

ROY G. DENNY

IBLA 78-42

Decided March 27, 1980

Appeal from a decision of the Fairbanks Alaska District Office, Bureau of Land Management, holding that 30 acres of appellant's Native allotment application within U.S. Survey 4088, is patented land and not under the jurisdiction of the Bureau of Land Management and is hereby rejected.

Set aside and remanded.

1. Patents of Public Lands: Effect

In treating cases similar in all respects to those encountered by the Court in Aguilar v. United States, 474 F. Supp. 840 (1979), the Board will conform to the District Court's directions in that case.

APPEARANCES: Roy G. Denny, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Roy G. Denny has appealed to this Board from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), dated August 24, 1977, which rejected in part his Native allotment application for parcel "A," sec. 32, T. 19 N., R. 11 E., Copper River meridian, Alaska. The stated reason for rejection in part was that 30 acres of the subject land is land conveyed by patent No. 50-68-0242, and therefore, is not subject to disposal under the public land laws.

The record shows that appellant claimed use of parcel "A" in his application beginning June 1960 to December 1970. Claimed use is for hunting and trapping. The State of Alaska received patent to a portion of this land by patent No. 50-68-0242.

The BLM conducted a field examination of the land on September 14, 1974. The examiner found that based on the statements of other local people, recognizing the applicant's use area, the

applicant could be considered as having potentially exclusive use of the tract for at least 5 years. The examination confirmed the location of parcel "A."

In August 1977 the Fairbanks District Office informed appellant that its records showed that part of the land within parcel "A" was patented land not subject to disposal under the public land laws. Appellant was informed that the northern 10 acres of parcel "A" was not within the patent and was available for disposal. On September 14, 1977, appellant filed notice of appeal.

Appellant has not filed a statement of reasons. ^{1/} However, a review of the record has identified the following issues of fact and law: (1) the extent of the Native's use and occupancy; (2) whether his prior use and occupancy entitles him to the land; (3) whether his prior use and occupancy prevented the land from being vacant, unappropriated, and unreserved at the time of its selection under the Alaska Statehood Act; and (4) whether the Department should seek cancellation of the patent if it was erroneously issued to the State.

In 1906 Congress passed the Alaska Native Allotment Act, which allowed the Natives of Alaska to perfect title to the land occupied and used by them. United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1015 (D. Alaska 1977). See H.R. Rep. No. 3295, 59th Cong., 1st Sess. (1906). The Act authorized the Secretary "in his discretion and under rules as he may prescribe" (section 270-1) to allot up to 160 acres of vacant, unappropriated, and unreserved land in Alaska to any qualified Alaska native. To qualify, the native applicant must make proof satisfactory to the Secretary of substantially continuous use and occupancy, which is at least potentially exclusive of others, over a minimum term of 5 years.

The legal precedents established by IBLA in Native allotment cases, where public land has been conveyed, or a patent has been issued by the United States, came under judicial scrutiny in Aguilar, et al. v. United States, 474 F. Supp. 840 (D. Alaska 1979). Aguilar was initiated by certain Native Alaskans, on their own behalf and on the behalf of all other Natives similarly situated, who asserted or could have asserted entitlement to allotments of public land pursuant to the Alaska Native Allotment Act of May 17, 1906, supra. The Alaska Natives brought an action challenging the Department of the Interior's rejection of their allotment applications without a hearing on grounds that the subject land had been conveyed to the State of Alaska. The

^{1/} The relaxed procedural rules relating to the filing of statements of reasons for appeal in Native allotment cases were enunciated in the Chief Administrative Judge's letter of September 24, 1975, extended in the order of November 26, 1976, IBLA 76-715, and revoked in futuro, August 16, 1979, IBLA 78-424.

District Court held that: (1) use and occupancy prior to State selection gave the native claimants "preference right" under Alaska Native Allotment Act; (2) the fact that plaintiffs did not file an application for allotment until after the land was selected by the State did not eliminate the "preference right" protection given their prior use and occupancy; (3) Government's decision not to recover the land before it held a hearing to determine the facts was arbitrary and capricious; (4) if defendant had mistakenly or wrongfully conveyed land to the State of Alaska to which plaintiff had a superior claim, it was the responsibility of the defendant to recover that land.

The Court certified a class under Fed. R. Civ. P. 23(a) and (b)(2) as follows:

All Alaska Native Allotment applicants each of whom commenced use of the land for which he or she applied prior to the filing with the Department of Interior of an application for conveyance of the same land to the State of Alaska and whose allotment application was or will be rejected, in whole or part, because the land described therein was conveyed to the State of Alaska prior to adjudication of the allotment application.

The Court then ordered, inter alia, "THAT the plaintiffs' cases are remanded to the Department of the Interior with instructions to adjudicate their substantive claims of entitlement pursuant to all applicable procedures" (Emphasis added). The author hereof remains firmly of the opinion that the Court in so holding in Aguilar, was unaware of the Supreme Court's ruling in Germania Iron Co. v. United States, 165 U.S. 379 (1897), that once title has been conveyed out of the United States: "[T]he effect of such issue is to transfer the legal title and remove from the jurisdiction of the land department the inquiry into and consideration of such disputed questions of fact." [Emphasis added.] Id. at 383.

[t]hat when through inadvertence and mistake a patent has been wrongfully issued, by which the jurisdiction of the land department over these disputed questions of fact is lost, a court of equity may rightfully interfere and restore such lost jurisdiction, to do which it becomes necessary to cancel the patent. [Emphasis added.]

Id. at 385. Other cases directly relying thereon include Southern Pacific R. Co. v. United States, 51 F.2d 873 (9th Cir. 1931); Sage v. United States, 140 F. 65 (8th Cir. 1905); United States v. Lavenson, 206 F. 755 (D. Wash. 1913). See discussion of this holding in State of Alaska, 45 IBLA 318 (1980).

As in Aguilar the District Court did not cancel the State's patent(s), the question arises whether this Department retains jurisdiction to implement the Court's order "to adjudicate their substantive

claims of entitlement pursuant to all applicable procedures." Perhaps this Department should seek clarification of this question before more cases of this type arise. Nevertheless, no appeal was taken by the United States or the State of Alaska from the Court's decision in Aguilar, and it remains the law of the case in that judicial district.

Accordingly, since appellant Roy G. Denny is apparently a member of the class as certified by the District Court, we set aside the decision of the Bureau of Land Management, Fairbanks, Alaska, District Office, and remand the case for a determination of appellant's rights to the 30 acres of patented land in parcel "A", consistent with the Court's ruling in Aguilar, supra. BLM is instructed to advise the State of Alaska of the proceeding, and to notify any third parties that may be affected.

Where the BLM determines that appellant is entitled to the patented land, it will recommend to the Solicitor that he request the Attorney General to initiate suit to cancel the patent. Dorothy H. Marsh, 9 IBLA 113 (1973).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, the decision appealed from is set aside and the case remanded for further proceedings in accordance with Aguilar v. United States, supra.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Frederick Fishman
Administrative Judge

