.C. § 357, in conjunction with Alaska Stat. § 42.05.631.[32] Copper Valley is opposed to condemnation and is reluctant to secure a right-of-way in this manner for two reasons. First, officials maintain that Copper Valley does not have the funds to compensate the allottees for the land condemned. Second, Copper Valley believes that condemnation is not politically feasible and may damage relationships with the community they serve.

In summary, Copper Valley officials maintain that the options currently available to resolve conflicts over rights-of-way within Native allotments are too costly, impractical, and/or potentially damaging to relationships with the community. Furthermore, Copper Valley takes the position that on principle they should not have to bear the cost of resolving conflicts that they believe the federal government caused by applying the relation back doctrine and by failing to recognize state issued rights-of-way within federally granted highway easements. Copper Valley has stopped trying to settle these disputes and is now seeking legislation to resolve the conflicts.

[32]Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where they are located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee (25 U.S.C. § 357). Under Alaska state law a public utility may exercise the power of eminent domain for public utility uses (Alaska Stat. § 42.05.631).

Federal Government Is Unlikely to Bring Trespass Actions against Copper Valley

In addition to remedies available to Copper Valley, the federal government has the option of resolving these conflicts by bringing trespass actions against Copper Valley to require that it relocate its electric lines and pay damages to Native allottees. For example, for the Evelyn Hash Koonuk allotment, the Interior Alaska Office of the Solicitor could recommend to the Justice Department that the federal government bring a trespass action against Copper Valley because it has not yet negotiated a valid right-of-way. In this case, BLM declared null and void Copper Valley's 1965 right-of-way through Ms. Koonuk's allotment, even though Copper Valley had obtained its right-of-way 7 years before Ms. Koonuk filed her allotment application. According to the Interior Alaska Office of the Solicitor, the federal government is unlikely to pursue this course of action because it would provide Copper Valley the opportunity to raise its concerns about the relation back doctrine and other legal issues in federal court. For this reason, the Department of Justice is generally unwilling to bring trespass cases against electric companies.

Legislative Alternatives to Resolve Conflicts between Native Allotments and Copper Valley Rights-of-way Have Been Identified

Several legislative alternatives to resolve conflicts over Copper Valley rights-of-way within Alaska Native allotments have been identified. Copper Valley representatives, Alaska Native advocates, and GAO have identified alternatives including legislation to: (1) change Interior's application of the relation back doctrine with respect to Alaska Native allotments, (2) allow the U.S. government to be sued with regard to Alaska Native allotments so that legal challenges to the relation back doctrine can be heard in federal court, (3) ratify the rights-of-way granted by the State of Alaska within its highway easements, and (4) establish a federal fund to pay for rights-of-way across Native allotments. These alternatives may be combined, and we do not hold an opinion as to which, if any, of these alternatives might be preferable. We also note that some of these individual legislative remedies would address only one specific cause of the conflicts between Native allottees and Copper Valley rights-of-way. Further, while we did not determine the financial costs or the legal ramifications on the property rights of the Alaska Native allottees associated with any of these options, such costs and legal ramifications would need to be assessed.

Alternative 1: Change Interior's Application of the Relation Back Doctrine to Alaska Native Allotments

Congress could enact legislation directing Interior to use the date an allotment application is filed, rather than the date an allottee claimed initial

use and occupancy of the land, to determine the rights of allottees and holders of rights-of-way. This option, which would rescind application of the relation back doctrine to Native allotments, would allow Copper Valley to keep its federal rights-of-way as long as the right-of-way was issued before the allotment application was filed. Implementing this option would likely benefit Copper Valley by favoring the holders of rights-of-way and might result in legal challenges by Native allottees claiming that this action constitutes a taking of their property. If such challenges were successful, the federal government would have to compensate Native allottees.

Alternative 2: Allow the U.S. Government to be Sued with Regard to Alaska Native Allotments

A second option is for Congress to allow the U.S. government to be sued with regard to Alaska Native allotments by waiving the U.S. government's sovereign immunity so that legal challenges involving the relation back doctrine can be heard in federal court. Under this option, IBLA decisions regarding the relation back doctrine could be appealed to the courts, providing an opportunity for judicial review of these administrative decisions. While this option would allow Copper Valley and others to challenge Interior's administrative decisions, the courts may well uphold Interior's decisions. Moreover, appeals would entail legal costs to Copper Valley and the federal government. In addition, even if Copper Valley were to prevail, a solution to the conflict may take years to achieve as these cases make their way through the courts. Also, a decision would need to be made regarding whether this alternative would only apply to future IBLA decisions or whether old cases could also be refiled. For this alternative to apply to old cases, like the Copper Valley relation back cases from the 1990s, a special exemption would need to be crafted that waived the statute of limitations for these older cases.

Alternative 3: Ratify Rights-of-way Granted by the State of Alaska within Certain Federally Granted Highway Easements

Congress could ratify the rights-of-way granted by the State of Alaska within certain federally granted highway easements. This option could provide Copper Valley with a valid right-of-way across the allotments dating back to the time the state right-of-way was granted. Legislation providing a right-of-way across Native allotments would have legal and financial implications. For example, such legislation might constitute a taking, for which compensation is required.

Alternative 4: Establish a Federal Fund to Pay for Rights-of-Way

A fourth option is to establish a federal fund to pay for rights-of-way across Native allotments. This option would benefit both Native allottees and Copper Valley by compensating allottees for use of their land and by not requiring Copper Valley to pay for the right-of-way across a Native allotment. Under this option, the federal government and taxpayers would bear the entire cost of resolving the conflicts. However, the cost of alternative four would be similar to the combined cost of alternatives one and three if they are determined to be takings that require federal compensation.

Conclusion

Some of the conflicts over the validity of Copper Valley's rights-of-way within Native allotments date back over 30 years. Since the mid-1990s, Alaska Realty, as the new realty service provider for BIA, has been pursuing Copper Valley to resolve these conflicts. Despite trying to resolve these conflicts intermittently over the past 9 years, existing remedies have generally been unsuccessful in settling disputes between Native allottees and Copper Valley. We have identified several legislative alternatives to address the issues at the root of these conflicts. While we did find a number of cases where conflicts currently exist over the validity of Copper Valley rights-of-way within Native allotments, we also found cases where Alaska Realty is requesting Copper Valley to obtain valid rights-of-way without sufficient proof that a trespass actually exists. In these cases, we believe Alaska Realty has created unnecessary conflict by requesting that Copper Valley obtain rights-of-way without adequately investigating and documenting the boundaries of Native allotments and the location of electric lines and highway rights-of-way. BIA's ability to prescribe specific performance standards for Alaska Realty is limited and, in some cases, prohibited under the Indian Self-Determination and Education Assistance Act, as amended. While BIA can and does provide training and technical assistance to its realty service providers in Alaska, the March 2004 training materials did not include information on the types of evidence that should be developed before pursuing an alleged trespass involving rights-of-way, such as the exact location of electric lines, and the boundaries of Native allotments and highway rights-of-way.

Recommendations for Executive Action

To ensure that potential conflicts over the validity of rights-of-way within Alaska Native allotments are not escalated unnecessarily, we are recommending that the Secretary of the Interior direct the Assistant Secretary for Indian Affairs to develop, as part of BIA's training and technical assistance provided to its realty service providers in Alaska, a training module identifying the types of evidence that should be developed before pursuing an alleged trespass involving rights-of-way.

Agency Comments and Our Evaluation

We provided copies of our draft report to Interior, the State of Alaska, and Copper Valley. Interior, the State of Alaska, and Copper Valley provided written comments. (See appendixes IV through VI, respectively, for the full text of the comments received from these three entities and our responses.) Interior and Copper Valley specifically commented on and agreed with our recommendation. The State of Alaska did not specifically comment on our recommendation, but did comment on our four legislative alternatives. Interior and Copper Valley also provided technical comments that we incorporated where appropriate.

Interior agreed with our recommendation that BIA develop a training module identifying the types of evidence that should be developed before pursuing an alleged trespass involving rights-of-way. Interior noted that BIA's Alaska Region Realty Office in conjunction with Interior's Alaska Office of the Solicitor would include evidentiary standards that should be developed before pursuing an alleged trespass involving rights-of-way. Interior did not comment on any of the four legislative alternatives.

The State of Alaska commented that the GAO report was laudable in its breadth of analysis of conflicts between Alaska Native allotments and rights-of-ways. The state commented on each of the alternatives, emphasizing the benefits and limitations of each alternative. In particular, the state expressed support for alternative three—a legislative solution that would include a clarification by Congress that third party rights-of-way granted by the state within federal highway easements are valid. The State of Alaska also noted that it is prepared to work cooperatively with the federal government, allotment advocates, and utility companies on a comprehensive legislative solution that recognizes the valid existing rights of all parties.

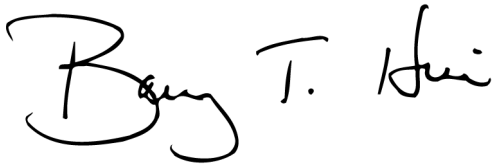
Copper Valley agreed with our recommendation and most of the alternatives. In its comments, Copper Valley congratulated GAO for

assembling information on all 34 Native allotments in controversy. They noted that this section is the heart of the report and provides a cogent summary of these cases. Copper Valley commented on each of the alternatives and specifically noted that alternative one—changing the application of the relation back doctrine—and alternative three should be adopted to resolve the problems. In addition, Copper Valley also expressed support for the establishment of a fund (alternative four), as long as the federal government covers all costs and administrative burdens.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies of this report to the Secretary of the Interior, the Governor of the State of Alaska, the Chief Executive Officer of Copper Valley, as well as to appropriate Congressional Committees, and other interested Members of Congress. We also will make copies available to others upon request. In addition, the report will be available at no charge on the GAO Web site at http://www.gao.gov.

If you or your staff have questions about this report, please contact me at (202) 512-3841. Key contributors to this report are listed in appendix VII.

Sincerely yours,



Barry T. Hill
Director, Natural Resources
and Environment

Objectives, Scope, and Methodology

Based on an August 25, 2003, request from the Chairman, Senate Committee on Appropriations, and subsequent discussions with the Chairman's staff, we reviewed conflicts concerning the validity of the rights-of-way of Copper Valley Electric Association within Alaska Native (Native) allotments. Copper Valley, a rural nonprofit electric cooperative, operates in south-central Alaska, north and east of Anchorage. Specifically we determined (1) the number of conflicts that exist between Alaska Native allotments and Copper Valley Electric Association's rights-of-way and the factors that contributed to these conflicts; (2) the extent to which existing remedies have been used to resolve these conflicts; and (3) what legislative alternatives, if any, could be considered to resolve these conflicts.

To determine the number of conflicts that exist between Alaska Native allotments and Copper Valley Electric Association's rights-of-way and the factors that contributed to these conflicts, we reviewed 34 Native allotments identified by Copper Valley and the Alaska Realty Consortium, a Bureau of Indian Affairs (BIA) contractor providing realty services for Native allotments in south-central Alaska, where either party suggested a conflict existed. To determine whether there was an actual conflict between Native allotments and Copper Valley's rights-of-way, we examined the Department of the Interior's Bureau of Land Management (BLM) allotment adjudication files and all of the rights-of-way permits (seven federal and two State of Alaska) issued to Copper Valley for these allotments. We interviewed representatives from BLM, BIA, and Interior's Alaska Office of the Solicitor. We also met with officials and reviewed records from Alaska Realty, Copper Valley, and the State of Alaska, including the Departments of Law, Transportation and Public Facilities, and Natural Resources. In May 2004, we met with 15 Alaska Native allottees, or their representatives, at group meetings in Glennallen and Anchorage, Alaska. We also spoke by telephone with several other allottees that were not able to attend the meetings.

To determine the extent to which existing remedies have been used to resolve conflicts between Alaska Native allotments and Copper Valley Electric Association's rights-of-way, we met with representatives from Copper Valley, Alaska Realty, and Native allottees. We also visited some Native allotments in question and several electric line rights-of-way to obtain a better understanding of the physical features of various land allotments. In addition, we reviewed records at Copper Valley and Alaska Realty to obtain information on when Copper Valley first initiated the right-

of-way process, whether Copper Valley had conducted a survey of the allotment, and if BIA performed any appraisal.

To determine what legislative alternatives, if any, could be considered to resolve these conflicts, we developed legislative alternatives based on our analysis of federal laws and regulations, federal court rulings, and decisions of Interior's Board of Land Appeals. In addition, we discussed possible legislative options with federal officials in Alaska and Copper Valley Electric Association representatives.

We conducted our work between November 2003 and June 2004 in accordance with generally accepted government auditing standards.

Legal Appendix on the Relation Back Doctrine

Relation back is a legal doctrine that considers an act performed at one time to have taken place at an earlier time. In the context of Alaska Native (Native) allotments, relation back refers to relating an Alaska Native's rights back to the date the Native first initiated use and occupancy rather than the date the allotment application was filed. Under this doctrine, when a Native allotment application is filed, the Native allotment relates back to the time the Alaska Native began (or claims he/she began) use and occupancy. When use and occupancy of available land began before the granting of a highway or utility right-of-way, the Native allotment is given priority, and the right-of-way is deemed to be invalid. The doctrine has been applied to Native allotments by federal courts and the Department of the Interior's Board of Land Appeals (IBLA).

Federal District Court Cases Applying Relation Back Doctrine

Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979)

Alaska Natives had applied for an allotment under the Alaska Native Allotment Act of 1906. The Department of the Interior rejected their application because the land they claimed for the allotment had already been conveyed to the State of Alaska. In challenging the rejection of their allotment, the Alaska Natives claimed that the use and occupancy upon which their allotment was based began before the conveyance of the land to Alaska. The District Court for the District of Alaska ruled that the fact that the Natives did not file an application for an allotment until after the land was selected by and conveyed to Alaska did not eliminate their preference right in the land. The court ordered the Department of the Interior to hold a hearing to determine the facts concerning the existence and sufficiency of the Alaska Natives' use and occupancy. The court stated that based on the facts determined at the hearing, if the Department of the Interior had mistakenly or wrongfully conveyed land to the State of Alaska to which the Alaska Natives had a superior claim, then the Department of the Interior was responsible to recover the land.

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)

An Alaska Native began to occupy the allotment at issue in 1946 and applied for a Native allotment in 1971. The allotment was issued in 1975. In 1969, Alyeska Pipeline Company applied for rights-of-way for the Trans-Alaska oil pipeline, including across lands occupied by the Alaska Native. Alyeska's rights-of-way were granted in 1974, resulting in a conflict with the Alaska Native's allotment. Alyeska subsequently obtained rights-of-way for

portions of the pipeline that crossed the allotment from the Alaska Native and for the other portions of the pipeline that crossed the allotment through a formal condemnation action. In adjudicating the amount of compensation to be awarded to the Alaska Native in the condemnation action, the District Court for the District of Alaska disagreed with Alyeska's argument that its right-of-way application had priority over the Alaska Native's allotment application. The court applied the relation back doctrine, ruling that the use and occupancy of the allotment by the Alaska Native created an inchoate preference right that became vested upon the filing of a timely application. Once vested, the preference relates back to the initiation of occupancy and takes preference over competing applications filed prior to the Native allotment application.

Selected IBLA Cases Applying the Relation Back Doctrine

Golden Valley Electric Association (On Reconsideration) (Jennie K. Irwin Allotment), 98 IBLA 203 (1987)

In this decision, the IBLA reconsidered its 1985 decision in which it had reversed a BLM decision declaring a portion of a right-of-way for a power transmission line null and void. In its 1985 decision, the IBLA had held that the Alaska Native's allotment was subject to the utility's right-of-way. *Golden Valley Electric Ass'n*, 85 IBLA 363 (1985). The IBLA reconsidered its decision in light of the Alaska district court's decisions applying the relation back doctrine in *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979) and *Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315 (D. Alaska 1985).

The IBLA held that an Alaska Native had a preference right to an allotment of land commencing with the first use and occupancy of the land. This preference right was not barred by the fact that a Native allotment application was not filed for the land until after a right-of-way had been granted across the land. Once the preference right becomes vested, the preference relates back to the initiation of occupancy and takes preference over rights-of-way or other uses of the land filed subsequent to the commencement of use and occupancy by the Native. Thus, in this case, where a Native allotment application was filed after a highway right-of-way was issued, the Native allotment related back and nullified the right-of-way that had already been granted.

State of Alaska, Golden Valley Electric Association (Dinah Albert Allotment), 110 IBLA 224 (1989)

Alaska and Golden Valley were granted highway and transmission rights-of-way in the mid-1960s. Subsequently, an Alaska Native filed Native allotment applications in 1967 and 1968, asserting use and occupancy that initiated in 1938. The application was legislatively approved under the Alaska National Interest Lands Conservation Act (ANILCA) in 1980. In a 1987 decision, the Bureau of Land Management (BLM) declared the portions of the rights-of-way that crossed the allotment null and void. In their appeal, Alaska and Golden Valley contended that the allotment should be made subject to their rights-of-way because the Native's use and occupancy was not open and notorious and, therefore, was insufficient to provide notice of her claim.

The IBLA affirmed BLM's decision and held that, where an allotment was legislatively approved, the legislative approval precluded any additional inquiry into the facts of the Native's use and occupancy of the land, including whether the use had been open and notorious. The IBLA stated that although the legislative approval of the allotment was subject to valid existing rights, the rights-of-way, approved in the mid-1960s, cannot be considered valid existing rights since they did not come into existence until after initiation of Albert's allotment, which was stated in the record as 1938. The IBLA concluded that the rights-of-way approved after the reported initiation of the Native's use and occupancy are not valid and existing rights, and BLM, therefore, was correct in declaring the rights-of-way null and void.

State of Alaska Department of Transportation & Public Facilities (Irene Johnson and Jack Craig Allotments), 133 IBLA 281 (1995)

In this decision, the IBLA consolidated appeals from two separate BLM decisions. Native allotment applications were filed by Johnson and Craig in the early 1970s. Johnson claimed use and occupancy of the land beginning in 1940, and Craig claimed use and occupancy beginning in 1937. A materials site right-of-way application was filed with BLM by the State of Alaska Department of Highways in 1965, after the date claimed for the initiation of use and occupancy of the allotments, but before the filing of the allotment applications. The right-of-way was granted in 1965. BLM later approved the allotment applications of Johnson and Craig but did not issue a certificate of allotment. Subsequently, ANILCA was enacted, and BLM held that the applications were legislatively approved by section 905(a)(1) of ANILCA. BLM did not state that the allotments would be subject to Alaska's materials site right-of-way.

Alaska appealed BLM's decisions, contending that the allotments should be subject to the right-of-way. The IBLA agreed with the state. In its decision, the IBLA considered whether the allottees had a preference right that related back to the initiation of use and occupancy that preempted the right-of-way and concluded that they did not. The IBLA stated that the authority to allot federal lands under the 1906 Native Allotment Act is limited to vacant, unappropriated, and unreserved nonmineral land. The IBLA ruled that, in the cases of Johnson and Craig, the land applied for was mineral in character and thus not available for Native allotment during the period of use and occupancy prior to the creation of the state's right-of-way. The IBLA concluded that the state right-of-way is a valid existing right to which the legislative approval of the allotment was subject under section 905(a)(1) of ANILCA.

In its decision, the IBLA noted that its 1987 decision in *Golden Valley (On Reconsideration)* "marked a departure from the approach espoused by the Board in [its 1985 *Golden Valley* decision] and other cases, holding that an allotment was subject to a right-of-way granted during the period of use and occupancy, but prior to the filing of the allotment application." 133 IBLA at 287 n.8, citing *State of Alaska v. Albert*, 90 IBLA 14, 21-22 (1985).

State of Alaska Department of Transportation & Public Facilities (Goodlataw Allotment), 140 IBLA 205 (1997)

Land was withdrawn in 1953 and 1956 for power projects. In 1965, Alaska filed an application for a channel change right-of-way using some of these lands. BLM issued the right-of-way in 1966, subject to all valid rights existing on the date of the grant.

In 1971, BIA filed an amended application for a Native Allotment on behalf of Goodlataw, claiming use and occupancy commencing in 1954. In 1974, BLM advised Goodlataw that the lands embraced by his amended application were not vacant and unreserved on the date he filed his application or on the date he initiated use and occupancy because they had been withdrawn by the power projects. Subsequently, BLM informed Goodlataw that the power site withdrawal was no longer an obstacle to ultimate approval of his application and in 1991 and 1992 issued decisions to confirm legislative approval of his allotment application and to declare Alaska's right-of-way null and void, respectively. In its 1992 decision, BLM noted that the right-of-way had been issued subject to all valid rights existing on its 1966 issuance date. BLM stated that Goodlataw's application, which claimed use and occupancy beginning in 1954, had begun prior to the

1965 filing of the state's right-of-way. Since the right-of-way had been issued subject to valid and existing rights, BLM held that the channel change right-of-way was null and void as to lands within the Native allotment.

Alaska appealed, asserting that its right-of-way is a valid existing right to which Goodlataw's Native allotment is subject. The IBLA agreed with Alaska and held that, because Goodlataw's occupancy of the land began after the land had been withdrawn, his occupancy did not constitute a valid existing right when the right-of-way was issued to the state. Accordingly, Goodlataw's allotment application could only properly be approved subject to Alaska's right-of-way, and the decision canceling the right-of-way was in error.

State of Alaska Department of Transportation & Public Facilities (Sabon Allotment), 154 IBLA 57 (2000)

This case involved Alaska's appeal from a BLM decision declaring Alaska's highway right-of-way null and void to the extent that it embraced lands within a Native allotment.

In 1966, BLM issued a right-of-way to Alaska for highway purposes (realignment of a highway), subject to "all valid rights existing on the date of the grant." The Alaska Native, Florence Sabon, applied for an allotment in 1971 and claimed use and occupancy starting in 1954. In 1983, BLM determined that Sabon's application had been legislatively approved under section 905(a)(1) of ANILCA. BLM's decision also stated that the land was valuable for oil and gas and that the allotment would be subject to a highway easement transferred to Alaska under the Alaska Omnibus Act. Subsequently, in a 1998 decision, BLM applied the relation back doctrine and concluded that part of Alaska's right-of-way was null and void due to Sabon's allotment.

In considering the state's appeal, the IBLA concluded that Alaska's right-of-way is a valid existing right to which the Sabon allotment is subject. The IBLA found that, at the time Sabon claimed she commenced her use and occupancy, the land had been withdrawn from all forms of appropriation and reserved for highway purposes by the Department of the Interior's Public Land Order (PLO) No. 601 (14 *Fed. Reg*. 5048 (August 16, 1949)). Thus, her allotment could not relate back to that time, as the land was not available. Subsequently, in 1958, PLO No. 1613 revoked PLO No. 601 and made the lands available for settlement claims but provided an easement for highway purposes on these previously withdrawn lands. PLO No. 1613

also prohibited the use of the lands within the easements for other than the highways except with the permission of the Secretary of the Interior.

The IBLA concluded that the legislative approval of Sabon's claim constituted permission under PLO No. 1613. However, while PLO No. 1613 permitted Sabon to commence use and occupancy in 1958, it also made that use and occupancy subject to the highway easement. Accordingly, the IBLA reversed BLM's decision as to the portions of the right-of-way that were located within the easement established by PLO No. 1613 and ruled that the Sabon allotment must be subject to any portion of the state's right-of-way within the easement.

Cases Analyzing Whether the Quiet Title Act Precludes Judicial Review of IBLA Decisions Concerning the Relation Back Doctrine

The IBLA decisions concerning the relation back doctrine generally cannot be appealed in the federal courts because the courts lack jurisdiction under the Quiet Title Act. The Quiet Title Act waives the sovereign immunity of the United States in actions to adjudicate title disputes involving real property in which the United States claims an interest. However, the Quiet Title Act does not apply to "trust or restricted Indian lands." Federal courts have ruled that, under this exception, federal courts do not have jurisdiction to review the IBLA's decisions concerning application of the relation back doctrine to rights-of-way over Native allotments.

Alaska v. Babbitt (Albert Allotment), 38 F.3d 1068 (9th Cir. 1994)

The State of Alaska brought suit against the Department of the Interior seeking judicial review of the IBLA's decision, applying the relation back doctrine, that Alaska's rights-of-way over a Native allotment were null and void. The Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the lawsuit and held that sovereign immunity was not waived under the Quiet Title Act. The appeals court also addressed the IBLA's application of the relation back doctrine and stated that the IBLA's analysis of relation back in its adjudication of the Albert allotment was not arbitrary or frivolous.

Alaska v. Babbitt (Foster I), 67 F.3d 864 (9th Cir. 1995) (amended and superseded by 75 F.3d 449 (9th Cir. 1996))

The State of Alaska brought suit against the Department of the Interior seeking judicial review of an IBLA decision that a Native allotment applicant's right to land took preference over the state's highway right-of-way. The Court of Appeals for the Ninth Circuit held that the government

was immune from suit under the Quiet Title Act. In addition, the court rejected the state's assertion that the IBLA had restricted the relation back doctrine.

Alaska v. Babbitt (Foster II), 75 F.3d 449 (9th Cir. 1996) (amended and superseded *Foster I* decision)

The State of Alaska brought action against the Department of the Interior, seeking judicial review of an IBLA decision that a Native allotment applicant's preference right to land took preference over the state's highway right-of-way. The Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the lawsuit, holding that the Quiet Title Act renders the government immune from suit. The court stated that its decision was based primarily on the authority of its earlier decision in *Alaska v. Babbitt (Albert Allotment)*, 38 F.3d 1068 (9th Cir. 1994). The court did not address the merits of the action, focusing solely on whether the United States had waived its sovereign immunity to allow an appeal from an IBLA decision. In the reissued opinion, the court deleted language contained in its earlier opinion concerning the IBLA's use of the relation back doctrine.

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

The Court of Appeals for the Ninth Circuit held that, under the facts of this case, sovereign immunity was waived under the Quiet Title Act and judicial review of an IBLA decision concerning a state materials site right-of-way over a Native allotment was permitted. In 1961, the United States granted a material site right-of-way to the State of Alaska. The grant was amended in 1969. In 1970, Bryant, an Alaska Native, filed an application for an allotment, based on use beginning in 1964 (3 years after the initial grant of the right-of-way to Alaska). BLM approved the allotment. The state's challenge to the allotment was dismissed by the IBLA, and the state appealed. The district court dismissed the action for lack of jurisdiction under the Quiet Title Act. The Ninth Circuit reversed. The appeals court observed that, subsequent to the IBLA's decision in Bryant's case, the IBLA changed its interpretation of the law. Specifically, in the 1997 *Goodlataw* case, the IBLA had held that commencement of the use and occupancy period for a Native allotment is without "color of law" if the state already has a right-of-way at the time. The Ninth Circuit determined that, under *Goodlataw*, the IBLA would now find that Bryant was not occupying the land under "color of law" because the state's right-of-way was in effect when he began using the land. Since the allottee did not have a colorable

claim that the land at issue was Indian land, the Indian lands exception under the Quiet Title Act did not apply.

Other Applications of Relation Back Doctrine

The doctrine of relation back is not unique to Native allotment cases and, for over a century, has been applied in other contexts, in particular civil and criminal forfeiture. As with holders of rights-of-way that cross Native allotments, application of the relation back doctrine in forfeiture cases can adversely affect the rights of third parties.

For example, in an 1889 case concerning forfeiture of property used in a crime, the Supreme Court stated: "By the settled doctrine of this Court, whenever a statute [provides] that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act . . . and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith." *United States v. Stowell*, 133 U.S. 1, 16-17 (1889).

One hundred years later, in *United States v. 92 Buena Vista Avenue*, 507 U.S. 111 (1993), the Supreme Court discussed the relation back doctrine in a drug trafficking case. In *Buena Vista*, the government sought to require a homeowner to forfeit a house that had allegedly been purchased with drug trafficking proceeds. The issues before the Court were whether ownership vested in the government at the time the house was purchased with the drug trafficking proceeds, and whether the homeowner could assert an innocent owner defense. In analyzing these issues, the Court stated that the relation back doctrine is not self-executing and does not make the government an owner of property before forfeiture has been decreed, thus allowing the purchaser to assert an innocent owner defense. However, if the government obtains a decree of forfeiture, the decree establishes the government's title to the property as of the date of the underlying offense and supersedes all subsequent transfers to third parties.

In *Knapp v. Alexander-Edgar Lumber Co.*, 237 U.S. 162 (1915), the Supreme Court applied the doctrine in a case concerning whether a homesteader was entitled to ownership of property. The Court stated that once the homesteader fulfilled the conditions entitling him to the land, his title related back to the date of his first act in meeting the conditions and cut off intervening claimants. The Court quoted from an earlier Supreme Court case that explains the purpose of the relation back principle:

"By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed**.** The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. 237 U.S. at 167, quoting *Gibson v. Chouteau*, 13 Wall. 92, 100-101 (1871)."

The above are examples of application of the relation back doctrine by courts under common law principles. The doctrine also has been incorporated in statutes, including those dealing with drug trafficking and money laundering. For example, 18 U.S.C. § 981(f) and 21 U.S.C. § 881(h) codify the relation back doctrine, providing that "all right, title, and interest in property . . . shall vest in the United States upon the commission of the act giving rise to forfeiture. . . ." Under these statutes, although a judgment resulting in civil forfeiture takes place some period of time after the commission of the illegal act, title to the property passes to the government when the illegal act was committed. However, in these cases, another statute, the Civil Asset Forfeiture Act, provides an innocent owner defense. The act states that "an innocent owner's interest in property shall not be forfeited under any civil forfeiture statute." 18 U.S.C. § 983(d). Accordingly, for example, a bona fide purchaser for value may have a defense to forfeiture of the property.

Status of the 34 Native Allotments Identified by Alaska Realty and Copper Valley Where Conflicts Were Suspected to Exist

This appendix contains two tables on the universe of 34 Alaska Native (Native) allotments identified by Alaska Realty and Copper Valley where conflicts were suspected to exist. Table 6 shows each of the 34 Native allotments categorized by its current status.

Table 6: Status of the 34 Native Allotments Identified by Alaska Realty and Copper Valley Where Conflicts Were Suspected to Exist

Name of Native allotment applicant	Native allotment serial number
BLM and Alaska Realty have applied the relation back doctrine	
Markle F. Ewan, Sr.	A-046337
Peter Ewan	AA-5896-A
Evelyn Hash Koonuk	AA-7242-B
Carol J. Gurtler Holt	AA-7552
Tazlina Joe	A-031653
State issued utility rights-of-way within federally granted highway easements	
Etta Bell	AA-6014-B
Bacille George	A-043380
Howard J. Jerue	AA-7059
Bernice E. Mai	AA-7600
Harvey B. Seversen	AA-8032
Roxy Venner	AA-6034
Copper Valley was never issued a right-of-way	
Frank Gurtler	AA-7553
Mary Ann Gurtler	AA-7554
Florence Sabon[a]	AA-7336
Native allotments that appear never to have had a conflict	
Adam Bell	AA-2068-A
Richard J. Clark[a]	AA-2918-C
Verina Estes	AA-8250
Derira George	A-023391
Marilyn Eskilida Joe[b]	AA-5568-B
Wilbur Joe[b]	AA-8112
Henry Peters	F-031726-A
Delia E. Renard	AA-6057-A
Glenna George Stansell	AA-6156
Lorraine A. Stickwan Gordon	AA-6155

(Continued From Previous Page)

Name of Native allotment applicant	Native allotment serial number
James C. Tyone	A-31656
Native allotments now in fee simple ownership	
Leona Fleury	A-046452
Vivian E.A. Grey Bear	AA-6033
Tenas Jack	AA-7164
Copper Valley has negotiated a valid right-of-way	
Howard Adams	AA-6726
Delores Lauesen	F-13814
Nicholas Tyone	AA-6495-B
Native allotments approved subject to Copper Valley's right-of-way	
Sam George	AA-7068
Judy L. Jaworski	AA-7454
Unknown whether conflict exists or not	
Caroline L. Mackey	AA-7102

Sources: GAO analysis of Alaska Realty and Copper Valley data.

[a]Richard J. Clark (AA-2918-C) and Florence Sabon (AA-7336) Native allotments are pending. As of April 2004, Richard Clark's Native allotment was pending approval. Florence Sabon's Native allotment was approved in July 1983, but as of April 2004 it had not been certified.

[b]The electric lines that cross Marilyn Eskilida Joe (AA-5568-B) and Wilbur Joe's (AA-8112) Native allotments are owned by the State of Alaska. Copper Valley only holds a 25 percent interest in these electric lines.

Table 7 shows the list of the 34 Native allotments categorized by the date the Native allotment was certified. Half of the Native allotments, 17 out of 34, were certified prior to the IBLA's 1987 decision on the relation back doctrine, including 6 that were certified prior to ANILCA in 1980. Also, about half of the Native allotments were approved under the 1906 Native Allotment Act, and about half were legislative approved under ANILCA.

Table 7: Native Allotments Categorized by Certificate Date and Type of Approval

Name of Native allotment applicant	Native allotment serial number	Year Native allotment certified	Type of approval
Native allotments certified before ANLICA in 1980			
Tazlina Joe[a]	A-031653	1960	1906 Act
James C. Tyone	A-31656	1961	1906 Act
Derira George	A-023391	1963	1906 Act
Leona Fleury	A-046452	1968	1906 Act
Markle F. Ewan, Sr.[a]	A-046337	1975	1906 Act
Howard J. Jerue[a]	AA-7059	1978	1906 Act
Native allotments certified after ANILCA but before 1987			
Bernice E. Mai[a]	AA-7600	1983	Legislative (ANILCA)
Roxy Venner[a]	AA-6034	1983	Legislative (ANILCA)
Peter F. Ewan[a]	AA-5896-A	1983	1906 Act
Mary Ann Gurtler[a]	AA-7554	1984	Legislative (ANILCA)
Caroline L. Mackey	AA-7102	1984	Legislative (ANILCA)
Vivian E.A. Grey Bear	AA-6033	1984	Legislative (ANILCA)
Frank Gurtler[a]	AA-7553	1984	Legislative (ANILCA)
Marilyn Eskilida Joe	AA-5568-B	1984	1906 Act
Wilbur Joe	AA-8112	1985	1906 Act
Delores Lauesen	F-13814	1985	1906 Act
Harvey B. Seversen[a]	AA-8032	1986	Legislative (ANILCA)
Native allotments certified after the relation back doctrine in 1987			
Etta Bell[a]	AA-6014-B	1988	Legislative (ANILCA)
Verina Estes	AA-8250	1989	1906 Act
Howard Adams	AA-6726	1991	1906 Act
Tenas Jack	AA-7164	1992	1906 Act
Nicholas Tyone	AA-6495-B	1994	Legislative (ANILCA)
Judy L. Jaworski	AA-7454	1994	Legislative (ANILCA)
Carol J. Gurtler Holt[a, b]	AA-7552	1995	Legislative (ANILCA)[b]
Evelyn Hash Koonuk[a]	AA-7242-B	1996	Legislative (ANILCA)
Delia E. Renard	AA-6057-A	1996	Legislative (ANILCA)
Bacille George[a]	A-043380	1996	1906 Act
Henry Peters	F-031726-A	1996	Legislative (ANILCA)
Lorraine A. Stickwan Gordon	AA-6155	1996	Legislative (ANILCA)
Glenna George Stansell	AA-6156	1996	Legislative (ANILCA)
Adam Bell	AA-2068-A	1999	1906 Act

(Continued From Previous Page)

Name of Native allotment applicant	Native allotment serial number	Year Native allotment certified	Type of approval
Sam George	AA-7068	2000	1906 Act
Richard J. Clark	AA-2918-C	Pending	1906 Act
Florence R. Sabon[a]	AA-7336	Pending	Legislative (ANILCA)

Source: GAO analysis of BLM data.

[a]One of the 14 Native allotments with a conflict.

[b]BLM legislatively approved the Carol J. Gurtler Holt allotment even though the State of Alaska had an outstanding protest. The state appealed BLM's legislative approval to the IBLA (IBLA 84-307). The appeal was settled by a stipulated agreement, signed by attorneys for the state, Ms. Holt and the federal government, that made the allotment subject to an easement for an existing road. The IBLA dismissed the appeal and the case was remanded to BLM with instructions to act in accordance with the stipulated settlement.

Comments from the Department of the Interior

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

AUG 2 4 2004

Mr. Barry T. Hill
Director, Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Hill:

Thank you for the opportunity to comment on the U.S. Government Accountability Office (GAO) draft report entitled *Alaska Native Allotment: Conflicts with Utility Rights-of-Way Have Not Been Resolved through Existing Remedies* (Report No. GAO 04-923). The Department of the Interior (DOI) offers the following comments on the subject draft report.

On page 35 of the draft report, GAO recommends:

> "To ensure that potential conflicts over the validity of rights-of-way with Native Alaska allotments are not escalated unnecessarily we are recommending that the Secretary of the Interior direct the Assistant Secretary for Indian Affairs to develop, as a part of BIA's training and technical assistance provided to its realty service providers in Alaska, a training module identifying the types of evidence that should be developed before pursuing an alleged trespass involving rights-of-way."

As the draft report indicates, the Bureau of Indian Affairs (BIA) has contracted with regional nonprofit corporations or other Alaska Native entities to perform certain realty services for owners of Native allotments. The Alaska Realty Consortium (Alaska Realty) provides realty services, such as sales, leases, mortgages, and rights-of-way, for over 160 Native allotments in south-central Alaska. In the course of the review, four instances were found where Alaska Realty was requesting that Copper Valley obtain rights-of-way where the GAO did not believe there was evidence that Copper Valley's electric lines were in trespass.

The BIA agrees with the recommendation that additional training needs to be provided to the realty service providers in Alaska to prevent unnecessary escalation of conflicts over the validity of rights-of-way. The realty training provided in March 2004 by the BIA's Alaska Region Realty Office was intended as basic training. The BIA provided advanced realty training the week of August 23, 2004. The Alaska Region Realty Office will be reviewing its training to incorporate suggestions in the GAO draft report. In conjunction with the Office of the Solicitor,

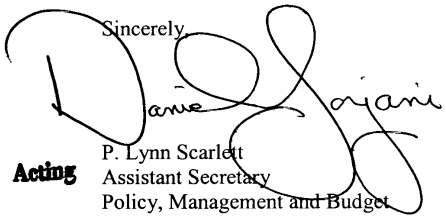
Note: Technical comments from Interior's Alaska Office of the Solicitor are not included.

Alaska Regional Office, the BIA's Alaska Region Realty Office will include evidentiary standards that should be developed before pursuing an alleged trespass involving rights-of-way.

Due to the frequent turnover of staff among realty service providers, the Alaska Region Realty Office intends to provide training and technical assistance periodically. This will allow training materials to be revised and updated as necessary.

Comments from the Solicitor's Office on the draft report are enclosed. If you have any questions, please contact Deborah Williams, DOI's GAO Liaison Officer, on 202-208-3963.

Sincerely,



Acting P. Lynn Scarlett
Assistant Secretary
Policy, Management and Budget

Enclosure

Comments from the State of Alaska

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

FRANK H. MURKOWSKI, GOVERNOR

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)276-3697

August 18, 2004

Barry T. Hill
Director for Natural Resources and Environment
U.S. Government Accountability Office
441 G Street NW
Washington, D.C. 20548

Re: Draft GAO Report on Alaska Native Allotments/
Conflicts With Utility Rights-of-Way

Dear Mr. Hill:

Enclosed are the comments of the State of Alaska on the draft report prepared by the GAO on the ongoing conflicts between Alaska Native Allotments and utility rights-of-way within Alaska. The State appreciates the opportunity to comment on this report, and is prepared to work cooperatively with the United States, allotment advocates and private utilities toward a comprehensive solution to this problem.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: John T. Baker
Assistant Attorney General

cc: John W. Katz
Office of the Governor

**State of Alaska's Comments on
Draft GAO Report: Alaska Native Allotments /
Utility Rights-of-Way Conflicts**

The State of Alaska ("State") appreciates the opportunity to comment on the GAO's draft report on conflicts between Alaska Native Allotments and utility rights-of-way within the state. The State discusses below two cases that highlight the allotment/right-of-way conflict, then addresses the four alternatives identified by GAO for legislation.

A. Background: The Parks Highway Cases

Conflicts between Alaska Native allotments and rights of way actually are broader than conflicts between utility lines and Native allotments. Since 1987, portions of the Parks Highway, the primary road between Anchorage and Fairbanks and the only road to Denali National Park, have also been declared null and void under the relation back theory. Since 1987, the application by the Department of the Interior of the relation back doctrine to rights-of-way has resulted in protracted, expensive, and ultimately fruitless litigation for the state and federal governments and for allotment owners.

Although the Parks Highway cases, *Foster and Bryant*, are discussed in the appendix to the GAO report, the full story of these cases is not disclosed. We include additional comments concerning these cases to demonstrate the need for legislation to address these conflicts.

***State v. Babbitt (Foster)*, 75 F.3d 449 (9th Cir. 1995)**

As the GAO report indicates, the Ninth Circuit decision in *Foster* held that the United States is immune from actions seeking judicial review of decisions that approve allotments and void conflicting rights of way.[1] However, *Foster's* aftermath is not discussed in the report. The Ninth Circuit has created a jurisdictional void, as the *Foster* case amply demonstrates.

After the Ninth Circuit issued its *Foster* decision, Mrs. Foster sued the state in state superior court for trespass and ejectment based on the IBLA's

[1] The lead attorney for the state in six of the nine IBLA and Ninth Circuit cases discussed in Appendix II to the GAO report has authored a thorough analysis of the law in this area and has suggested legislation that would resolve the conflicts. *See* E. John Athens, Jr., *The Ninth Circuit Errs Again: The Quiet Title Act as a Bar to Judicial Review*, 19 ALASKA L. REV. 433 (2002)(hereinafter "Athens").

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approval of her allotment and its voiding of the Parks Highway easement where it crossed her allotment. The superior court dismissed Mrs. Foster's complaint because Public Law 280 (28 U.S.C. § 1360(b)) exempts ownership disputes concerning Indian trust lands from that statute's grant of jurisdiction to the state. The Alaska Supreme Court affirmed the dismissal in *Foster v. State*, 34 P.3d 1288 (Alaska 2001).

Thus, neither the state nor Mrs. Foster can obtain judicial redress for perceived interference with their respective property rights. In *State v. Babbitt (Foster)*, the Ninth Circuit held that the state could not obtain judicial review in federal court challenging the IBLA's cancellation of its right of way for the Parks Highway, while in *Foster v. State*, the Alaska Supreme Court held that Mrs. Foster could not bring an action in state court to eject the state from the right of way after the IBLA cancelled it.[2]

The federal government could fill this void by suing the state in federal court on Mrs. Foster's behalf, thus waiving its sovereign immunity and providing a judicial forum in which the competing ownership claims could be litigated. However, the federal government has not taken this action and, as the GAO report notes, it is unlikely to do so because of concerns that litigation would result in allotments being declared invalid.[3]

The upshot of the *Foster* litigation is that neither state nor federal courts have jurisdiction to adjudicate conflicts between Native allotments and rights of way. The status of Mrs. Foster's rights in her allotment and the status of the state's interest in the Parks Highway where it crosses the Foster allotment are in limbo. Given the federal government's understandable reluctance to initiate

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[2] "There is little reason to question the Alaska Supreme Court's decision; [Public Law 280's] proscription against state court jurisdiction is explicit." Athens, at 434 (citations omitted).

[3] This concern is especially relevant in *Foster*. Under the relation back theory, Mrs. Foster's interest in her allotment is measured from the date she first used the land. Mrs. Foster started using her allotment land in 1964. However, the state was granted a Highway Act material site covering virtually all of the Foster allotment three years before Mrs. Foster started using it. The Parks Highway is built entirely within this material site right of way. Thus, relation back would not help Mrs. Foster. In litigation where ownership of the land was adjudicated, Mrs. Foster's allotment would likely be invalidated because the land was not unappropriated, nonmineral land on the date Mrs. Foster initiated her use. *See* Athens at 437-440; *see also Alaska v. Norton*, 168 F.Supp.2d 1102 (D.Alaska 2001)(discussed below). *Norton* invalidated an allotment under a factual scenario virtually identical to that in *Foster*.

litigation on Mrs. Foster's behalf, those rights are likely to stay in limbo for the foreseeable future.

***State v. Babbitt (Bryant)*, 182 F.3d 672 (9th Cir. 1999), decision on remand *sub nom.*, *Alaska v. Norton*, 168 F.Supp.2d 1102 (D.Alaska 2001)**

While *Foster* demonstrates the jurisdictional void created by the Ninth Circuit in most allotment–right of way conflict cases, *Bryant* demonstrates the unsatisfactory result of litigating an allotment–right of way conflict in those instances where judicial review is not barred by sovereign immunity.

In *Bryant*, the state succeeded in obtaining judicial review of a Native allotment decision voiding a right of way. The Ninth Circuit held that the government had no "colorable claim" that Mr. Bryant's allotment was "Indian land" because the state was granted a material site three years before Mr. Bryant first started using the land: The land was, therefore, not available for allotment under the Alaska Native Allotment Act. Because there was no "colorable claim" that Mr. Bryant's allotment was Indian land, sovereign immunity did not bar judicial review of the IBLA decision voiding the state's right of way where it crossed Mr. Bryant's allotment.[4]

On remand to the district court from the Ninth Circuit's decision in *Bryant*, the state argued that the Parks Highway right of way was valid, but sought only to make the allotment subject to the highway right of way and a portion of the state's original 500-acre material site.[5] Nevertheless, because the state's original 500-acre material site was granted three years before Mr. Bryant first started using his allotment, the district court held that Mr. Bryant's *entire* allotment was void where it conflicted with the original 500-acre site,[6] a result that the state neither sought nor desired.

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[4] *Bryant*, 182 F.3d at 676-77. The Ninth Circuit's decision in *Bryant* highlights the IBLA's unequal application of the relation back doctrine. Although constrained by Ninth Circuit precedent to deny judicial review, the district court in *Bryant* had noted that the IBLA had unfairly applied the relation back doctrine to the allottee's use of the land while refusing to apply that doctrine to the state's prior use of the same land for a material site. *Bryant*, 182 F.3d at 674. The district court described the IBLA's decision as "cynical or ... intellectually dishonest," and "a bunch of garbage." *Id.* at 675.

[5] *Alaska v. Norton*, 168 F.Supp.2d at 1108.

[6] *Id.* at 1107 and n.12.

Norton preserved the state's rights of way but left Mr. Bryant with only eight of the original 160 acres of land he claimed as an allotment. Because the deadline for allotment applications had expired in 1971, Mr. Bryant had no opportunity to commence use on, or apply for, other allotment lands.

B. The Four Alternatives for Legislation Identified by GAO

The GAO report identifies four alternatives for legislation to address conflicts between allotments and rights-of-way: (1) changing Interior's application of the relation back-doctrine; (2) waiving federal sovereign immunity to allow disputes between allotments and state or third party interests to be resolved in federal court; (3) ratifying rights-of-way granted by the State of Alaska within federally granted highway easements; and (4) establishing a fund to pay for rights-of-way across Alaska Native allotments. Each alternative is addressed below.

1. Changing the Application of the Relation-Back Doctrine

As discussed above, Interior's application of the relation-back doctrine to rights-of-way issued prior to the filing of the allotment application has resulted in protracted litigation involving the State, the United States, and allottees. The conflict dates from 1987, when the IBLA, in *Golden Valley Electric Ass'n (On Reconsideration)*, 98 IBLA 203 (1987), ruled that an allotment could not be made subject to a right-of-way issued prior to the filing of the allotment application, where use and occupancy of the allotment commenced prior to the issuance of the right-of-way. This ruling overturned longstanding precedent, and repudiated prior rights granted by the United States to the State under what has long been recognized as the plenary power of the Secretary of the Interior over federal public lands, including occupied Indian lands.[7] The State received numerous federal highway and material site right-of-way grants, pursuant to 23 U.S.C. 317, prior to the filing of Native Allotment applications in which they are now in conflict as a result of IBLA's ruling in *Golden Valley Electric Ass'n*.

Legislation clarifying that allotments are subject to rights of way granted before an allotment application was filed would avoid protracted litigation and would preserve the legitimate expectations of both rights of way grantees and allotment owners in the lands that allottees and grantees applied for and have used for years. Amending ANILCA to clarify that right of way grants issued under the Highway Act are "valid existing rights" to which allotments must be made subject

[7] *See Tee-Hit-Ton Indians v. United States*, 343 U.S. 272, 279 (1955); *United States v. Clarke*, 529 U.S. 984, 986 (9th Cir. 1976); *Alaska v. 13.90 Acres of Land*, 615 F.Supp. 1315, 1320 (D.Alaska 1985), *aff'd sub nom. Etalook v. Exxon Pipeline Company*, 831 F.2d 1440 (9th Cir. 1987).

under 43 U.S.C.§ 1634(a)(1)(A) would be one way to resolve these conflicts and would do "nothing more than make clear what was undoubtedly the intent of § 1634(a)(1) in the first place."[8]

It should be noted, however, that legislation to correct Interior's application of the relation-back doctrine should be limited to the resolution of conflicts with those prior rights-of-way that should properly be viewed as "valid existing rights." Legislation should not be so broad as to invalidate the application of the relation-back doctrine in other respects, as the doctrine is the central premise on which Interior determines the validity of allotments, where use and occupancy commenced prior to the segregation of the land from the public domain.[9]

2. Waiving Federal Sovereign Immunity

Legislation waiving the immunity of the United States to allow for judicial review of allotment/right-of-way conflict cases would resolve the jurisdictional dilemma illustrated by the *Foster* case, discussed above. However, unless IBLA's application of the relation-back doctrine is addressed also, this remedy offers limited help to the holders of rights-of-way in conflict with allotments. By itself, this alternative would do nothing to defray the costs of bringing litigation or to bring expeditious closure to these disputes.

3. Ratifying the Rights-of-Way Granted by the State Within Federally Granted Highway Easements

Any legislative solution should include a clarification by Congress that third-party rights-of-way granted by the State within federal highway easements granted to the State are valid. As the GAO report makes clear, the BIA has relied on a 1989 Regional Solicitor's Opinion concluding that the State lacks the authority to issue rights-of-way to third party utilities within federally granted highway easements, because such easements do not include the right to install utility lines.[10] This position is squarely at odds with Alaska law and with prevailing common law governing the rights attendant to highway easements.

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[8] Athens, at 460.

[9] *See Aguilar v. United States*, 474 F.Supp. 840 (D.Alaska 1979) (because validity of allotment relates back to date use and occupancy commenced, United States has trust responsibility to determine validity of allotment applications filed after date land was segregated by competing claim).

[10] This conclusion apparently was based on the holding in *United States v. Gates of the Mountain Lake Shore Homes, Inc.*, 732 F.2d 1411 (9th Cir. 1984).

The use of an easement reserved "for highway purposes" is not limited to movement of vehicles but, rather, embraces every reasonable method of over, under and along the right-of-way.[11] The easement acquired by the public in a highway includes every reasonable means for the transmission of intelligence, the conveyance of persons, and the transportation of commodities that the advance of civilization may render suitable for a highway.[12] Thus, the installation of power and telecommunication lines with a highway right-of-way is permissible so long as the lines are compatible with road traffic because "they are viewed simply as adaptations of traditional highway used made because of changing technology."[13] Since a highway may be built within a highway easement, so any "incidental subordinate use" may be made of the easement, since it imposes no additional burden or servitude on the underlying fee.[14] An easement for a public highway also permits "inchoate future transportation uses," incidental to the primary highway purpose, which do not further encroach on the underlying fee.[15]

Interior's position that federal grants of highway easements to states do not include the right to create third party utility easements is in conflict, then, not only with Alaska law, but with the prevailing common law rule as recognized by numerous state courts. The State of Alaska would support legislation resolving this conflict.

4. Establishing a Federal Fund to Pay for Rights-of-Way

The last option identified by the GAO report is the establishment of a federal fund to pay for the acquisition of rights-of-way across allotments. The effectiveness of this option is obviously constrained by federal budget realities, although in some cases, the cost of acquiring a right-of-way may be relatively modest. In addition, if other legislative alternatives, particularly Alternatives 1 and 3, were pursued, a federal fund to acquire rights-of-way might not be necessary.

However, a federal funding source might well be necessary to deal with any takings claims resulting from legislation action. Requiring the State and other grantees to compensate allotment owners in order to clear the conflicts would be manifestly unfair to the State and other grantees. As the GAO report

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[11] *Fisher v. Golden Valley Elec. Ass'n, Inc.*, 658 P.2d 127, 129 (Alaska 1983). *See also State v. Homar*, 798 P.2d 824, 826 (Wyo. 1990); *Bentel v. County of Bannock*, 656 P.2d 1383 (Idaho 1983).

[12] *Golden Valley Elec. Ass'n, Inc.*, 658 P.2d at 129.

[13] *Id.*

[14] *Id.*

[15] *Broadbend Land Company v.Town of Manila*, 842 P.2d 907, (Utah 1992).

points out, because of the nature of the land's use, there was often very little evidence of an allotment applicant's potentially exclusive use and occupancy of land. Therefore, initial fieldwork to locate material sites, highways and other rights of way would not have disclosed that an Alaska Native was using the land. In the absence of an application filed with BLM, the State and other grantees had no way of knowing that a parcel of land was being claimed and had no way of locating projects and material sites so as to avoid the conflicts. It would be utterly unreasonable, therefore, to expect the State or other grantees to absorb the cost of resolving conflicts created by the United States' misapplication of its legal authority.

C. Conclusion

The GAO report is laudable in its breadth of analysis of conflicts between Alaska Native Allotments and rights-of-ways. The State of Alaska is prepared to work cooperatively with the United States, allotment advocates, and utility companies on a comprehensive legislation solution that recognizes the valid existing rights of all parties.

Comments from the Copper Valley Electrical Association

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

Copper Valley Electric Association, Inc.

P.O. Box 45 • Glennallen, Alaska 99588 • Telephone: 907-822-3211 • Facsimile: 907-822-5586 • Valdez: 907-835-4301

August 13, 2004

Barry T. Hill
Director, Natural Resources
General Accounting Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Hill:

Copper Valley Electric Association (CVEA) has been working with the General Accounting Office on its draft report #04-923 on Alaska Native Allotments. This includes a number of meetings in Alaska and Washington, DC on this report.

CVEA appreciates the opportunity to comment on the GAO's draft report. Our comments on the draft report are attached for your review. Thank you for the effort which GAO has taken on this important issue.

Sincerely,

Robert A. Wilkinson
Chief Executive Officer

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Comments of Copper Valley Electric Association
On Draft General Accounting Office Report #04-923

The Copper Valley Electric Association (CVEA) appreciates the opportunity to comment on this draft report. The CVEA also appreciates the time and effort the GAO staff have devoted to this investigation including two trips to Alaska and one trip to the CVEA service area to determine the facts surrounding the issues under this investigation and the federal policies which have created this problem. When combined with the 1980 blanket approval of Native allotment applications under section 905 of the Alaska National Interest Lands Act, CVEA is made the victim of federal policies which act to place its rights of way from the federal government and State of Alaska in jeopardy.

These policies must be changed by a combination of federal actions, including legislation. These must include:

1. Passage of legislation to void or change the doctrine of relation back so that the doctrine does not jeopardize CVEA and other utility rights of way in Alaska.

2. Recognition by BIA that CVEA rights of way are not in conflict with allotments and that no trespass actions should be threatened or pursued by BIA against CVEA.

3. Adoption of the GAO recommendation that no further trespass actions be permitted until the BIA has developed a training module and that training module is fully implemented with sufficient training to prevent the conflicts currently in controversy in the CVEA service area.

4. Administrative or legislative action to recognize that the CVEA rights of way within State of Alaska Rights of way are valid and recognized by the federal government including the BIA.

General Comments

See comment 1.

On pages 3 and 4, GAO states that CVEA is trespassing on allotments. CVEA takes very strong exception to these statements. CVEA does not agree that it is in trespass on any allotment. Further, it does not believe that GAO has either the legal ability or authority to reach such a conclusion. Only a court of competent jurisdiction can adjudicate such a finding of trespass. CVEA respectfully urges that these statements of "trespass" be removed from this document.

See comment 2.

On pages 30 and 34, GAO appears to repeat as correct allegations by individual allottees that electric service has been denied by CVEA as some sort of tactic or retribution in this allotment dispute. This is categorically untrue. CVEA has a goal of serving all potentially eligible customers in its service area. Because this allotment issue has become so complicated and controversial, it may be helpful to repeat a basic point: A fundamental requirement for obtaining service from CVEA under its by-laws is that the customer agree to a blanket easement across his or her property without cost to CVEA for both the

service lines and distribution lines, and these allottees have never offered to CVEA to do this. These statements should be removed, or clarified to reflect that the allotment conflict has caused this situation.

While CVEA understands and appreciates that this report deals strictly with the allotment/right of way conflict situation in the Copper River basis, it is critical that the readers of this report understand this is not an issue unique to CVEA's service area. CVEA believes that this is a statewide problem which needs more attention to insure that CVEA's conflict experience is not repeated in other areas of the state of Alaska. There are many other utilities and right of way holders at risk unless a good soluton to this problem is achieved.

Comments on GAO Draft Report, Conclusions

See comment 3.

CVEA congratulates the GAO for assembling information on all 34 allotments in controversy. This section is the heart of the report factually and provides a cogent summary of these cases. While CVEA agrees with many of the conclusions in this part of the report, it does have comments and a fundamental disagreement with one conclusion, all of which are provided below.

1. CVEA's 5 "relation back cases"–CVEA agrees that each of the five cases list in Table 1 as relation back cases are properly categorized and described. Each of these allotments is located alongside the Richardson Highway (their consistent proximity to the highway suggests that these allotments were located where they are precisely because they were adjacent to the highway and other modern services, such as electric and telephone utility service). While the facts on these cases vary, CVEA believes that the Bureau of Land Management (BLM) improperly voided CVEA rights of way using the relation back doctrine and that Alaska Realty has improperly asserted that the relation back doctrine applies even in cases in which there is no native allotment holder.

Without the relation back doctrine, CVEA's rights of way would be recognized as valid exiting rights and there would be no problem or controversy. This is why the relation back doctrine must be repealed.

See comment 4.

Finally, please note that we strongly believe that the 6 cases which GAO lists as "no right of way cases" are actually "relation back cases." The GAO should modify its draft to reflect this and to eliminate this erroneous "no right of way category." See comments below.

2. CVEA's "state right-of-way" cases–This is another situation in which the Department of Interior (DOI) has acted to subsequently void what were clearly valid existing rights. Each of the 6 allotments in this category has a valid State of right-of-way crossing it. Until 1989, there was no problem asserted by Interior with such rights-of-way. Such problems arose following an Alaska Regional Solicitor's opinion that stated that the State did not have the right to issue utility easements to utilities such as CVEA in a manner that would have precedence over Native allotments. The Solicitor has created a controversy where there need not have been one. This action, 30 years after the State

rights of way were granted, clearly is in conflict with the ANILCA policy that native allotments must be subject to valid existing rights.

The State's right to grant rights of way easements for utility purposes is critical to providing utility service to CVEA and other utility customers in the State. The clear solution is for the Congress to validate the State right-of-way for all transportation purposes, including utility easements granted thereunder, and/or directly validate the existing CVEA rights of way to insure that they are deemed valid existing rights for all purposes.

See comment 4.

Now on pp. 25-27.

Table 1 is now on p. 16.

3. CVEA's cases with "no right-of-way" are "relation back" doctrine cases–It is and would have been futile for CVEA to seek BIA consent to these rights-of-way because of the "relation back" doctrine. CVEA respectfully disagrees with the findings of GAO on these cases, Frank and May Ann Gurtler and Florence Sabon, described at pages 24- 26 of the draft report. These cases should be considered as "relation back" cases –fundamentally no different from the other five "relation back" cases described earlier and listed in the first section of Table 1 on page 15. In other words, CVEA believes there are 11, not 5, "relation back" cases.

In these cases, CVEA applied for a BLM right-of-way in 1965 and constructed the line in 1967; the BLM did not act on the CVEA application until 1982, some 17 years later. In the meantime, the Native applicants applied for these allotments in 1971-72 and claimed initiation of use and occupancy prior to the time of the CVEA application, ANILCA was passed in 1980 approving the allotment applications, and the Natives were granted allotment certificates in 1982. Then, in 1982, CVEA was required to obtain the consent of the BIA to the grant of a right-or-way across the allotment.

The GAO Report states that these allotments are different from the "relation back" cases discussed above, because no consent to the right-of-way across the allotment was ever issued by BIA. However, it is perfectly obvious that seeking consent from the BIA for these rights of way is, and would have been, completely futile because the BIA would have taken the position these allotments were subject to the relation back doctrine because the date of initiation of use and occupancy predated the application by CVEA. GAO distinguishes these cases from the other "relation back" cases on a fact that does not make a difference—the real reason, the only reason, that there is no consent and no right-of-way in these cases is the "relation back" doctrine.

See comment 5.

Now footnote 29 on p. 26.

CVEA also wishes to note that the Sabon allotment is currently the subject of an ongoing administrative appeal before IBLA. This appeal is taken from a BLM order denying CVEA a right-of-way, and granting CVEA the right to appeal. We believe that the GAO report inappropriately states, in footnote 27, that the BLM action was "in error". We understand that the Regional Solicitor and Alaska Legal Services may take this view, and may attempt in the future to withdraw or invalidate the BLM order granting CVEA a right to appeal. If they are successful then this action perhaps will leave CVEA without an appeal, and perhaps without any legal remedy at all in this case. We believe it is incorrect and improper for GAO to comment on the merits of cases currently in active litigation, and we believe this portion of the discussion should be removed from the report.

Now on pp. 27-29.

4. CVEA's Cases "without trespass"–While CVEA believes that it is not in trespass on any of the 34 cases examined, it certainly agrees with the GAO conclusions on these four cases discussed on pages 26-28. The actions taken by BIA through its contractor, Alaska Realty Consortium, demonstrates the real problem here. Neither BIA nor Alaska Realty has any rules governing its actions. This leads to Alaska Realty making demands based on inaccurate facts. No further action by Alaska Realty should be permitted by DOI until a full revamping of this program is accomplished.

5. The existing status of this issue requires only innocent private parties to bear the resulting costs–Any discussion of the costs of legislative remedies should consider the current imposition of costs on innocent third parties, and that what would occur in the event the United States assumed the costs of its allotment policies would simply be to reallocate the cost of the issue from innocent third parties to the United States, where it belongs.

Now on pp. 5-6.

The Report contains a discussion, at pp. 6-7, of four possible remedies and the costs of these remedies. The four possible remedies identified are: (1) do away with the "relation back" doctrine; (2) waive federal sovereign immunity to allow CVEA to sue; (3) ratify state grants of utility easements to CVEA in highway rights of way; (4) pay the allottees for the CVEA rights of way. It is then discussed that options 1 and 3 could result in the US being sued for a taking of possible allottee rights, and that the cost of option 4 approximately equals the cost to the United States of options 1 and 3.

This discussion carefully sidesteps the crux of CVEA's concern with this entire issue: the current situation has shifted **AWAY FROM THE UNITED STATES** and **TO A COMPLETELY INNOCENT THIRD PARTY** the entire cost of the federal policies relative to Native allotments, including their approval in ANILCA without any adjudication, and the invalidation of rights of way through the "relation back" doctrine. CVEA did nothing to the allottees, and the allottees had no rights contrary to CVEA when CVEA obtained its rights-of-way and constructed its lines. The entire costly imposition of this regime on CVEA has occurred by unilateral Federal action which occurred without any consideration at all of the impacts on CVEA or other innocent third parties like it that would result, and with the costs imposed on CVEA as a result.

Specific Comments on Draft Report

The CVEA makes the following comments on the draft report:

Page 1–It is critical that the US government recognize the need to fix this problem by federal legislative or administrative action. These problems were created by federal legislative or administrative actions. The only legal remedies that CVEA may have are costly and time-consuming. It should not be the responsibility of CVEA to solve these problems. The US government, and specifically the Congress must act to remedy he situation.

Now on p. 2.

Page 3–As stated at the top of the page, the principal problem is that since 1987, The BLM no longer recognizes the validity of previously located right-of-way easements. This creates the conflict that cannot be resolved by litigation because the US refuses to waive sovereign immunity to allow CVEA to contest the validity of the relation back doctrine. This is a classic "catch 22" situation. CVEA has no effective remedy in these cases.

See comments 1 and 4.
Now on pp. 3-4.

Page. 4–As stated above, CVEA does not agree that it is in trespass on any allotment. CVEA believes that the three cases which GAO refers to as cases in which CVEA constructed electric lines without a right-of-way are more property considered "relation back" cases.

Now on pp. 4-5.

Page 5–This page describes how difficult, time consuming and expensive it is for CVEA to pursue a solution without federal administrative or legislative action.

Page 5-CVEA is not "hoping for " a legislative solution" Rather CVEA is "seeking" legislative amendments to existing law to solve the problems described in this report.

Page 6–This problem can only be solved by the adoption of at least remedies numbers 1 and 3. CVEA does not believe authorizing litigation by waiving sovereign immunity is a viable solution.. This will only prolong the solution to this problem. CVEA believes that if establishing a fund under remedy number 4 is selected as one of the remedies, this must be structured to insure that all costs and administrative burden is borne by the federal government.

Now on pp. 8-9.

Page 9–CVEA believes it is absolutely clear that the term "valid existing rights" in Section 905 of ANILCA was specifically intended to protect the State's and CVEA's rights of way. If these rights-of-way are not considered valid, the operation of the relation back doctrine will effectively void **ANY** right-of-way since most claims of occupancy predate Alaska Statehood and the issuance of virtually all other uses which would qualify as valid existing rights.

Page 10–The GAO correctly states that BLM makes no examination of the facts of any application which qualifies for legislative approval. **This is the critical issue. Since BLM now assumes that the facts of any affidavit of use and occupancy are correct, there is no opportunity for BLM or CVEA to question when or if occupancy actually occurred as stated in the affidavit.**

Since an affidavit of previous use and occupancy will void a right-of-way under the relation back doctrine, the CVEA has very limited tools with which to protect its otherwise valid existing right

Now on pp. 27-28.

Page 26–One of the fundamental "on the ground issues" is the inability of any party to easily and correctly identify the exterior boundaries of an allotment because almost all have not been surveyed. The report needs to reflect this as a major difficulty which cannot be ignored by BIA or its contractor. Instead, ARC has boldly demanded easements based on little or no factual basis. This practice must cease and the difficulties created by lack of adequate surveys must be recognized.

Page 31–As stated above, regarding page 5, CVEA is seeking legislative amendments to existing law to solve the problems described in this report.

Page 32-CVEA restates its previously stated position that only implementation of at least remedies number 1 and 3 can solve this problem. Congress must act to protect CVEA and other utility rights of way.

Comments on Appendices

CVEA has no comments on the appendices except to note that the five cases involving the relation back doctrine indicate how difficult it is to understand the current state of the law. In two cases, the federal courts have upheld the State right-of-way as a valid existing right to which a Native allotment is subject even though legislatively approved or that the land on which the allotment was located was not actually open to occupation by a native allotment application.

It was this confusion of facts and law that led the Congress to legislatively approve thousands of allotment applications encompassing hundreds of thousand of acres. However, the protection of valid exiting rights cannot be left to individual adjudication. This would only defeat the purpose of the decision to approve these allotments. This situation is made even more difficult by the fact that sovereign immunity prevents any case to adjudicate the validity of the relation back doctrine.

This can lead only one conclusion. Congress must act on this matter as described below.

Conclusion

CVEA congratulates the GAO for assembling a comprehensive and generally accurate draft report.

However, this problem can only be solved if the U.S. government, including the Department of Interior, acts on the recommendations contained in the report. This must include at a minimum the following:

1. Changing the Relation Back Doctrine so that it does not act to void CVEA's existing rights of way;

2. Ratifying the State's rights of way so that its grant to CVEA cannot be questioned as to validity by the federal government or third parties.

3. Complete reworking of any future action by BIA or Alaska Realty to insure that action is taken only after a full investigation with facts to support any demand for a right of way;

4. Suspension of any activities in the CVEA service area pending implementation of number 3 above particularly on the 20 allotment applications on which GAO has found no conflicts.

The following are GAO's comments on the Copper Valley Electrical Association's letter dated August 13, 2004.

GAO Comments

Copper Valley commented on our recommendation and the legislative options, both of which are discussed in the Agency Comments and Our Evaluation section of this report. Copper Valley also provided technical comments, which we incorporated as appropriate. In addition, discussed below are GAO's corresponding detailed responses to some of Copper Valley's comments.

1. GAO has not concluded that Copper Valley is trespassing on allotments, rather, our report states that Interior and/or Alaska Realty have determined that Copper Valley is trespassing or allegedly trespassing across Native allotments.

2. We acknowledge Copper Valley's goal of serving all potentially eligible customers in its service area and its requirement that customers agree to a blanket easement across their property without cost to Copper Valley. However, Copper Valley has been inconsistent in how it has dealt with securing rights-of-way across Native allotments. For example, as stated in our report Copper Valley has negotiated a right-of-way and compensated Native allottees for use of the land in the following cases: Howard Adams (1998 right-of-way), Delores Lausen (1997 right-of-way), and Nicolas Tyone (1996 right-of-way).

3. Yes, as noted in our report, we state that while several relation back cases have been identified so far in the Copper River area, other cases may exist.

4. Yes, we agree that in these cases the relation back doctrine could presumably have been applied to invalidate Copper Valley's right-of-way, if Copper Valley had obtained a right-of-way. As our report notes, because Copper Valley did not obtain BIA approval and was not granted a right-of-way through these Native allotments, they are not examples of the relation back doctrine. BLM's 1982 right-of-way decision affecting these Native allotments was 5 years before Interior started applying the relation back doctrine to Native allotments. The decision was based on a 1979 Memorandum of Understanding between BLM and BIA and not on the relation back doctrine.

5. GAO has no position on this case and did not intend to comment on the merits of this case. We have revised the footnote by deleting the phrase "in error" and we have noted Copper Valley's appeal to the IBLA.

GAO Contacts and Staff Acknowledgments

GAO Contacts

Barry T. Hill, (202) 512-3841
Jeffery D. Malcolm, (202) 512-6536

Staff Acknowledgments

In addition to those individuals named above, John Delicath, Doreen Stolzenberg Feldman, José Alfredo Gómez, Paul Staley, Carrie Wilks, and Arvin Wu made key contributions to this report.

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