



Testimony  
Before the Committee on Resources,  
House of Representatives

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Not to Be Released  
Before 2:00 p.m. EST  
Wednesday, September 13, 2006

**ALASKA NATIVE  
ALLOTMENTS**

**Alternatives to Address  
Conflicts with Utility  
Rights-of-way**

Statement of Robin Nazzaro, Director  
Natural Resources and Environment



**G A O**

Accountability \* Integrity \* Reliability

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Highlights of GAO-06-1107T, a testimony before the House Resources Committee, House of Representatives

## 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 allottees and holders of rights-of-way.

This testimony is based on GAO's report, *Alaska Native Allotments: Conflicts with Utility Rights-of-way Have Not Been Resolved through Existing Remedies (GAO-04-923)*. Specifically 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.

[www.gao.gov/cgi-bin/getrpt?GAO-06-1107T](http://www.gao.gov/cgi-bin/getrpt?GAO-06-1107T).

To view the full product, including the scope and methodology, click on the link above. For more information, contact Robin Nazzaro at (202) 512-3841 or [nazzaror@gao.gov](mailto:nazzaror@gao.gov).

# ALASKA NATIVE ALLOTMENTS

## Alternatives to Address Conflicts with Utility Rights-of-way

### What GAO Found

There are 14 cases where conflict exists regarding Copper Valley's rights-of-way within Native allotments. These conflicts stem from three principal sources. First, 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. Second, 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. Third, Copper Valley constructed electric lines even though they were never issued a right-of-way.

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. 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. Copper Valley officials told us that 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 representatives, Alaska Native advocates, and GAO identified four legislative alternatives that could be considered to resolve these conflicts.

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

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to discuss our work on conflicts between Alaska native allotments and utility 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.<sup>1</sup> 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 utility companies claim that their utilities 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.

Two agencies within Interior—the Bureau of Land Management (BLM) and the Bureau of Indian Affairs (BIA)—have key responsibilities with regard to Native allotments in Alaska. These responsibilities include adjudicating applications for Native allotments and granting rights-of-way on federal lands. 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.<sup>2</sup>

In September 2004, we reported on conflicts between Alaska native allotments and Copper Valley Electric Association (Copper Valley), a rural nonprofit electric cooperative that was formed in 1955, and 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

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<sup>1</sup>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.

<sup>2</sup>See, e.g., *Golden Valley Electric Ass'n*, 85 IBLA 363 (1985), *vacated*, 98 IBLA 203 (1987).

Allotments is the subject of ongoing dispute. Our testimony today is based on that report and focuses on (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 meet 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 did not conduct any follow-up audit work in conjunction with this testimony. Our September 2004 report, on which this testimony is based, was prepared in accordance with generally accepted government auditing standards.

In summary, we reported the following:

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.

- 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.
- 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.
- Copper Valley constructed electric lines even though they were never issued a right-of-way.

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

- *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.

In commenting on our report, Interior, the State of Alaska and Copper Valley generally agreed with the report’s contents. 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.

## **Background**

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. 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.<sup>3</sup> 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.”<sup>4</sup> 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. The provision that repealed the Native Allotment Act preserved any pending Native allotment applications “before” Interior as of December 18, 1971.

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<sup>3</sup>43 C.F.R. § 2561.0-8.

<sup>4</sup>Act of August 2, 1956, ch. 891, 70 Stat. 954 (1956). The 1956 Act also authorized Native allottees, or their heirs, to sell their allotments.

While Interior has processed most of the Native allotment applications, as of March 2004, applications for about 3,000 parcels remain to be processed.

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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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).<sup>8</sup> 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 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 allottees and holders of rights-of-way and resulted in numerous legal appeals.

BLM is responsible for adjudicating applications for Native allotments and granting rights-of-way on BLM lands. 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.

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-

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<sup>5</sup> *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976).

<sup>6</sup> *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979).

<sup>7</sup> Pub. L. No. 85-508, § 6(a)-(b), 72 Stat. 339, 340 (1958).

<sup>8</sup> Pub. L. No. 96-487, § 905(a), 94 Stat. 2371, 2435-36 (1980).

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. 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. 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. BLM's decisions concerning Native allotments and rights-of-way can be appealed to the Interior Board of Land Appeals (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.

Prior to 1987, Alaska Native allotments were generally subject to rights-of-way existing when they were approved. 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.<sup>9</sup> 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.<sup>10</sup> 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.

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<sup>9</sup> 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).

<sup>10</sup> See, e.g., *Alaska v. Babbitt (Foster)*, 75 F.3d 449 (9th Cir. 1995); *Alaska v. Babbitt (Albert)*, 38 F.3d 1068 (9th Cir. 1994).

## Conflicts Exist in 14 Cases

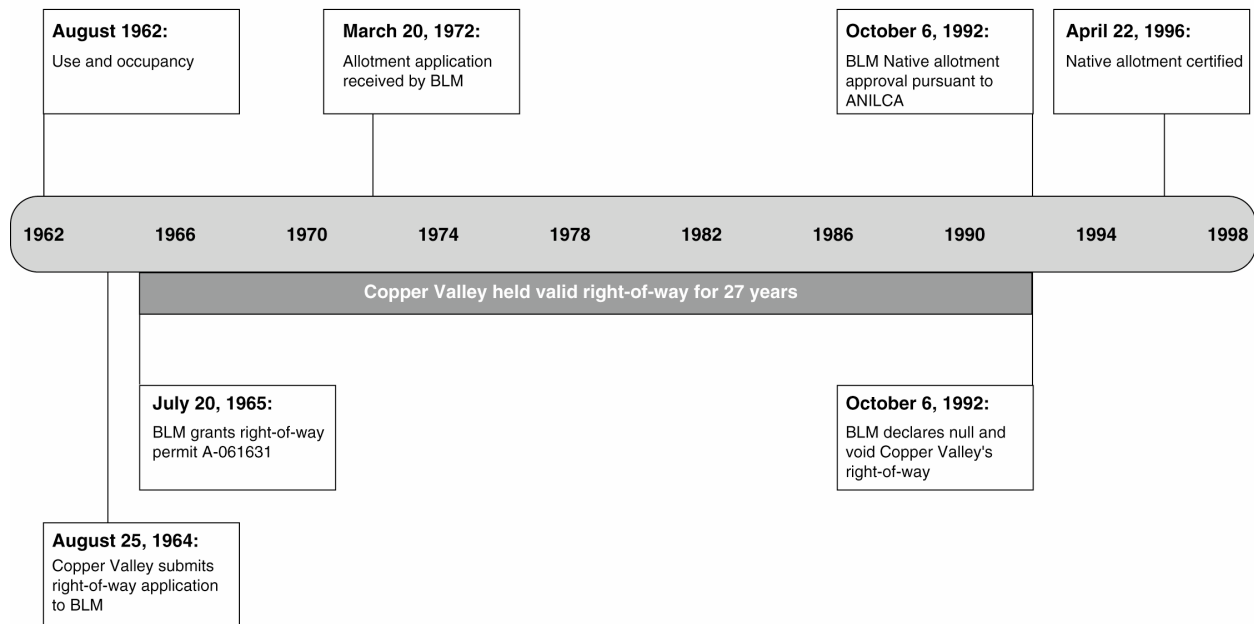
There are 14 cases where conflict exists regarding the validity of Copper Valley's rights-of-way within Native allotments. (See appendix 1) In each of these cases, BIA and/or the allottee believes that Copper Valley has failed to obtain permission for electric lines on Native property. These conflicts 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. In each of these cases BLM and Alaska Realty have invalidated or questioned Copper Valley rights-of-way because a Native allottee's use and occupancy of the land predated the right-of-way. 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. 1.)
- 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. 2.)

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.

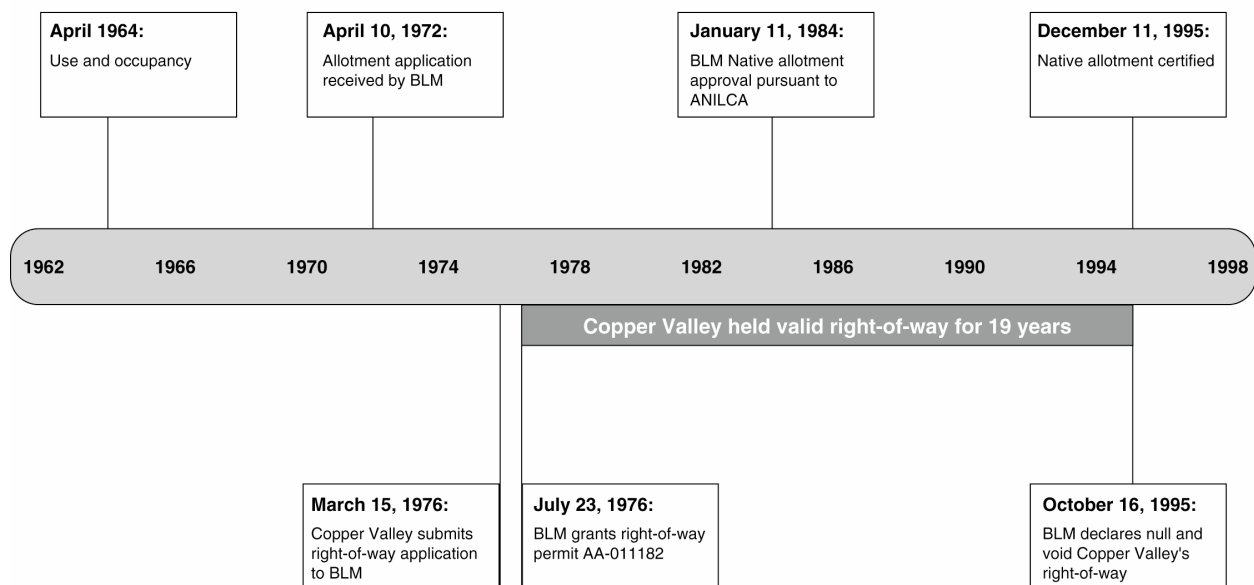


**Figure 1: Key Milestones for Evelyn Hash Koonuk’s Native Allotment and Copper Valley’s Right-of-way**



Source: GAO analysis of BLM data.

**Figure 2: Key Milestones for Carol J. Gurtler Holt’s Native Allotment and Copper Valley’s Right-of-way**



Source: GAO analysis of BLM data.

Second, in six cases 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. The federal government transferred the easements for the Richardson and Old Edgerton

Highways to the State of Alaska under the 1959 Alaska Omnibus Act.<sup>11</sup> 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. 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. 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.

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 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.<sup>12</sup>

Third, in three cases conflict exists because Copper Valley built an electric line across Native allotments where a right-of-way had not been issued. 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

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<sup>11</sup> Pub. L. No. 86-70, 73 Stat. 141 (1959).

<sup>12</sup> *Fisher v. Golden Valley Electric Ass'n, Inc.*, 658 P.2d 127 (Alaska 1983).

were, at the time, pending approval as Native allotments. 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.

### **Exiting Remedies to Resolve Disputes Have Produced Limited Results**

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.

Under the first option, Copper Valley can negotiate with Alaska Realty to secure a right-of-way across a Native allotment. Since the mid-1990s, Copper Valley began discussions with Alaska Realty to obtain rights-of-way within 13 Native allotments. 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 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.<sup>13</sup> Copper Valley is opposed to condemnation and is reluctant to secure a right-of-way in this manner because they maintain they do not have the funds to compensate the allottees for the land condemned, and because they believe 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.

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

Copper Valley representatives, Alaska Native advocates, and GAO have identified four legislative alternatives to resolve conflicts over Copper Valley rights-of-way within Alaska Native allotments. These alternatives may be combined. Also, some of these individual legislative remedies would address only one specific cause of the conflicts between Native allottees and Copper Valley rights-of-way.

#### *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

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<sup>13</sup>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).

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.

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In 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. While we have identified several legislative alternatives to address the issues at the root of these conflicts, 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.

Mr. Chairman this completes my prepared statement. I would be happy to respond to any questions you or other Members of the Committee may have at this time.

### **GAO Contacts and Acknowledgments**

For further information, please contact Robin Nazzaro on (202) 512-3841. Doreen Feldman, José Alfredo Gómez, Roy Judy, Mark Keenan, and Jeff Malcolm made key contributions to this testimony.

Appendix I

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

<b>Name of Native allotment applicant</b>	<b>Native allotment serial number</b>
<b>BLM and Alaska Realty have applied the relation back doctrine</b>	
Markle F. Ewan, Sr.	A-046337
Peter Ewan <sup>a</sup>	AA-5896-A
Evelyn Hash Koonuk	AA-7242-B
Carol J. Gurtler Holt	AA-7552
Tazlina Joe	A-031653
<b>State issued utility rights-of-way within federally granted highway easements</b>	
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
<b>Copper Valley was never issued a right-of-way</b>	
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.

<sup>a</sup>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.

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