

STATE OF ALASKA
MARY FRANCES DeHART

IBLA 84-197

Decided August 6, 1984

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application AA-7550.

Affirmed.

1. Administrative Procedure: Administrative Review -- Appeals -- Board of Land Appeals -- Rules of Practice: Appeals: Generally

Where the resolution of an appeal depends on the determination of disputed issues of fact, the Board of Land Appeals will often refer the case for an evidentiary hearing on the record before an administrative law judge. However, when the administrative record appears to include nearly all of the available evidence, and affords an adequate basis for decision, and other circumstances indicate that an oral hearing would be unlikely to contribute substantially to the existing record, the Board may determine the facts and decide the appeal on the basis of the record before it.

2. Alaska: Native Allotments

Where a trail was cut across a tract of land by the father of a Native allotment applicant a few years prior to her occupancy of the tract, but was used only by her father's hunting clients and perhaps one or two other hunting parties each hunting season, such use does not constitute either occupancy or appropriation of the land such as would bar the applicant's claim to it as "vacant and unappropriated land."

3. Alaska: Native Allotments -- Alaska: Grazing

A grazing lease, issued after the lessee's daughter initiated her qualifying use and occupancy of a portion of the leased premises as a Native allotment claim, cannot

bar the approval of the allotment. Moreover, a formal relinquishment by the lessee of the portion of the lease so occupied by his daughter was effective to terminate the grazing lease as to the relinquished land, so that upon his death two years later the lease, which passed to his widow, did not include the land within the allotment.

APPEARANCES: Mary Frances DeHart, pro se; Barbara L. Malchick, Esq., Assistant Attorney General, State of Alaska, for appellant State; David C. Fleurant, Esq., Alaska Legal Services Corporation for Native allotment applicant Maude A. Bernel Foster; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This is an appeal by the State of Alaska and Mary Frances DeHart from a decision dated September 7, 1983, by which the Bureau of Land Management (BLM) approved the Alaska Native allotment application of Maude A. Bernel Foster for approximately 160 acres of unsurveyed land in sec. 1, T. 7 N., R. 9 E., Copper River meridian. The decision also "held for rejection" that portion of Mary Frances DeHart's grazing lease A-062014 which is within Foster's allotment. Moreover, BLM's decision did not expressly reserve a public right of way over a trail which traverses most of the allotment.

Foster's father was Don DeHart, who had a commercial guiding and outfitting business, in conjunction with which he held the grazing lease. Foster's initial use of the property is said to date approximately from the late 1950's, when she was a small child in the company of her father. In the late 1950's Don DeHart used a tractor to cut a trail for access into the area, the terminal part of which traverses most of the length of what is now the Foster allotment. Whether the trail cut by Don DeHart was a new one or whether he followed and improved an old historic trail is part of the subject dispute. A log cabin was built in 1964 or 1965 by Don DeHart, allegedly with Foster's help, "for my [Foster's] intended homestead or allotment." Foster asserts independent use and occupancy of the allotment land from 1963, when she was 14 years old. This pre-dated the grazing lease, which issued to Don DeHart on January 1, 1965. The trail terminates at the cabin, although another branch continues beyond the allotment boundaries.

Foster (then Maude Bernal) filed her Native allotment application, dated July 30, 1971, with the Bureau of Indian Affairs. In 1973 Don DeHart married Mary Frances DeHart, one of the appellants. Under date of July 25, 1975, Don DeHart and Foster (then Bernal) executed a formal contractual agreement whereby Foster authorized and permitted her father the use of her claimed allotment lands for 5 years "for hunting, fishing, trail rides and other recreational activities," and Don DeHart agreed that "any building or additional improvements made by him on the property will become the property of Maude Ann Bernal." On August 15, 1975, Don DeHart executed a "Statement of Waiver," in which he requested the authorized officer, BLM, to withdraw from his grazing lease the land covered by his daughter's allotment application. This instrument was witnessed by appellant Mary Frances DeHart and another, and filed with BLM.

Don DeHart died on May 31, 1977. His widow, Mary Frances DeHart (henceforth "DeHart"), subsequently made inquiry to BLM concerning the status of Foster's Native allotment application. In September 1978 DeHart informed BLM that her deceased husband's grazing lease A-062014 was transferred to her after his death and that she did not want to relinquish the part of her lease covered by the Native allotment. Apparently, Foster had informed DeHart that she was not to graze her horses on the allotment land. DeHart asserted certain facts and concluded: "It is impossible to keep my horses off this so called claimed native land and therefore I am for denial of this entire claim if it means that I cannot use the area for my horses." (Letter to BLM from Mary Frances DeHart dated Sept. 14, 1978). In November 1978 the record shows that DeHart visited BLM to discuss Native allotment application AA-7550 because she believed approval of the allotment would adversely affect her grazing lease by hindering access to her lease. She wanted to negate the waiver filed by her late husband (to which she had borne witness) withdrawing from his grazing lease the land covered in this allotment application. Appellant DeHart wrote another letter in January 1979 requesting that the waiver be omitted from the file and asserting again that the applicant does not qualify for an allotment.

In December 1980, Foster responded to some of the allegations made previously by DeHart to BLM. On March 5, 1981, Foster filed an amended legal description as to the boundaries of her allotment AA-7550.

Section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1982), legislatively approved pending Native allotment applications, but provided 180 days for specified protests, in which case the applications had to be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, 34 Stat. 197. ANILCA also provided in section 905(a)(4) that an allotment application describing land within the boundaries of the national park system must be adjudicated. The land concerned is now within the national park system boundaries.

On June 1, 1981, the State of Alaska filed a form protest under section 905(a)(5) whereby:

(B) The State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist[.]

On April 29, 1982, BLM responded to Foster's amended allotment description, and notified all parties then of record to satisfy section 905(c) of ANILCA which states, in relevant part:

An allotment applicant may 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. If the allotment

application is amended, this section shall operate to approve the application or to require its adjudication, as the case may be, with reference to the amended land description only: Provided, That the Secretary shall notify the State of Alaska and all interested parties, as shown by the records of the Department of the Interior, of the intended correction of the allotment's location, and any such party shall have until the one hundred eightieth day following December 2, 1980, or sixty days following mailing of the notice, whichever is later, to file with the Department of the Interior a protest as provided in subsection (a)(5) of this section, which protest, if timely, shall be deemed filed within one hundred and eighty days of December 2, 1980, notwithstanding the actual date of filing[.]

On June 24, 1982, DeHart protested the amended description asserting that there is a trail right-of-way which is a "marked BLM trail from the Nabesna Road to the upper cabin on my grazing lease at the southern tip of Black Mountain." The protest continues:

There is a fork in the trail as it comes off the bench at Copper Lake. (one trail leads to the lake and the other branch to the Copper Cabin and on to the southern tip of Black Mountain) * * *. This trail right of way should not be a part of the native claim as the tract [sic. "trail"?] was made before claim was filed. [Emphasis in original.]

DeHart further challenged the inclusion of the cabin on Copper Creek, asserting it was built by her late husband for the grazing lease and that although he "was willing to give the cabin to her [Foster] and relinquish this part of the grazing lease" that Foster's interest in the area had not continued. DeHart concluded that she would be willing to relinquish a part of the grazing lease as long as the trail, cabin, and a boat landing area were not part of the allotment.

On June 9, 1983, Foster accompanied the BLM realty specialist on a field examination of AA-7550. The August 10, 1983, field report concluded that under "current guidelines, the applicant at age 14, appears to have met the requirements for the use and occupancy of the applied for allotment in 1963." BLM issued its decision on September 7, 1983, holding Native allotment application AA-7550 for approval. The decision stated: "This allotment may be subject to an R.S. 2477, 14 Stat. 253, right-of-way, for the Copper River Trail. This right-of-way will not be listed in the certificate of allotment as the Federal Government has no authority to adjudicate rights granted under State law." The decision also provided that if the grazing lessee (DeHart) did not initiate a private contest against the Native allotment application within 60 days, the grazing lease A-062014 would be rejected (sic) as to the lands in the Native allotment without further notice. 1/

Neither the State of Alaska nor DeHart asserts that the trail, or trails, on the allotment represent a granted right-of-way. The State, in fact,

1/ We presume that the decision intended to say that the grazing lease would be "canceled" as to those lands in the allotment, rather than "rejected."

expressly denies that its appeal involves "a claim for a public right-of-way under R.S. 2477 * * * [n]or does the appeal involve BLM's separate duty under § 905(e) of ANILCA to identify and adjudicate record entries conflicting with allotment applications." Finally, the State denies that it is premising its challenge on the statutory standing provided it in section 905(a)(5)(B) by stating that "the applicant's argument that there may be alternate access to public lands in the area is irrelevant to the issue of whether BLM properly adjudicated the allotment application" (Reply Brief at 2). 2/ The State declares "[t]he sole issue on appeal is whether BLM erred in its adjudication of the allotment application" (Reply Brief at 1).

The gravamen of the appeals by both DeHart and the State is founded on their respective contentions that Foster has not qualified for an allotment of the land occupied by the trail because the trail predated the initiation of any qualifying use of the land by Foster and was used by the general public so as to preclude her from engaging in a use of the land that was "at least potentially exclusive of others." 43 CFR 2561.0-5. The State asserts that this is a portion of the old Copper River Trail, historically used by Natives and early white men, and more recently by fishermen and hunters for access to Copper Lake, and thus, the land was not "vacant and unappropriated" when entered by Foster.

These contentions are emphatically disputed by Foster, who maintains that the trail was originally cut by her father to facilitate his guiding and outfitting service, and that no trail existed there before. She states that use of the trail, cabin, and boat landing by her father and his clientele was by her permission based on the mutual understanding between her and her father that the land and improvements were her allotment property. Aside from their use of the trail, she says, the only other users were the rare hunters or fishermen whose passage through the allotment was unauthorized as well as unusual.

[1] The issues thus presented are disputed questions of fact. Ordinarily, where an appeal can be adjudicated only upon resolution of the factual issues, this Board will order an evidentiary hearing pursuant to 43 CFR 4.415. In this case, however, it appears that most of the available evidence has already been incorporated in the record before us. The participants have supplied, as exhibits to their various pleadings, maps, affidavits, photographs, excerpts from historical documents and reference works, and similar materials. The administrative record is quite well documented with field reports, letters, and memoranda. Moreover, a number of the affiants are no longer Alaska residents and are widely scattered in other states, and would probably be unavailable for testimony, except, perhaps, by deposition, at great expense. We conclude, therefore, that a hearing would be unlikely to yield evidence which would contribute significantly to the record presently before us. The present record, we find, affords an adequate basis for decision. Moreover, as previously noted, BLM's decision instructed appellant DeHart that, as grazing lessee, she had 60 days within which to initiate a private contest of the allotment. Had she desired an evidentiary hearing, she should have availed herself of that procedure. She did not. Further, neither the State of Alaska, nor Foster, nor BLM has even suggested that resolution of this appeal would be

2/ Section 905(a)(5)(B) of ANILCA requires the State to establish that there are no reasonable alternatives for access.

benefited by a hearing, nor proposed the submission of any further evidence. Accordingly, the Board makes the following findings and conclusions on the basis of the record before us:

[2] First, the Board finds that the trail across the allotment was originally opened by Don DeHart, that it is not part of the historic Copper River Trail, and although it connects with the Copper River Trail, their juncture is at some considerable distance from the allotment. We base this finding in large part upon the following evidence:

Aerial photographs provided by BLM show no trails crossing the allotment land were visible in 1957, but were clearly evident in 1977.

An affidavit of one Marjorie DeHart, of Wastucna, Washington, declares that she was married to Don DeHart at the time he constructed the trail and that this was the first trail in the area, and that he did so to provide access to get his client hunters to and from the hunting area.

A letter by Clyde Ormond, of Rigby, Idaho, an author of outdoor books, relates how Don DeHart explained to him in detail how he had "busted" the trail out, "using a small Oliver 'cat' tractor" equipped with a six-foot bulldozer blade. Subsequently, Ormond used this trail several times, before and after the cabin was built, as a client of Don DeHart.

An affidavit by Fred W. Young, a registered guide, states that he worked in the area from 1951 until 1959 for another outfitter (Lee Hancock), and then worked for Don DeHart from 1960 to 1969. Young asserts, "[d]uring that time there were perhaps one or two hunting parties, not associated with Don's outfit, that would use the trail during a season. * * * I never saw them, but I heard about them through conversations with others, or saw signs along the trail."

Another former employee, Richard B. Bowlby, worked for Don DeHart from 1957 to 1959. His affidavit states, in part:

3. During my years with Don, I never saw anyone use the access trail. I did hear about someone getting back there with a 4x4 during a dry season, but that's about it. In fact, Don tried to discourage such use by making his trails difficult to find and follow. We never left any equipment on the road and the one trail was cut in with tight turns so a 4x4 could not negotiate the trail.

4. There were other hunters in the area during my employment with Don but they always flew into the lake. And I was never aware of anyone coming up the creek by boat to get to the lake. The hunters flew into the hills to get the sheep.

5. The trail is not the easiest way to get to Copper Lake. An easier route would be to come in towards the upper end of the lake because the terrain was better for traveling. Don purposely chose the longer, more difficult route to discourage public use.

6. Don worked hard to keep evidence of the trail a secret. And it apparently worked because virtually no public use of the trail occurred.

Based upon this and other evidence of record, we conclude that there was insufficient use of the trail by the general public between the time it was constructed and 1968 (when Foster completed her 5-year tenure) to warrant a finding that the land within the allotment boundaries was "not vacant or unappropriated," as alleged by appellants. The use of the land by Don DeHart and his clients was quite apparently permissive and subordinate to Foster's claim, as it was Don DeHart's declared intention that she should acquire the land. ^{3/} Such desultory incursions by others as occurred during this period were so brief and so infrequent that at no time could the allotment land be said to have been "occupied" or "appropriated" by them. We find, therefore, that the land claimed by Foster as her Native allotment was in fact vacant and unappropriated.

[3] The "Statement of Waiver" which Don DeHart filed with BLM, requesting that the land covered by Foster's allotment be withdrawn from his grazing lease, constituted a partial relinquishment of his lease. This Department has often held that a relinquishment of all or part of an oil and gas lease is effective eo instanti to terminate the lease from the first moment of the day it is filed. See, e.g., Sol Singer, 35 IBLA 361 (1978); Humble Oil & Refining Co., 64 I.D. 5 (1957). Although those cases have a statutory premise based upon a provision in the Mineral Leasing Act of 1920, we perceive no legal impediment which would preclude a grazing lessee from relinquishing all or part of his interest with similar effect. BLM erred in failing to delete the relinquished area from the grazing lease in response to Don DeHart's formal request.

As the Native allotment claim pre-dated the grazing lease, the allotment had priority. Moreover, because the grazing lease was relinquished by the lessee as to the lands within the allotment in 1975, almost two years before his death, his widow could not have succeeded to his former interest to a lease of those lands. We find, therefore that appellant DeHart has no cognizable interest or claim to the allotment lands.

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 affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

R. W. Mullen
Administrative Judge

^{3/} In this context, we note that Don DeHart witnessed Foster's original allotment application.

