

Editor's note: Reconsideration granted; decision vacated -- See 98 IBLA 203 (June 29, 1987).

GOLDEN VALLEY ELECTRIC ASSOCIATION

IBLA 84-520

Decided March 25, 1985

Appeal from that part of a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management, which declared a portion of transmission line right-of-way null and void. F-035083.

Reversed.

1. Alaska: Native Allotments -- Rights-of-Way: Cancellation --
Rights-of-way: Nature of Interest Granted

A right-of-way for an electric transmission line issued pursuant to the Act of Mar. 4, 1911, over lands to which, at the time of issuance, an Alaska Native had an inchoate right through use and occupancy, cannot be defeated by subsequent determination of entitlement to an allotment for such lands, and the allotment must be made subject to the right-of-way. A decision holding such a right-of-way null and void must be reversed.

APPEARANCES: David H. Call, Esq., Fairbanks, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Golden Valley Electric Association has appealed from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), dated March 29, 1984, which, in part, declared a portion of appellant's transmission line right-of-way, F-035083, null and void.

Effective July 11, 1966, BLM granted a 50-year, 100-foot wide right-of-way for a 138 KV transmission line to appellant, pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1970) (repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2793, effective October 21, 1976). The right-of-way grant was expressly made subject to "valid rights existing on the date of the grant." The transmission line is part of a line which runs from the substation at Nenana, Alaska, to the switchyard of appellant's mine-mouth power plant at Healy, Alaska.

In its March 1984 decision, BLM declared the portion of appellant's right-of-way which crosses the Native allotment of Jennie K. Irwin, F-1311, null and void. BLM noted that subsequent to the right-of-way grant Irwin had filed a Native allotment application for approximately 2 acres of land

situated in the S 1/2 NE 1/4 sec. 36, T. 6 S., R. 8 W., Fairbanks Meridian, Alaska, alleging use and occupancy since June 10, 1962, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1982), subject to pending applications). Although BLM held that the Native allotment application was not subject to automatic legislative approval pursuant to section 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634 (1982), it approved the application after adjudication, concluding that Irwin had satisfied the use and occupancy requirements of the Act of May 17, 1906. BLM further concluded that:

Since the right-of-way grant F-035083, was made subject to valid existing rights and Jennie K. Irwin held the land at the time the right-of-way grant was issued, the grant is hereby declared null and void as to that portion within Jennie K. Irwin's Native allotment.

In its statement of reasons for appeal, appellant contends that, at the time Irwin was using and occupying the land, but prior to filing her allotment application, she conveyed a "right-of-way" to appellant 1/ which should be recognized in any subsequent patent of the land to Irwin, citing Willis v. City of Valdez, 546 P.2d 570 (Alaska 1976). In effect, appellant argues that it was improper for BLM to declare its right-of-way null and void to the extent appellant had derived rights from Irwin's "valid existing rights." In the alternative, appellant contends that Irwin is estopped from denying the right-of-way granted to appellant prior to patent of the underlying land under the doctrine of after-acquired title.

Thus, appellant is not challenging Irwin's right to an allotment, but rather is appealing cancellation of its right-of-way. Accordingly, the issue raised is whether Irwin's rights stemming from her use and occupancy pursuant to the Native Allotment Act predating the right-of-way grant 2/ require cancellation of appellant's right-of-way grant.

[1] Generally, an applicant will not be deemed to have a preference right to an allotment until "an allotment selection has been made by the filing of an acceptable application for public land open to such application and the applicant has used and occupied the land for not less than 5 years in his lifetime." Arthur R. Martin, 41 IBLA 224, 226 (1979), and cases cited therein. This preference right may entitle the applicant to preempt subsequently initiated claims, provided the applicant has complied with the statute. Village and City Council of Aleknagik, 77 IBLA 130 (1983).

It is the filing of a timely application together with completion of the requisite use and occupancy which causes the inchoate preference right to become a vested right. United States v. Flynn, 53 IBLA 208, 234, 88 I.D.

1/ Appellant states that Irwin had occupied the land "for four years before conveying the right-of-way to GVEA [(Golden Valley Electric Association)]." Appellant also states that, at the time of the conveyance, Irwin "had nearly completed the five-year period of occupancy required under the Native Allotment Act."

2/ We note that no issue has been raised here of subsequent abandonment of the allotment.

373, 387 (1981). In Flynn, we noted that the provision in section 8 of the Act of May 17, 1884, 23 Stat. 26 (1884), that Alaska Natives "shall not be disturbed in the possession of any lands actually in their use and occupation" was followed up by the Act of May 17, 1906, which provided for the more permanent protection of Native rights by granting a preference right upon the completion of 5 years use and occupancy and the filing of an application identifying the land sought (up to 160 acres). Thus, prior to the vesting of a preference right, an allotment applicant has a right not to be disturbed in his use and occupancy, which right can ripen into a preference right. Appellant's right-of-way grant was expressly subject to this right "existing on the date of the grant." See Transwestern Pipeline Co. v. Kerr-McGee Corp., 492 F.2d 878 (10th Cir. 1974), cert. denied, 419 U.S. 1097 (1975). Moreover, Irwin's right of use and occupancy subsequently ripened into a preference right and BLM concluded in its March 1984 decision that she is entitled to an allotment. As noted previously, appellant has not challenged Irwin's right to an allotment under the Act of May 17, 1906. Indeed the right-of-way which appellant allegedly obtained from Irwin ^{3/} supports a finding that Irwin's use and occupancy was at least potentially exclusive of others -- one of the indicia of a qualifying Native allotment. See 43 CFR 2561.0-5(a).

However, the right generated by Irwin's use and occupancy of the land in 1966 at the time of appellant's right-of-way grant had not yet ripened into a vested right through the filing of a Native allotment application and the completion of the use and occupancy requirements. See State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 242-43, 91 I.D. 331, 334-35 (1984). The right of the allotment applicant was inchoate at the time -- Irwin might have determined not to file an allotment application or might have abandoned the tract at issue and established her preference right in a different tract by use and occupancy thereof and filing an application therefor. Thus, we must conclude that at the time appellant sought its right-of-way from BLM Irwin had only an inchoate right, and BLM properly granted the right-of-way across the land in question.

The fact that Irwin's right subsequently ripened into a vested right and Irwin was determined to be entitled to an allotment cannot defeat the previously granted right-of-way. The allotment must be made subject to appellant's validly authorized right-of-way. BLM improperly declared that part of the right-of-way crossing the allotment null and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision declaring the right-of-way null and void is reversed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge

^{3/} There is no copy of the right-of-way in the record.

