

STATE OF ALASKA

IBLA 84-689

Decided February 26, 1985

Appeal from a decision of the Alaska State Office, Bureau of Land Management, holding that Native allotment F-14364 (Anch.) is not subject to right-of-way F-030653.

Appeal dismissed.

1. Alaska: Native Allotments -- Appeals -- Rights-of-Way: Generally -- Rules of Practice: Appeals: Dismissal

Where the State of Alaska appeals a decision holding that a Native allotment is not subject to a right-of-way granted to the State and on appeal the heirs of the allottee relinquish that part of the allotment in conflict with the right-of-way, the issue is moot and the appeal is dismissed.

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

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which properly should be submitted to and decided by BLM, nor does the Board render advisory opinions or opinions in hypothetical cases.

APPEARANCES: Linda L. Walton, Esq., Assistant Attorney General, Fairbanks, Alaska, for the State of Alaska; Colleen DuFour, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Andrew Nicklie (deceased).

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The State of Alaska appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated May 17, 1984, holding that Native allotment F-14364 (Anch.) is not subject to an easement or right-of-way for the George Parks Highway.

On September 29, 1971, the Bureau of Indian Affairs (BIA) filed Native allotment application F-14364 (Anch.) on behalf of Andrew Nicklie for 5 acres of surveyed land located in lot 28, sec. 4, T. 18 S., R. 7 W., Fairbanks

Meridian, Alaska, U.S. Survey No. 3229. Witnesses stated that the applicant began using these lands in 1945. Andrew Nicklie died in 1975 and his heirs are asserting their claim to the allotment.

On October 17, 1983, BLM issued a decision approving the Native allotment subject to an easement for the George Parks Highway as established by Public Land Order No. (PLO) 1613 (23 FR 2376 (Apr. 11, 1958)), pursuant to the Act of August 1, 1956, 70 Stat. 898, and transferred to the State of Alaska pursuant to the Alaska Omnibus Act, P.L. 86-70, 73 Stat. 141.

In its decision of May 17, 1984, BLM modified its earlier decision by stating that the George Parks Highway is not a PLO 1613 highway, but rather a granted right-of-way, F-030653. BLM explained that the right-of-way grant was issued on March 7, 1963, which was after the date use and occupancy began for the Native. Therefore, BLM held that Native allotment F-14364 (Anch.) shall not be subject to an easement or right-of-way for the George Parks Highway.

The State of Alaska filed its notice of appeal on June 19, 1984. In its statement of reasons it contends, inter alia, that use and occupancy by a Native, without the filing of an application, does not prevent BLM from conveying a 23 U.S.C. § 317 (1982) right-of-way.

On November 5, 1984, counsel for Andrew Nicklie (deceased) filed a motion to dismiss the State's appeal. Counsel states that the portion of the allotment in conflict with the right-of-way was relinquished on October 19, 1984, by Mr. Nicklie's heirs with the approval of BIA. Counsel contends that the relinquishment satisfies the interests of the State and the heirs of the allottee. Counsel explains that this allows BLM to reinstate the granted right-of-way and expedite conveyance of the remainder of the allotment. Thus, counsel reasons, the relinquishment eliminates the need for resolution of the issues in this case.

On November 13, 1984, the State filed its opposition to the motion to dismiss. The State is immediately concerned that BIA properly approve the relinquishment in accordance with a 1979 Memorandum of Understanding between BIA and BLM (Exh. A). The State notes that the "approval" written across the top of the relinquishment does not recite that Mr. Kahklen, the signator, is a BIA employee having authority to approve the relinquishment. The State requests that an appropriate document or notarization clause reflecting Mr. Kahklen's authority to act for BIA in relinquishments be added before remand to BLM. The State says that it will withdraw its objection to approval and certification of the allotment provided that the portion of the allotment in conflict with right-of-way grant F-030653 is excluded.

Even assuming that the "approval" problem is remedied, the State argues that the appeal is not moot. According to the State, one of the main issues in its appeal is whether BLM "has authority to unilaterally revoke rights-of-way, based upon nebulous concepts of use and occupancy, unaccompanied by any allotment entry of record at the time the right-of-way was granted."

The State contends that it has suffered actual injury due to the time and cost involved in preparing briefs for this appeal. The State notes that

thousands of Native allotment applications remain pending with a significant possibility that the right-of-way issue will recur and the State will suffer future monetary damages. The State contends that unless and until BLM concedes that its procedure of unilaterally revoking such rights-of-way is improper, the case is not moot.

In response to the State's request that BIA properly approve the relinquishment, Andrew Nicklie's counsel has submitted several additional documents. One is an affidavit signed by Albert D. Kahklen in which he states that he is employed as Superintendent of BIA, Anchorage Agency, and has the authority to approve Native allotment relinquishments as provided in the Memorandum of Understanding dated February 20, 1979, between BLM and BIA. Kahklen also stated that he approved the relinquishment in question on October 19, 1984.

Counsel also submitted a copy of the probate order which determined Dan Nicklie and Tammany Nicklie to be the heirs of Andrew Nicklie. The remainder of the documents include a copy of the relinquishment signed by Margie N. Ewan and Eleanor Dementi, a copy of an order of guardianship appointing Margie N. Ewan as guardian of Dan Nicklie, and a copy of a special power of attorney appointing Eleanor Dementi to act on behalf of Tammany Nicklie. We find that the relinquishment was approved by the authorized BIA official and that the signatories were authorized to sign the document on behalf of the heirs of Andrew Nicklie. The State's request that the relinquishment be properly authorized has been satisfied.

[1] An appeal will be dismissed where there is no justiciable issue or where the appeal is moot. Duncan Miller, 11 IBLA 14, 80 I.D. 322 (1973). The conflict between the State's right-of-way and the Native allotment has been resolved and the issue is moot. Since the State has been granted the relief sought, that is, that the right-of-way not be revoked, and there is no existing controversy between the parties, the appeal is dismissed for mootness. See Sierra Club, 71 IBLA 235 (1983); Arizona State Association of 4 Wheel Drive Clubs, 65 IBLA 126, 133 (1982). The Board does not exercise supervisory authority over BLM except in the context of an actual case in controversy over which the Board has jurisdiction.

[2] The State urges that the appeal is not moot because the possibility exists that future disputes will occur if BLM revokes a right-of-way in conflict with a Native allotment. It is the Board's duty to decide actual controversies by a decision that can be carried into effect and not to give opinions on moot questions or abstract propositions. See International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Zantop Air Transport Corp., 394 F.2d 36, 41 (6th Cir. 1968). The Board does not render advisory opinions in hypothetical cases. Edgar W. White, 85 IBLA 161 (1985). As the court stated in Alton & Southern Railway Co. v. International Association of Machinists and Aerospace Workers, 463 F.2d 872, 882 (D.C. Cir. 1972):

We do not deem it appropriate to ascertain and announce applicable legal principles, dependent as they are on the shape of specific factual contexts, before the facts have taken shape. Perhaps when and as the facts evolve, there will be no legal

controversy of consequence. If there is such a controversy, it will likely be different from the one presented [in this case]

....

The case is remanded to BLM for issuance of the Native allotment excluding right-of-way F-14364, all else being regular.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Edward W. Stuebing
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Gail M. Frazier
Administrative Judge

