

Appeal from a decision of the Alaska State Office, Bureau of Land Management, finding a Native allotment was correctly surveyed. AA-7601.

Set aside and referred to hearing.

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

Sec. 905(b) of ANILCA authorizes the Secretary of the Interior to adjust land descriptions to eliminate conflicts between two Native allotment applications by altering the allotment boundaries to achieve an adjustment that is consistent with prior use of the allotted land. Although the statute encourages Departmental implementation of adjustments proposed by the parties concerned, where they have attempted but failed to resolve their conflicting claims, a hearing will be ordered to resolve the dispute.

APPEARANCES: Gregory Peters, Esq., Alaska Legal Services Corporation, Dillingham, Alaska, for appellant; Peter H. Nelson, pro se, intervenor.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Anna S. Moxie has appealed from a June 14, 1990, decision of the Alaska State Office, Bureau of Land Management (BLM), finding that her Native allotment AA-7601 was correctly surveyed and properly described as lots 2 and 4, U.S. Survey No. (USS) 4933, Alaska.

This appeal stems from a conflict between two Native allotment applications embracing the same land. On September 7, 1960, the Bureau of Indian Affairs (BIA) filed Native allotment application A-053199 on behalf of Peter H. Nelson, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (Native Allotment Act), repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), subject to applications then pending. Nelson has requested and is allowed to intervene in this appeal because his Native allotment application includes the land in dispute.

Nelson claimed use and occupancy of approximately 160 acres adjacent to the southern shore of Lake Nunavaugaluk (Snake Lake) and the eastern bank of the Snake River in T. 12 S., R. 57 W., Seward Meridian, Alaska, commencing in 1959. In 1965, Nelson amended his application, and in

his evidence of use and occupancy filed on August 17, 1966, he claimed two parcels: 155 acres of the land originally applied for (now identified as parcel B) and an additional 5-acre parcel on the north shore of Lake Nunavaugaluk (now identified as parcel A). He indicated that, while his occupancy of the land had begun in 1959, he had used the lands for hunting, trapping, fishing, and berry picking since 1948. He listed several cabins and fish racks built between 1961 and 1965 as improvements on the land.

On February 20, 1969, BLM officially filed a plat of survey that designated Nelson's original claim as lot 1, USS 4933. Nelson entered into a lease with the State of Alaska, Department of Fish and Game, on February 7, 1974, permitting the State to use the cabins and 1.9 acres of land located at the outlet of Lake Nunavaugaluk along the left bank of the Snake River on parcel B.

On April 14, 1972, BIA filed Native allotment application AA-7601 on behalf of Moxie. The application, which was dated May 11, 1971, described the requested lands as south and west of the river and lake boundary in the SW $\frac{1}{4}$ sec. 9, T. 12 S., R. 57 W., Seward Meridian. Moxie claimed use and occupancy of the land from March 1940 for hunting, fishing, trapping, and berry picking, and identified a cabin built in 1935 as an improvement on the land.

On September 12, 1975, she accompanied BLM employees on their field investigation of her application. According to the March 1976 report prepared after the examination, Moxie stated during the inspection that the lands described in her application were not the lands that she had used and occupied. She explained that she had used and wanted the lands on the other side of the river, but had been told that because Nelson had filed for those lands, she could not also apply for them. Since no evidence of use was found on the parcel described in her application, the report concluded that Moxie had not met the requirements of the Native Allotment Act for that parcel, but suggested that her claim for the land on the east side of the river be analyzed in concert with Nelson's application. On June 21, 1977, Alaska Legal Services Corporation requested permission to amend Moxie's Native allotment application and protested Nelson's application to the extent it conflicted with Moxie's ancestral lands.

Although BLM arranged for the parties to meet at the mouth of the Snake River on Lake Nunavaugaluk on August 10, 1977, to attempt to resolve the conflict between the two applications, this meeting was cancelled when Moxie's son was unable to attend. Further efforts to resolve the controversy culminated when Nelson agreed to limit his parcel B to the 5-acre tract right around his cabin at the south end of Snake Lake, which excluded the area where Moxie's cabins and graves were located, and to expand his parcel A from 5 acres to 155 acres at the north end of the lake. In a statement dated April 3, 1978, Moxie and her daughter signified that they understood that Nelson only wanted 5 acres around his cabin at the south end of the lake "in the southwest corner of U.S. Survey 4933," leaving her with an approximately 155-acre allotment, and agreed to this solution to the conflict between the two allotment applications.

BLM confirmed this conflict resolution by letter dated April 11, 1978, and requested that Nelson submit a signed statement indicating that he wanted 5 acres at the south end of the lake and 155 acres at the north of the lake along with a sketch map for each parcel. On April 24, 1978, Nelson responded, stating that he "would like to have 5 acres of land at the lower end of Snake lake around my cabin there." He did not, however, describe the retained 5-acre parcel as being situated in the southwest corner of lot 1, USS 4933. To implement the apparent agreement of the parties, BLM amended the descriptions of both Native allotment parcels on November 15, 1978, and on April 10, 1981, both applications were replotted on the master title plats. Both the amended descriptions and the revised plats placed Nelson's parcel B in the southwest corner of lot 1, USS 4933. BIA approved the conflict resolution on November 3, 1983.

BLM conducted a field examination of Nelson's parcel B accompanied by both Nelson and his wife. In the June 30, 1986, field report prepared after the inspection, the examiner found that the parcel was situated at the confluence of Lake Nunavaugaluk and the Snake River, one-half mile north of the parcel identified in the 1978 conflict resolution. He recited that Nelson claimed to have trapped in the area from 1948 to 1953 and to have built cabins on the parcel in 1958 which he had later leased to the State of Alaska until 1984. The examiner observed that two single story cabins had been constructed on the parcel, that the parcel exhibited signs of use, that the resources necessary to support the claimed uses existed on the parcel, and that Nelson was familiar with the area. He stated that the remains of other cabins and graves were located near the parcel but were not claimed by Nelson. Accordingly, he concluded that Nelson had met the requirements of the Native Allotment Act for parcel B, and provided a metes and bounds description of that parcel which conformed to the area examined. On August 6 and December 2, 1986, BLM requested a survey of parcel B based on the examiner's description, which included the two cabins at the confluence of the lake and river. By decision dated March 12, 1987, BLM held Moxie's Native allotment application for approval. The decision recited that, although the allotment had been surveyed, an additional survey would be necessary to exclude the 5 acres included in Nelson's parcel B. A plat of survey subdividing original USS 4933 was officially filed on October 12, 1989. Nelson's parcel B was identified as lot 3, USS 4933, containing 4.95 acres and was located at the confluence of Lake Nunavaugaluk and the Snake River within sec. 9, T. 12 S., R. 57 W., Seward Meridian. The remaining acreage was designated as lot 4, USS 4933, containing 154.92 acres.

Since a conflict still existed between Moxie and Nelson over the cabins sited on the 5-acre tract now described as lot 3, USS 4933, the Bristol Bay Native Association (BBNA), BIA's contractor in the area, arranged a meeting between Moxie and Nelson on February 23, 1990, to resolve the issue. Two BBNA representatives, one of whom spoke Yupik, Moxie's Native language, also attended the meeting. According to a memorandum by Dugan Nielson dated February 23, 1990, documenting the meeting, following a discussion of the history of the area, and after assurances were given to Moxie that she would retain 155 acres of land and an explanation of the issues was provided in both English and Yupik, Moxie and Nelson agreed that Nelson would own the

cabins and the 5 acres of land at the outlet of the lake. Both Moxie and Nelson signed a map with a depiction of the cabins sited on the 5-acre tract, agreeing that the parcel and cabins so depicted belonged to Nelson.

On March 21, 1990, BLM notified Moxie that the lands within her Native allotment had been surveyed and were now described as lots 2 and 4, USS 4933, Alaska, situated on the southerly shore of Lake Nunavaugaluk and the left bank of the Snake River, containing 154.93 acres as shown on the plat of survey officially filed on October 12, 1989. BLM requested that Moxie give notice within 60 days if the surveyed lands did not contain all the improvements originally intended to be on the parcel. On April 5, 1990, Moxie responded by asserting that the survey did not include all of her improvements, and stating that she considered the February 23, 1990, conflict resolution to be invalid because it did not represent the 5-acre area she intended to relinquish to Nelson. Two of Moxie's children also filed objections to the February 23, 1990, conflict resolution.

The June 14, 1990, BLM decision here under review found that Moxie's Native allotment AA-7601 was correctly surveyed and properly described as lots 2 and 4, USS 4933, Alaska. BLM based the decision on the February 23, 1990, conflict resolution and the supplemental survey plat depicting the subdivision of the original USS 4933 signed by both Moxie and Nelson. It was determined that both Moxie and Nelson had agreed in writing to the location of Nelson's 5-acre parcel and that Nelson would have ownership of the cabins located on those 5 acres, now described as lot 3, USS 4933. Citing section 905(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(b) (1988), which authorized the Secretary of the Interior to adjust descriptions to eliminate conflicts between Native allotment applications and to implement adjustments proposed by the parties to the extent feasible, BLM concluded that the conflict resolution signed by the parties on February 23, 1990, constituted such an agreed upon adjustment and rejected Moxie's request to amend the description of her parcel.

On appeal, Moxie contends that BLM erroneously approved the survey based on the February 23, 1990, conflict resolution because that resolution was inconsistent with the relinquishment she signed in 1978. She asserts that, as her April 3, 1978, statement explains, her consistent intent has been to retain all of the original USS 4933 except for a 5-acre parcel in the southwest corner of USS 4933 containing Nelson's improvements. She maintains that she thought the parcel being discussed at the February 23, 1990, meeting, was land in the southwest corner of the allotment, not land near the mouth of the river where her family had once lived, her family grave site is situated, and her improvements, including cabins given her by the State, are located. Moxie insists that she would never have agreed to give Nelson the land around her cabins where her children were born and her family is buried. Moxie argues that, at a minimum, she is entitled to an evidentiary hearing on the factual issues presented by this appeal.

In response, Nelson denies that lot 3, USS 4933, contains any of Moxie's improvements. He acknowledges that Moxie lived on the land prior to 1946 when she and her family moved away from the area so that her children could attend school, but asserts that the remains of the cabins

her family occupied and the grave site are outside the boundaries of lot 3. He explains that in 1957 he built a log cabin in the southwest corner of USS 4933, but that because he was flooded out in that location, he constructed a wood and plywood cabin (frame house), as well as a warehouse, at the confluence of Lake Nunavaugaluk and the Snake River on what is now lot 3 in 1958 and 1959. He states that when he agreed in 1978 to amend parcel B of his Native allotment application to accommodate Moxie's claim, he intended to retain the cabins and lands now described as lot 3, not the land around his cabin in the southwest corner of USS 4933. He avers that he was unaware of any controversy over the location of his parcel B since he did not receive copies of Moxie's April 3, 1978, statement or BLM's revised master plat.

Nelson challenges Moxie's claim to the cabins located on lot 3. He asserts that he allowed the State of Alaska to use his land and cabins during the summer months when he went commercial fishing, initially pursuant to a verbal agreement and later in accordance with a written lease. Nelson maintains that, although Moxie contends these cabins were given to her by the State, they are actually his property, and points out that he has continued to use and improve the cabins and the land. He concludes that since Moxie neither built nor occupied these cabins, she has no right to identify them as her improvements. Because lot 3 does not contain any of Moxie's improvements, Nelson argues that Moxie's allotment was properly surveyed.

[1] Section 905(b) of ANILCA, 43 U.S.C. § 1634(b) (1988), provides:

Where a conflict between two or more allotment applications exists due to overlapping land descriptions, the Secretary shall adjust the descriptions to eliminate conflicts, and in so doing, consistent with other existing rights, if any, may expand or alter the applied-for allotment boundaries or increase or decrease acreage in one or more of the allotment applications to achieve an adjustment which, to the extent practicable, is consistent with prior use of the allotted land and is beneficial to the affected parties: Provided, That the Secretary shall, to the extent feasible, implement an adjustment proposed by the affected parties.

BLM concluded that Moxie's allotment was properly surveyed because the February 23, 1990, conflict resolution was found to be an "adjustment proposed by the affected parties," which should be implemented. The record before us reveals, however, that despite BLM's and BIA's best efforts to resolve the controversy by consensus, Nelson and Moxie have been unable to agree over the ownership of lot 3, USS 4933. The parties' failure to agree to an acceptable adjustment does not end this matter. Even in the absence of such an agreement, section 905(b) of ANILCA, 43 U.S.C. § 1634(b) (1988), directs the Secretary to adjust the descriptions of the conflicting allotment applications to achieve an adjustment consistent with the prior use of the disputed acreage. Because both Nelson and Moxie claim prior use and occupancy of lot 3 and have raised issues of fact that can best be decided

at a fact-finding hearing, the dispute over who is entitled to the parcel should be resolved at an evidentiary hearing. See generally John H. Peterson, 125 IBLA 267, 270 (1993).

Accordingly, we set aside BLM's June 14, 1990, decision, and pursuant to 43 CFR 4.415 refer the case for a hearing and a decision by an Administrative Law Judge. Moxie, as the party challenging the October 12, 1989, plat of survey, has the ultimate burden of proving that her allotment was incorrectly surveyed by establishing that her prior use and occupancy of lot 3 entitles her to the inclusion of that lot within her allotment because it exceeded Nelson's use and occupancy. See United States v. Rastopsoff, 124 IBLA 294, 300 (1992). At hearing, the fact-finder may properly consider whether her alleged cessation of use and occupancy of the parcel in 1946 has a bearing on her entitlement to lot 3. See United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981). Nelson will be recognized as a party to this proceeding and allowed to offer evidence supporting his claim to lot 3.

The decision by the Administrative Law Judge will be subject to appeal to the Board by any adversely affected party. In the absence of a timely appeal, the Administrative Law Judge's decision will constitute the final decision of the Department.

Therefore, 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 set aside and the case is referred to the Hearings Division, Office of Hearings and Appeals, for further action consistent herewith.

Franklin D. Arness
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge