HEIRS OF OKALENA WASSILLIE

175 IBLA 355 Decided August 20, 2008

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

HEIRS OF OKALENA WASSILLIE

IBLA 2008-76 Decided August 20, 2008

Appeal from a decision of the Alaska State Office, Bureau of Land Management denying a request to add acreage to a Native allotment for which a certificate had been issued. AA-7787.

Affirmed.

1. Alaska: Native Allotments--Alaska: Native Allotments--Applications and Entries

   Where a Native allotment applicant, who was present at the field investigation to identify the land she claimed, which revealed no evidence of her use and occupancy, subsequently submitted three witness statements attesting to her use of only 120 acres, which appellant does not challenge or counter with affidavits or declarations attesting to the applicant's use of 160 acres, there is no basis for now impeaching or rejecting those contemporaneous statements of the witnesses' knowledge of the applicant's use of 120 acres.

2. Alaska: Native Allotments--Alaska: Native Allotments--Applications and Entries

   When a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the case was considered on review, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice. When in 35 years neither the Native allotment applicant nor anyone on her behalf ever questioned the allotment application, the

> fractional sections described in that application, the survey, or the size of the 120-acre parcel allotted to her, the decisions culminating in issuance of the patent are administratively final for the Department.

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant; Joseph D. Darnell, Esq., Office of the Solicitor, Alaska Region, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Vera Wassillie, an heir of Okalena Wassillie (the Heir), has appealed the December 31, 2007, decision of the Alaska State Office, Bureau of Land Management (BLM), denying a "Request for Reinstatement of 39.40 Acres Previously Deducted From Allotment in Error" (Request) filed by the Bristol Bay Native Association (BBNA) on Okalena Wassillie's behalf.[1]

Background

Okalena Wassillie applied for a Native allotment pursuant to the Native Allotment Act of May 17, 1906, 43 U.S.C. § 270-1 to 270-3 (1970), repealed with a savings provision by section 18(a) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617(a) (2000). Her application was received by BLM on April 20, 1972. The typewritten application described the land sought as the fractional W½NW¼ protracted sec. 25, and the fractional E½NE¼ protracted sec. 26, southwesterly of Nushagak River, T. 4 S., R. 48 W., Seward Meridian (SM), as shown on a copy of U.S. Geological Survey (USGS) Quadrangle Map Dillingham D-4, which was incorporated as part of the application. No acreage figure was stated. Wassillie signed her application, which had been duly certified by the Bureau of Indian Affairs (BIA) Realty Specialist, on February 3, 1971.

A field investigation followed on July 27, 1974. Wassillie and a guide and interpreter accompanied the BLM Realty Specialist. On June 2, 1975, the Realty Specialist issued his report (Field Report) in which the parcel is described as "120 acres more or less." The Realty Specialist concluded that Wassillie had not made substantial use and occupancy of the land, which was the abandoned site of Koliganek Village. The Area Manager concurred in the Realty Specialist's findings and recommendations. Wassillie was notified of the findings by letter dated January

[1] BLM styled its decision "Request for Additional Acreage Denied."

19, 1976, which she received on January 22, 1976. That letter allowed Wassillie 60 days in which to submit additional information to support her claim. On February 10, 1976, two neighbors and a relative submitted witness statements in support of Wassillie's application, and each attested that the parcel she sought was 120 acres in secs. 25 and 26, in T. 4 S., R. 48 W., SM. By letter dated April 12, 1976, BLM notified Wassillie that, in light of the information submitted, it had determined that she had used the land for which she had applied.

By memorandum dated April 12, 1976, a survey was requested. The memorandum stated that the record "indicated that the applicant has used the land in a consistent manner," and provided the metes and bounds description that appeared in the Field Report, which described 120 acres, more or less. A case file record dated January 3, 1979, states that the protracted township differed from the USGS Quadrangle Map in that "water doesn't match with the allotment shoreline." U.S. Survey No. 6067 was officially filed on April 12, 1982, and Wassillie's lands were conformed to the survey as Lots 1 and 2 consisting of 120 and .60 acres, respectively. Wassillie received notice of the completed survey on August 22, 1983. The notification stated that "the surveyed description of your claim is . . . U.S. Survey No. 6067 . . . on the right bank of the Nuyakuk River.[[2]] The surveyed area equals 120.60 acres." Wassillie was informed that she had 30 days to respond, and if she did not, BLM would "consider the survey correct." She did not respond to the notice. The Certificate of Allotment for 120.60 acres was issued on September 29, 1983, and Patent No. 50-84-0239 was issued on February 3, 1984. Wassillie died on December 16, 1999.

On May 21, 2007, BLM received BBNA's Request. In support, BBNA stated the following:

> The BIA file for Mrs. Wassillie contains Mrs. Wassillie's original application which includes a legal description stating "See Attached Map." A copy of this application is attached hereto as Exhibit A. The map attached to this application, found at page 4 of Exhibit A, shows Mrs. Wassillie applied for an allotment consisting of "approx. 160 acres."

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[2] The Nuyakuk River appears to be a tributary of the Nushagak River. *See* USGS Quadrangle Map Dillingham D-4. Wassillie's parcel is located south and slightly west of the confluence of the two river bodies, so that it is equally accurate to describe the land as on the right bank of the Nuyakuk River as the Field Report did, or southwesterly of the Nushagak River, as stated in the typed allotment application filed with BLM in 1972.

> The BIA file also contains a typed application for Mrs. Wassillie's allotment. A copy of that application is attached hereto as Exhibit B. The typed legal description on this application does not contain the amount of acreage Mrs. Wassillie claimed for her allotment. Similarly, the map attached to the typed application which is found at page 3 of Exhibit B shows her allotment but no acreage is shown. It must be noted that BIA's file also contains two blank application forms Mrs. Wassillie signed on February 3, 1971[,] which is the same date she signed the original hand-written application (Exhibit A) and the typed application (Exhibit B). As evidenced by these blank signed forms, it was routine for BIA to have allotment applicants sign numerous blank application forms at the time the applicants provided the information for the original application so that BIA could type the information from the hand-written applications onto an application form that was then submitted to BLM. In most, if not all cases, the applicants never saw the typed application that BIA submitted to BLM and thus, were unaware of any errors or omissions that may have been on the typed applications.

Request at 1-2.[3] BBNA concluded that, due to BIA's error, the allotment was reduced by 39.40 acres. BLM processed the Request as a "request for reinstatement or reconstruction of an application." *See* letters from Alaska State Office to Land Title Company of Alaska dated Sept. 11, 2007, and to BBNA dated Nov. 26, 2007.

On December 31, 2007, BLM denied BBNA's Request. BLM acknowledged that the application did not state an acreage figure, because the land claimed was described as "a *fractional* part of the W½NW¼ of sec. 25, and *fractional* part of the E½NE¼ of sec. 26." Decision at 2 (emphasis in the original). BLM explained that "[a] half of a quarter section normally contains 80 acres, therefore[,] when fractional is used to describe a half of a quarter section it usually means that it is for less acreage th[a]n 80 acres, as in this case." *Id*.[4] BLM stated that the survey conformed

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[3] The two blank signed application forms were not submitted by the BBNA or the Heir.

[4] According to Black's Law Dictionary (Rev. 4th Ed. 1968), *fractional*

> as applied to tracts of lands, particularly townships, sections, quarter sections, and other divisions according to the government survey . . . means that the exterior boundaries are laid down to include the whole of such a division . . . , but that the tract in question does not measure

(continued...)

to the sketch shown on the map that was attached to the application, and that survey determined that the parcel comprised 120.60 acres.

Arguments of the Parties

On appeal, the Heir argues that BLM "effectively reject[ed] a substantial portion of Mrs. Wassillie's allotment without affording Mrs. Wassillie's heirs an opportunity for a hearing." Statement of Reasons (SOR) at 5. She contends that this case presents the situation addressed in *Matilda S. Johnson*, 129 IBLA 82 (1994), and *George Hoffman, Sr.*, 134 IBLA 361 (1996), and that "if the Department of the Interior had issued a notice to Mrs. Wassillie informing her of the reduction with an explanation, it is possible that someone would have protested or tried to correct the eliminated 39.40 acres." SOR at 8. The Heir further claims that BLM erred in failing to provide Wassillie a notice of rejection and offer her an opportunity for a hearing under *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976).

BLM responds that Wassillie received the land for which she applied and intended to apply, and that she never objected to the acreage. BLM argues that the request to add acreage is barred by the doctrine of administrative finality. It further disputes the Heir's assertion that the facts of this appeal are identical to those of *Matilda S. Johnson*.

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[4] (...continued)

> up to the full extent or include the whole acreage, because a portion of it is cut off by an overlapping survey, a river or lake, or some other external interference.

See also the 1973 Manual of Surveying Instructions, section 3-88, Subdivision of Fractional Sections ("where opposite corresponding quarter-section corners have not been or cannot be fixed, the subdivision of section lines shall be ascertained by running [lines] from the established corners . . . to the water course, reservation line, or other boundary of such fractional section"); section 3-90, Subdivision of Fractional Quarter Sections ("subdivisional lines . . . will be run from properly established quarter-quarter- or sixteenth-section corners . . . to the lake, water-course, reservation, or other irregular boundary which renders such sections fractional"); sections 3-81 and 3-82 (Subdivision of Fractional Sections by Protraction); and sections 3-97 to 3-99 (Subdivision of Fractional Townships).

Analysis

The Heir's claim is founded solely on a notation on the sketch submitted as part of Exhibit A of BBNA's Request, a handwritten version of the application filed with BLM that Wassillie signed and dated on February 3, 1971, which has no BIA certification.[5] "See Attached Map" was written in the part of the application form calling for the description of the land. The third page of Exhibit A is an undated simple sketch of a line representing Tps. 4 S. and 5 S., a depiction of the parcel with the handwritten notation "T 4 S, R 48 W, sec. 25, 26," an indication of the river at the north boundary of the parcel, and the handwritten notation, in script, "approx 160 acres" just below the figure representing the parcel. In the upper left corner of the page, "Dillingham D-3" is noted. Wassillie's misspelled name is written in the bottom left corner of the sheet.[6] From this, the Heir concludes that her decedent intended to submit an application that described 160 acres, presumably contiguous, and that the Department "arbitrarily reduce[d] the amount of acreage claimed in an allotment application" and "arbitrarily refuse[d] to correct its mistake" when the "reduction" was discovered. SOR at 2.

The record presents one additional sliver of evidence the Heir overlooked: One of the four photographs taken during the field investigation shows Wassillie beside her allotment claim marker, a large wooden sign showing her name, the application serial number, and the note "160 acres."

Exhibit A also includes a second page that the Heir has not addressed. That page is an undated form without a caption, with Wassillie's name written on it, which identifies the land as "fract. W½NW¼ sec. 25 and fract. E½NE¼ sec. 26 southwesterly of Nushagak River" followed by what appears to be the word "all," and then the Township, Range, and Meridian. "Dillingham D-4" was written on the line requesting identification of the relevant Quadrangle or Protraction Sheet, and a box for "Excess Shoreline" is checked "yes." The last line shows the surname of the processor, "Riding."

Except for the notation "approx 160 acres" on the sketch and the error in identifying the Dillingham Quadrangle Map as D-3 instead of D-4, the typed application BLM received and acted on is the original of the Heir's Exhibit B, and it otherwise conforms to the documentation offered as the Heir's Exhibit A. More

[5] The two-sided Native allotment application form is the first page of Exhibit A.
[6] The sketch and notations, like the handwritten application, were made or completed by someone other than Wassillie.

fundamentally, if Exhibit A represents what Wassillie intended to file as her allotment application, as the Heir argues, it shows recognition that the land she sought was something less than the full 160 acres authorized by the Native Allotment Act. Moreover, Wassillie provided the land description for her application because, according to the Field Report of the 1974 field examination, "the applicant identified the claimed lands which had been described correctly on the application." Field Report at 2.

[1] The Field Report described in chains a parcel containing about 120 acres. Wassillie accompanied the field examiner with a guide and interpreter "to insure that no evidence of occupancy was overlooked." *Id.* at 1. A 39.40-acre "error" that reduced the size of the parcel presumably would have been noticed and pointed out by Wassillie as she and the Realty Specialist walked the ground of her claim. The field investigation revealed no visible evidence of her use and occupancy and, accordingly, BLM held the application for rejection, pending receipt of additional information. In response to the lack of observable evidence of use and occupancy, on January 26, 1976, Wassillie's two neighbors and a relative submitted their witness statements attesting to their personal knowledge of Wassillie's use and occupancy of the parcel claimed, and each averred, under penalty of perjury, that Wassillie's parcel embraced "acres + 120." The Heir does not challenge those averments, the truth of which provided the basis for approving Wassillie's allotment where previously there had been no basis at all. Nor has the Heir offered countering affidavits or declarations attesting to her use of 160 acres that would provide a basis for impeaching or rejecting the contemporaneous statements of the witnesses' knowledge of the applicant's use of only 120 acres. In short, while Wassillie perhaps may have hoped that the actual acreage would be closer to 160 acres than it proved to be, we have no doubt that she intended to apply for the two sections rendered fractional by the presence of the Nushagak River described in her application.

Matilda S. Johnson, 129 IBLA 82, and *George Hoffman, Sr.*, 134 IBLA 361, do not change our conclusion. In those cases, BLM took action that reduced the acreage described in the allotment applications for which the appellants had intended to apply. In each case, the applicants had agreed to an adjustment of boundaries, but neither had intended to reduce the total acreage sought or to relinquish any part of their respective allotments. *Matilda S. Johnson*, 129 IBLA at 84; *George Hoffman, Sr.*, 134 IBLA at 364. In both cases, BLM argued that the applicants' failure to respond to notices regarding the changed acreage resulted in a waiver of the right to timely request an amendment of the allotment applications. *Id.* at 85; *id.* at 365. As the Board's analysis makes clear, those cases stand for the basic proposition that BLM is required to adjudicate the application the applicant intended to submit.

[2] Here, in contrast, there is no ambiguity regarding the fractional lands described in Wassillie's application. When a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the case was considered on review, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice. *Heir of Jack Moore*, 174 IBLA 45, 53 (2008); *Peter Blair*, 166 IBLA 120, 125 n.3 (2005), and cases cited. In the 35 years since Wassillie filed her application, neither Wassillie nor anyone on her behalf ever questioned it, the survey, the size of the land allotted to her, or the patent. The decisions culminating in issuance of the patent on February 3, 1984, are thus administratively final for the Department. The two shreds of evidence reflected by the handwritten notation on the map sketch and on the allotment marker are inadequate to overcome the greater weight and consistency of the record as a whole, and do not rise to a compelling legal or equitable reason that would lead us to reconsider or suspend the administrative finality that otherwise attends the Department's decisions. BLM properly rejected the Heir's request to add acreage to the application.

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

/s/
T. Britt Price
Administrative Judge

I concur:

/s/
Sara B. Greenberg
Administrative Judge