

BAY VIEW, INC.

IBLA 90-183

Decided June 7, 1993

Appeal from a decision of the Alaska State Office, Bureau of Land Management, accepting relocation of Native allotment application A-052547 and rejecting protests of relocated allotment.

Reversed in part and appeal dismissed in part.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

To the extent that pending Native allotment applications describe lands previously conveyed out of Federal ownership, these applications were not subject to legislative approval by sec. 905 of ANILCA, 43 U.S.C. § 1634 (1988).

2. Administrative Authority: Generally--Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

An interim conveyance is similar to a patent in that it conveys legal title to the land described. In the absence of legal title, the Department lacks jurisdiction to adjudicate entitlement of an applicant for a tract of land. Where the applicant is a Native American, the fiduciary duty of the Department may justify a review of the application to determine whether to seek reconveyance of the land.

3. Administrative Authority: Generally--Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Rules of Practice: Appeals: Standing

With respect to lands which have been conveyed out of Federal ownership, a decision accepting a Native allotment application as amended is not an adversarial adjudication of entitlement of the applicant to an allotment which is dispositive of the rights of the applicant or adverse parties since the Department lacks jurisdiction

to make such a ruling in the absence of legal title. In this context, an appeal by an adverse party is properly dismissed as premature. If the land is reconveyed, any decision adjudicating the amended location will be subject to appeal.

4. Surveys of Public Lands: Authority to Make

A decision rejecting a protest of a BLM survey of lands which have been conveyed to a Native corporation will be reversed. Authority to survey the public lands is generally restricted to lands where the United States holds legal title.

Kenai Natives Association, Inc., 87 IBLA 58 (1985), overruled in part.

APPEARANCES: Peter Vollintine, Esq., Vollintine & Carey, Anchorage, Alaska, for appellant; Gregory Peters, Esq., Alaska Legal Services Corporation, Dillingham, Alaska, for Harry O. Kaiakokonok; Regina L. Sleater, Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Bay View, Incorporated (Bay View) appeals from a December 6, 1989, decision of the Alaska State Office, Bureau of Land Management (BLM), accepting the amended Native Allotment application, A-052547, filed for Harry O. Kaiakokonok. 1/

On July 8, 1960, Kaiakokonok filed Native allotment application A-052547 pursuant to the Alaska Native Allotment Act of 1906 (Allotment Act), as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed on December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1988), subject to applications pending before the Department on that date). 2/ In his application, Kaiakokonok

1/ Although the decision was issued in the name of Harry O. Kaiakokonok, counsel for BLM indicated in a submission of May 11, 1990, that Kaiakokonok is now deceased.

2/ The original description in the application was:

"Beginning at a point North of Gull Rock in Stepovak Bay at approximately 55 degrees 51 Min. N Lat. and 159 degrees 45 Min. W Long. Marked with a post 4 ft. high and 4 in. in diam placed firmly on the edge of a slough in front of my cabin and identified as corner #1. Then in a westerly direction along the edge of the slough to the mouth of Big River to corner #2 marked with a post 4 ft. high and 4" in diam. Thence in a northerly direction approximately 1500 feet along the bank of Big River to corner #3 marked with a post 4 ft. high and 4" in diameter. Thence East approximately 3500 feet to corner #4 marked with a post 4 ft. high and 4" in diam. Thence South to corner #1 point of beginning."

claimed use and occupancy of the land for trapping beginning October 15 and ending in January each year, except for two, since 1924. He listed a cabin built in 1948 as an improvement. As part of that application, the Bureau of Indian Affairs (BIA) certified that Kaiakokonok was a Native entitled to an allotment.

While the original description encompassed approximately 120 acres, an October 8, 1963, field examination resulted in a recommendation for approval of only 5 acres because all of the improvements were in an area of less than 5 acres. The field examination also moved corner #1 of the allotment one chain southeast from the cabin. Kaiakokonok was not present at the field examination. On May 28, 1967, Kaiakokonok filed a request to amend his application with BLM. 3/ A May 23, 1969, BLM memorandum states that Kaiakokonok had not filed any amendment.

A second field examination was conducted on May 26, 1973. Kaiakokonok was also not present during this field examination, but he was interviewed at the time and stated his intention to build a new cabin. This field examination resulted in a land description essentially the same as in the original 1960 application for A-052547. The only difference was in the description of the location of the starting point. The field examination report described the starting point as in front of and a "few feet easterly of the dugout cabin," as opposed to the latitude and longitude description used in the May 1960 application. 4/

BLM issued interim conveyances (IC) 036 and 038 to appellant on March 15 and 30, 1976, respectively, for the surface estate in various lands including fractional secs. 13 and 14 of T. 50 S., R. 68 W., Seward Meridian. Both conveyances specifically excluded fractional Native allotment application A-052547 in secs. 13 and 14 of T. 50 S., R. 68 W. IC 038 also conveyed sec. 18 in T. 50 S., R. 67 W., Seward Meridian to appellant. Both interim conveyances were made subject to valid existing rights. By letter dated March 31, 1976, BLM advised claimant that he met the use and occupancy requirements of the Allotment Act and his allotment claim, A-052547, was approved for 120 acres. A Request for Survey was made to the Chief, Division of Cadastral Survey, giving the same description found in the May 1973 field report. 5/

3/ The request, submitted on a preprinted form, indicates that claimant has been advised that he could apply for more land than that embraced in the original application up to a limit of 160 acres. Thus, the intent to amend the application manifested an intent to add additional lands to those already described, but not necessarily an intent to substitute new lands for those previously described.

4/ Notes accompanying the field report noted that the post marking the point of beginning in front of the cabin had apparently eroded away.

5/ On the file carbon copy of this request the word "creek" is printed in pencil next to the name "Big River." When this was done or by whom is unexplained. It appears from the record that there is an unnamed creek just west of Kaiakokonok's original cabins and substantially east of Big River. This creek was later argued by Kaiakokonok as the western boundary

On April 21, 1976, appellant leased land to Bristol Bay Native Corporation (BBNC) for an airfield and for drilling an oil and gas well. This leased land included lands in sec. 18 of T. 50 S., R. 67 W., Seward Meridian which had been conveyed by IC 038. BBNC subleased this land to Phillips Petroleum Company (Phillips) on May 18, 1976. Appellant and BBNC, together with Phillips, had identified the land Phillips desired to lease in early 1976 but waited until the IC's were issued before entering into the lease. The location of Kaiakokonok's claim was ascertained in an effort to avoid any conflict when identifying the land to be leased (Affidavit of William P. Johnson, Director of Lands for BBNC, Mar. 5, 1990, Exh. E to Statement of Reasons (SOR)). Subsequently, Phillips built an airstrip and began drilling in the summer of 1976, but terminated the lease agreement on April 19, 1977, after failing to discover oil, causing the land and airstrip to revert to appellant.

In a letter dated November 11, 1980, counsel for appellant advised BLM that a survey of the allotment had resulted in placing the allotment on lands conveyed to appellant by the IC and later leased to Phillips. Appellant specifically objected to the placing of "survey stakes" on lands conveyed to it, including land within the airport facility. Enclosed with the letter was a photocopy of the "as-built" survey plat of the lands leased to Phillips showing the remains of Kaiakokonok's old cabin posted with his Native allotment claim number dated March 23, 1975 (Exh. A to letter of Nov. 11, 1980). The old cabin is located well outside the boundary of the leased tract. However, a point within the Phillips lease survey is marked with the handwritten notation "Harry's Cabin." The record also contains a photocopy of a November 13, 1980, letter addressed to counsel for appellant reporting that Kaiakokonok had built a "new cabin located adjacent to the airport apron." ^{6/} In a followup letter of November 26, 1980, counsel for appellant informed BLM of appellant's concern regarding the erroneous survey and the lack of BLM jurisdiction and authority to convey to Kaiakokonok land which had already been conveyed to appellant.

In May 1987, BLM conducted a third field examination. For the first time, Kaiakokonok was present at a field examination. Although Kaiakokonok was unable to actually walk around with the examiner because of poor health, he was able to get to the area he claimed by flying into the airstrip built by Phillips. The June 19, 1987, field report notes that Kaiakokonok said he

fn. 5 (continued)

for his amended application. This creek became the western boundary of Kaiakokonok's allotment in the June 1987 field report which concluded that "[t]he sketch of USS 6271 incorrectly identifies the unnamed creek forming the western boundary of the parcel as Big River. Big River is one mile west of the survey" (1987 Field Report at 4).

^{6/} Appellant has also submitted an affidavit from John C. Moores, Land Planner/Engineering Geologist for BBNC, stating that the cabin adjacent to the airport apron was built after Moores' visit to the area in early 1977 (Affidavit of Moores, Feb. 27, 1990, SOR, Exh. E). A May 1987 field report found a modern cabin built in the 1980's and the remnants of two earlier sod cabins which had been damaged by the unnamed creek eroding east.

intended to apply for the land immediately east of the unnamed creek which was just west of his old cabin (1987 Field Report at 1). Kaiakokonok is also quoted in the field report as saying he did not fill out the original application and that he did not mark the parcel. His stated reason for not wanting the land as originally described in the 1960 allotment application was that the land is flooded by winter tides making it unusable. The field report concluded that BLM survey USS 6271 (apparently referring to a draft or unapproved version) correctly described the land which he intended to apply for but the sketch of the parcel on the topographic map incorrectly identified an unnamed creek forming the western boundary of the allotment

as the Big River which, in fact, was 1 mile west of the surveyed area. The survey plat, showing the western boundary of the allotment as the meandered shore of an unnamed creek, was accepted on January 14, 1988. USS 6271 was deemed to have been officially filed on March 4, 1988. ^{7/}

On May 2, 1988, BLM issued a notice of intent to relocate Kaiakokonok's allotment from the description as given on the 1960 allotment application to E½ of sec. 13, R. 68 W., and W½ of sec. 18, R. 67 W. The BLM notice recited that it was issued pursuant to section 905(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(c) (1988). The new land description as set forth in USS 6271 encompassed

a substantial part of the airstrip built by Phillips and included lands conveyed in IC 036 and IC 038. In response to the BLM notice, appellant filed a protest of the relocation of the allotment. Among other grounds, appellant noted the consistent prior descriptions (including at least one expressly approved by the allotment applicant) of the land in the allotment as located within secs. 13 and 14, the 1978 survey instructions which placed the allotment riparian to the Big River, the 1976 interim conveyance of the lands to appellant, and the subsequent construction by appellant of improvements including a runway on the land. ^{8/} By decision dated December 6, 1989, BLM accepted the relocation of Kaiakokonok's allotment application without any response to the protest and without any discussion or analysis of the basis for the decision. This appeal followed.

[1] Section 905(a) of ANILCA provides, subject to valid existing rights and certain exceptions, for the legislative approval of pending Native allotment applications on the 180th day following December 2, 1980. 43 U.S.C. § 1634(a) (1988). Further, section 905(c) of ANILCA recognizes the right of a Native allotment applicant to "amend the land description contained in his or her application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed." 43 U.S.C. § 1634(c) (1988). This

^{7/} The record before the Board does not disclose any explicit response by BLM to the protest of the survey prior to the final approval of the survey.

^{8/} Appellant also indicated in the protest that the BLM survey of the allotment across lands conveyed to appellant by IC in 1976 had previously been protested.

legislative approval is subject to certain exceptions, including where a Native corporation files a protest pursuant to section 905(a)(5) of ANILCA, 43 U.S.C. §1634(a)(5) (1988). The timely filing of a protest by a Native corporation precludes the legislative approval of an affected application and requires that the application be adjudicated according to the criteria of the Allotment Act. 43 U.S.C. § 1634(a)(5) (1988); Pedro Bay Corp., 88 IBLA 349 (1985). ^{9/} Appellant lodged a timely protest of A-052547, thereby precluding application of the automatic vesting provisions of ANILCA. In any event, the Board has held that section 905 of ANILCA

did not serve to legislatively approve Native allotments of lands such as those involved in the present dispute which had already been conveyed out of Federal ownership ^{10/} at the time of enactment of ANILCA (Dec. 2, 1980) in light of the major constitutional implications of a taking of property without due process of law to which a contrary holding would give rise. See, e.g., Heirs of Doreen Itta, 97 IBLA 261, 265 (1987).

[2] Since an interim conveyance is generally similar to a patent (the latter document requires final survey of the conveyed tract) in terms of conveying legal title to the land, the Department effectively loses jurisdiction to adjudicate conflicting interests in the lands so conveyed. Germania Iron Co. v. United States, 165 U.S. 379, 383 (1897); Kenai Natives Association, Inc., 87 IBLA 58, 61 (1985), overruled on other grounds, Matilda Titus, 92 IBLA 340, 345 (1986) (Department retains authority to determine the validity of a relinquishment in determining whether to recommend suit to cancel the subsequent conveyance); Chickaloon Moose Creek Native Association, Inc., 4 ANCAB 250, 274, 87 I.D. 219, 229 (1977). In the present context,

^{9/} Specifically, section 905(a)(5)(A) of ANILCA precludes legislative approval of an application and, instead, requires BLM to adjudicate a Native allotment application under the Allotment Act, where a Native corporation files a protest "stating that the applicant is not entitled to the land described in the allotment application, and said land is withdrawn for selection by the Corporation pursuant to the Alaska Native Claims Settlement Act." 43 U.S.C. § 1634(a)(5)(A) (1988). Similarly, adjudication under the Allotment Act is required where a protester alleges that the allotment applicant is not entitled to the land and the land is the site of improvements claimed by the protester. 43 U.S.C. § 1634(a)(5)(C) (1988).

^{10/} As noted above, the land in sec. 18 and the land in secs. 13 and 14 outside the original allotment description was embraced in an IC granted to appellant in 1976. The key to the legal significance of the term "interim conveyance" is found in the regulatory definition: "Interim conveyance as used in these regulations means the conveyance granting to the recipient legal title to unsurveyed lands, and containing all the reservations for easements, rights-of-way, or other interests in land, provided by the act or imposed on the land by applicable law, subject only to confirmation of the boundary descriptions after approval of the survey of the conveyed land." 43 CFR 2650.0-5(h) (emphasis in original). See also 43 U.S.C. § 1621(j) (1988).

where the land has already been conveyed, consideration of the amended Native allotment application pursuant to the Allotment Act can only be justified by the Secretary's special fiduciary responsibility to Native Americans, in this case, Native Alaskans (i.e., Indians, Aleuts, and Eskimos). See Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979). "The protection of Indian property rights is an area where the trust responsibility has its greatest force." Aguilar v. United States, 474 F. Supp. at 846 (citations omitted). We think this fiduciary responsibility properly extends to ascertaining the proper description of the lands for which an Alaskan Native intended to apply. ^{11/}

[3] However, we must recognize that the Department no longer has title and, hence, jurisdiction over the land embraced in the amended description. Accordingly, BLM has no authority to adjudicate title to the conveyed land. ^{12/} In this situation, it may be appropriate for BLM to review the application as amended to make a preliminary determination whether the applicant had a claim to an allotment for the lands at the time of conveyance which would warrant initiation of action to recover the land for the benefit of the applicant. See Heirs of Doreen Itta, 97 IBLA at 265.

^{11/} Appellant contends that 1989 relocation notice does not describe the land Kaiakokonok originally intended to claim (SOR at 15). Appellant argues that the description in the 1960 application is specific as to the location desired and that the parcel was staked with the starting point "placed firmly on the edge of a slough in front of my cabin" and thence west to the Big River. Appellant also points out that Kaiakokonok not only signed a mineral waiver on Feb. 15, 1961, containing the same land description as in the 1960 application, but also approved a sketch map in 1975 with the parcel located west from the cabin to the Big River indicating the land described in the 1960 application was what he intended to apply for. Appellant maintains that Kaiakokonok is improperly seeking "other land." In response, counsel for the estate of Kaiakokonok maintains that he did not prepare the description in the original application and that it did not describe the lands he intended to claim (Answer at 12).

^{12/} The allotment applicant cites Kootznoowoo, Inc. v. Johnson, 109 IBLA 128 (1989), and Matilda Titus, 92 IBLA 340 (1986), in support of its contention that BLM does not lack jurisdiction to adjudicate the Native allotment application regardless of the prior conveyance to appellant. We find these cases to be distinguishable from the case at issue. In Kootznoowoo, the conveyance to the Native corporation was effectuated by the same statute which required adjudication of the Native allotment application in conflict with the conveyance. In such a context, it would stand logic on its head to hold the Department was ousted of jurisdiction to adjudicate the conflicting Native allotment application. But see State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984). In the case now before the Board, the interim conveyance issued in 1976, substantially before passage of ANILCA or amendment of the allotment application. In Matilda Titus, the issue before the Board was the validity of the relinquishment of the Native allotment application rather than an adjudication of the applicant's entitlement to an allotment.

Any such preliminary inquiry would not constitute an adjudication of title to the land, as the land has been conveyed and, hence, BLM has no jurisdiction to adjudicate a claim of title. Thus, in one such case involving land previously conveyed, the Department rejected a request for a hearing and held:

After patent has issued, the purpose of inquiry and investigation is for information of the Department, whether proper ground exists to seek cancellation of the patent by suit. Such proceeding is not an adversary one, but is an administrative proceeding for information of the Department and may be conducted in such manner as suits its own convenience, and as is, in its own judgment, best calculated to attain its object. It determines no right of parties adversely claiming land no longer public, or property of the United States.

Heirs of C. H. Creciat, 40 L.D. 623, 624-25 (1912); quoted in State of Alaska, 45 IBLA 318, 326 (1980). Accordingly, there is no final BLM decision in this matter since BLM is not adjudicating title to the land at this stage. Hence, this matter is not yet ripe for review by the Board. If BLM persuades the Federal district court to order a reconveyance of the new land embraced in the amended Native allotment description, 13/ then an adjudication by BLM of the applicant's entitlement to an allotment of the new lands would necessarily be appealable to the Board. See 43 CFR 4.410.

It follows that the appeal of BLM's preliminary determination to accept the revised allotment description is properly dismissed as premature. To the extent that anything in Kenai Natives Associations, Inc., *supra* at 60-61, might be construed as authorizing an appeal from such preliminary determination, it is hereby overruled.

[4] There is, however, one aspect of the matter on appeal which is currently ripe for review. The BLM decision implicitly rejected appellant's protest of the survey (USS 6721) to the extent it embraced lands conveyed to appellant. The BLM decision provides no rationale or basis for rejecting the protest. The authority of the Department of the Interior to conduct surveys of the public lands is derived from various Federal statutes. See Mr. & Mrs. John Koopmans, 70 IBLA 75 (1983). Thus, it is provided by statute that: "The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining

13/ The availability of this judicial relief is subject to substantial doubt. As appellant has argued on appeal, the statute of limitations regarding decisions of the Secretary involving ANCSA conveyances provides that such decisions "shall not be subject to judicial review unless such action is initiated before a court of competent jurisdiction within two years after the day the Secretary's decision becomes final or December 2, 1980, whichever is later." 43 U.S.C. § 1632(a) (1988). However, we are unable to conclude that the statute of limitations bars BLM inquiry into whether to seek reconveyance as the Board has held that a statute of limitations may bar judicial relief but does not bar administrative determinations. See Forest Oil Corp., 111 IBLA 284, 286-87 (1989).

to the surveying and sale of the public lands of the United States * * *." 43 U.S.C. § 2 (1988). We know of no authority for the BLM to conduct a survey of private lands to which the United States holds no title. See Titus O. Nashookpuk, Sr., 99 IBLA 213 (1987). Accordingly, the decision of BLM is reversed in so far as it denied appellant's protest of the survey to the extent it embraced land previously conveyed to appellant, and the survey is suspended pending ultimate resolution of matters involved herein.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed in part and the appeal is dismissed in part.

C. Randall Grant, Jr.
Administrative Judge

I concur:

James L. Burski
Administrative Judge

