

Editor's note: overruled to extent inconsistent -- See 92 IBLA 340 (June 30, 1986); overruled in part -- See 126 IBLA 281 (June 7, 1993)

KENAI NATIVES ASSOCIATION, INC.

IBLA 84-375 Decided May 28, 1985

Appeal from a decision of the Alaska State Office, Bureau of Land Management, recognizing the reinstatement of a previously relinquished portion of Native allotment application AA-6028.

Reversed.

1. Rules of Practice: Appeals: Standing to Appeal

Under 43 CFR 4.410, a party to a case who is adversely affected by a BLM decision is properly recognized as having standing to appeal to the Board of Land Appeals.

2. Alaska: Native Allotments -- Alaska Native Claims Settlement Act: Conveyances: Interim Conveyance

An interim conveyance to a Native corporation under the Alaska Native Claims Settlement Act effectively conveys title to the land, subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANCSA conveyance. Where a conflicting application has been relinquished prior to conveyance, and hence was not excluded, the Department has no authority to reinstate the application pursuant to a request filed subsequent to the interim conveyance.

APPEARANCES: James Vollintine, Esq., Anchorage, Alaska, for Kenai Natives Association, Inc.; David C. Fleurant, Esq., and Colleen DuFour, Esq., Anchorage, Alaska, for James R. Showalter; John M. Allen, Esq., Office of the Regional Solicitor, Alaska Region, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Kenai Native Association, Inc. (Kenai), appeals from that part of a February 6, 1984, decision of the Alaska State Office, Bureau of Land Management (BLM), recognizing the reinstatement of a previously relinquished portion of Native allotment application AA-6028 for a tract of land described as parcel C. The BLM decision also noted the need for a field examination in the normal course of adjudicating the claim for parcel C.

On August 20, 1970 the Bureau of Indian Affairs (BIA) filed Native allotment application AA-6028 on behalf of James R. Showalter for approximately 55 acres in sec. 8, T. 1 N., R. 29 W., Seward Meridian, Alaska. BLM received on July 17, 1972, an application amending AA-6028 to include approximately 60 additional acres in secs. 1 and 2, T. 4 N., R. 8 W., Seward Meridian. These separate parcels were designated parcel A and parcel C, respectively. On March 3, 1971, Showalter filed another Native allotment application designated F-15467 for 45 acres in sec. 18, T. 11 N., R. 28 W., Seward Meridian. The application was later consolidated with AA-6028 and this tract was designated parcel B. Appellant claimed use and occupancy of these lands originating on the following dates: parcel A, July 1968; parcel B, August 1965; parcel C, September 1938.

On January 20, 1976, Kenai filed Native group selection application AA-8909-A, which embraced parcel C (among other lands), pursuant to section 14(h)(3) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(3) (1982). At that time Departmental regulations provided that an ANCSA selection application conflicting with a prior Native allotment application was not subject to automatic rejection. See 43 CFR 2561.1(e); 39 FR 34541, 34543 (Sept. 26, 1974). Subsequently, on December 14, 1977, Showalter completed and signed an official BLM form relinquishing his rights in parcel C. Attached to this form when it was filed with BLM on April 11, 1978, was a typewritten relinquishment signed by Showalter and dated March 28, 1978. This relinquishment stated, in part, that the applicant had "voluntarily determined to relinquish" a portion of his Native allotment application. Applicant further certified in the relinquishment that he had "received satisfactory compensation for this relinquishment from the Kenai Native Association." The relinquishment was reviewed by the BIA and was approved by it on April 11, 1978. The approved relinquishment was filed with BLM and the public land records for the subject land, including the Master Title Plat for T. 4 N., R. 8 W., Seward Meridian, were revised accordingly. Since the relinquishment resulted in the availability of parcel C, this land was thereafter conveyed on March 21, 1980, as part of an 18,083-acre interim conveyance to Kenai pursuant to its outstanding selection application.

Counsel for Showalter approached BLM on May 12, 1982, seeking to have Showalter's Native allotment application for parcel C reinstated. The request included Showalter's affidavit that he "unknowingly and involuntarily relinquished" parcel C. ^{1/} Based upon this request, BLM posted the renewed claim to the public land records. The record file for AA-6028 does not reveal that notice of BLM's action was provided to Kenai. However, by letter of October 26, 1983, BIA advised Kenai not to develop the land in parcel C because Showalter's application for it had been recently reinstated (Exh. F to Appellant's Brief). Subsequently, Kenai sent a letter of protest to BLM

^{1/} The request for reinstatement was apparently prompted by enactment on Dec. 2, 1980 of section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1982), which provided for statutory approval of Native allotment applications in certain circumstances. Section 905(a)(6) provided that this statutory approval would not apply to applications "knowingly and voluntarily relinquished." 43 U.S.C. § 1634(a)(6).

dated December 28, 1983, contesting the jurisdiction of BLM to reinstate the application for parcel C (Exh. G to Appellant's Brief). Appellant's protest letter pointed out that Showalter's relinquishment had been approved by BIA. Appellant asserted this occurred only after investigation of the circumstances of the relinquishment to ascertain that it was knowing and voluntary. The BLM decision from which this appeal is brought followed.

The BLM decision of February 6, 1984, made the following finding regarding parcel C: 2/

On July 17, 1972, the Bureau of Indian Affairs filed a Native allotment application and evidence of occupancy on [Showalter's] behalf for land described as Parcel C. Due to the time involved with the relinquishment and subsequent reinstatement of Parcel C, a field examination has not been done. The field examination must be completed before further consideration can be given this parcel. Executive Order No. 8979 established the Kenai National Moose Range effective December 16, 1941; later it became part of the National Wildlife Refuge System. Although you [Showalter] claim use and occupancy since September 1938, it cannot be legislatively approved because it is located within this Refuge. In order to arrive at a decision for Parcel C (after completion of the field examination) we will require notarized witness statements as described above.

Kenai appeals this portion of BLM's decision to the extent it reinstates the application for parcel C and contemplates further administrative consideration of it.

In its statement of reasons, the primary issue raised by Kenai is whether BLM has jurisdiction to reinstate or adjudicate a relinquished application for a Native allotment where the lands described have been conveyed under the provisions of ANCSA to the selecting Native corporation. Kenai argues that the Department lost jurisdiction when title to the subject lands was vested by interim conveyance. Showalter counters this claim by charging he was wrongfully deprived of his allotment and, therefore, it is BLM's duty to recover it. In addition, he asserts that BLM retained jurisdiction and authority to correct the conveyance to preserve his Native rights, citing *State of Alaska v. Thorson*, 76 IBLA 264 (1983). Showalter also challenges the standing of appellant to appeal the decision. Counsel for BLM asserts, in essence, that the stewardship of the United States for Alaska Natives imposes a duty on BLM to study the circumstances and review the application to determine whether to file suit to recover the land.

[1] Since the outset of this appeal, Showalter has challenged Kenai's standing to appeal. He condemns the appeal as premature by classifying the determination as "interlocutory" and asserts that it does not adversely affect Kenai's interest in the land or cloud its title thereto. Departmental regulation governing appeals to this Board, 43 CFR 4.410(a), provides that

2/ The decision also approved conveyance of parcel B to Showalter. This part of the decision was not appealed by Kenai.

any party to a case who is adversely affected by a BLM decision may appeal. Kenai is properly a party to this case since it holds title to the land in question. It has also protested BLM's reinstatement of the conflicting application. Kenai's interest in the land is directly and adversely affected by BLM's determination that it has jurisdiction to reinstate the application and administrative authority to adjudicate Showalter's rights to the land. ^{3/} BLM has not rendered a final decision regarding Showalter's entitlement to the purported allotment, but its determination to adjudicate a Native allotment application for land previously conveyed is a justiciable issue ripe for review by this Board.

[2] The legal significance of the term "interim conveyance" is defined in the regulations as follows:

(h) "Interim conveyance" as used in these regulations means the conveyance granting to the recipient legal title to unsurveyed lands, and containing all the reservations for easements, rights-of-way, or other interests in land, provided by the act or imposed on the land by applicable law, subject only to confirmation of the boundary descriptions after approval of the survey of the conveyed land.

43 CFR 2650.0-5(h). Thus, as we noted in Peter Andrews, Sr., 77 IBLA 316, 319 (1983), interim conveyance and patents are generally considered as documents of equal significance in granting title under ANCSA. Accordingly, upon interim conveyance the Department loses jurisdiction to adjudicate interests in the land conveyed. See Appeal of Chickaloon Moose Creek Native Association, Inc., 4 ANCAB 250, 87 I.D. 219 (1980); Appeal of Eklutna, 1 ANCAB 305, 84 I.D. 105 (1977). Hence, BLM has no jurisdiction to grant Showalter an allotment for the land in parcel C which was previously conveyed to Kenai. The Congress affirmed this status of interim conveyances by statute when it enacted section 1410 of ANILCA, amending section 22(j) of ANCSA. 43 U.S.C. § 1621(j) (1982). Thus, 43 U.S.C. § 1621(j)(1) (1982) provides, in pertinent part, that "Subject to valid existing rights * * * the force and effect of such an interim conveyance shall be to convey to and vest in the recipient exactly the same right, title, and interest in and to the lands as the recipient would have received had he been issued a patent * * *."

This leaves the question of whether BLM has an obligation to seek reconveyance of the land in parcel C in order to permit allotment of the tract. Showalter asserts that his Native allotment application for parcel C constitutes a "valid existing right" to which the interim conveyance is subject under section 1410 of ANILCA and that BLM is required to adjudicate this right. Showalter cites the Board's decision in State of Alaska v.

^{3/} Showalter's contention that the BLM decision does not constitute a cloud upon appellant's title is refuted by the letter of Oct. 26, 1983, written on his behalf by BIA and sent to appellant (Exh. F to Appellant's Brief). The letter expressed "concern" over potential conflict between Showalter's parcel C and appellant's plans to subdivide and sell property on the Kenai River.

Thorson, 76 IBLA 264 (1983), in support of his contention. We find that this analysis breaks down in several respects.

Initially, it must be recognized that the interim conveyance in this case issued pursuant to section 14(h)(3) of ANCSA prior to enactment of section 905 of ANILCA on December 2, 1980. Thus, this case is very similar to Peter Andrews, Sr., *supra*. Subsequent to the relinquishment by Showalter of his application for parcel C, the land was conveyed by interim conveyance to appellant. Conveyances pursuant to ANCSA are subject to valid existing rights. Appeal of Raymond A. Kreig, 3 AN CAB 168, 86 I.D. 189 (1979); 43 CFR 2650.3-1(a); see sections 14(g) and 22(b) of ANCSA, 43 U.S.C. §§ 1613(g), 1621(b) (1982). Conveyances to Native corporations shall exclude any lawful entries which are being maintained in compliance with laws leading to the acquisition of title. 43 CFR 2650.3-1(a); Appeal of Raymond A. Kreig, *supra*. A right to a Native allotment requires a combination of qualifying use and occupancy together with an application therefor, describing the land applied for, pending before the Department. See United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981). We cannot find that Showalter's relinquished application constituted a valid existing right which should have been excluded from the conveyance. As we stated in Peter Andrews, Sr. (On Reconsideration), 83 IBLA 344, 347 (1984), we know of no authority which would allow consideration or reinstatement of a relinquished application subsequent to conveyance of the lands embraced therein.

We recognize that, subject to certain qualifications, section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), approved previously relinquished Native allotment applications which were not knowingly and voluntarily relinquished. See ANILCA, section 905(a)(6), 43 U.S.C. § 1634(a)(6). ^{4/} However, Showalter's application for parcel C was not eligible for statutory approval under section 905(a)(1) of ANILCA in any event because, as the BLM decision discloses, the land was withdrawn by Exec. Order No. 8979 in December 1941. Further, although section 905 did not except from its coverage allotment applications which were unknowingly or involuntarily relinquished, the provision was expressly made subject to valid existing rights. We believe that in the circumstances of this case the prior interim conveyance to Kenai constituted such a right.

We find this case to be distinguishable from State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984), *reversing* 76 IBLA 264

^{4/} We expressly refrain from ruling that Congress intended in section 905 to approve previously relinquished applications describing land conveyed prior to enactment of ANILCA.

^{5/} The Board held that the allotment claims were excluded from the statutory confirmation of title in the State to the tentatively approved lands under section 906(c). 76 IBLA at 272. This decision was reversed on reconsideration, State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984), although the Department was found to have a duty to make a preliminary determination as to the validity of the allotment claims and, if appropriate, to pursue recovery of the land through negotiation or litigation. 83 IBLA at 254, 91 I.D. at 341.

(1983). In that case it was conceded that the timely filed Native allotment claims were valid existing rights to which the tentatively approved State selection was subject. The question was whether the claims were excluded from the conveyance as confirmed by section 906(c) of ANILCA, 43 U.S.C. § 1635(c) (1982), so that the Department retained jurisdiction over adjudication (including a contest) of the claims. 5/ In the present case, by contrast, we are unable to find a valid existing right based on Showalter's application which was relinquished prior to the conveyance of title to the Native corporation.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision to reinstate the relinquished portion of Native allotment application AA-6028 relating to parcel C is hereby reversed.

C. Randall Grant, Jr.
Administrative Judge

I concur: Will A. Irwin
Administrative Judge

ADMINISTRATIVE JUDGE HARRIS CONCURRING IN THE RESULT:

In this case the Board holds that a conflicting Native allotment application which is relinquished prior to interim conveyance to a Native corporation is not a valid existing right, and the Department has no authority to reinstate the application pursuant to a request filed subsequent to the interim conveyance. While I agree that the BLM decision must be reversed in this case, I disagree with the statement that the Department has no authority to reinstate such an application. I believe the Government has not only the authority, but the duty, to investigate and to reinstate a relinquished application when circumstances warrant such action.

In Aguilar v. United States, 747 F. Supp 840 (D. Alaska 1979), the court stated at page 846: "The protection of Indian property rights is an area where the [Government's] trust responsibility has its greatest force." In Aguilar certain Alaska Natives challenged the Department of the Interior's rejection of their allotment claims without a hearing, the basis for rejection being the lands in question had been patented to the State of Alaska. The court found the due process rights of the Natives were violated by the failure to provide fact-finding hearings and that if entitlement to allotments could be established at a hearing "they would have an equitable interest in their allotment." *Id.* at 846. The court concluded that if the United States mistakenly or wrongly conveyed land to the State of Alaska to which an Alaska Native had a "preference right" under the Allotment Act based on use and occupancy prior to a state selection, the Government has the responsibility to recover that land. *Id.* at 847.

I find the Aguilar case to be instructive herein. An interim conveyance has the same status as a patent. Aguilar concerned conflicts between Native allotment applications and patents to the State of Alaska. Here, there is a possible conflict between a Native allotment application and an interim conveyance.

An interim conveyance to a Native corporation is subject to valid existing rights. See 43 U.S.C. § 1621(j)(1) (1982). A Native allotment applicant who has satisfied the requirements of the Alaska Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed subject to pending applications, 43 U.S.C. § 1617 (1982)) possesses a valid existing right. State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 243, 91 I.D. 331, 335 (1984). In this case Showalter's Native allotment application for parcel C had been relinquished at the time of the interim conveyance; therefore, the interim conveyance was not made subject to the allotment. Subsequently, Showalter sought reinstatement of his application for parcel C, claiming that his relinquishment was involuntary and unknowing. The majority holds that reinstatement is unavailable for lack of authority, regardless of whether relinquishment was proper. I find the first inquiry should be whether the allotment was knowingly and voluntarily relinquished. If it were, Showalter's request should have been denied. On the other hand, if it

were involuntarily and unknowingly relinquished then it should be reinstated, and under State of Alaska v. Thorson (On Reconsideration), supra, the Department would have a duty to make a preliminary determination as to the validity of the allotment claim and, if appropriate, to pursue recovery of the land through negotiations with Kenai or litigation. Herein, Showalter requested reinstatement of his allotment application for parcel C, and BLM granted it, apparently without any investigation into the circumstances of the relinquishment and the reinstatement request. ^{1/} I find, after reviewing the record, that Showalter voluntarily and knowingly relinquished parcel C of his Native allotment.

The case record contains a BLM form relinquishment dated December 14, 1977, signed by Showalter. The form contains the typewritten statement, "I wish to relinquish only parcel 'C' in the above described land." This relinquishment form was filed with BLM on April 11, 1978. Filed the same day with BLM was a typewritten notarized relinquishment stating:

This is to certify that I, [s/s] James Showalter, have voluntarily determined to relinquish (a portion of) of the land which I applied for under Native Allotment Act of May 17, 1906.

I further certify that I have received satisfactory compensation for this relinquishment from the Kenai Native Association.

It is my request that the Bureau of Indian Affairs approve this relinquishment and properly forward to Bureau of Land Management. [Emphasis in original.]

This statement was signed by Showalter and dated March 28, 1978. The Bureau of Indian Affairs (BIA) Superintendent approved this relinquishment on April 11, 1978.

In 1982 Showalter requested reinstatement of that part of his allotment application relating to parcel C because it was allegedly unknowingly and involuntarily relinquished. In his affidavit accompanying his request Showalter states:

3. In the mid-1970's, I was approached by George Miller. He was president of the Kenai Native Association at the time. He asked that I relinquish my allotment application. He said that the land I applied for was on the Moose Range, and that there was very little chance that I would get the land. He said that if I relinquished my land, I would be able to retain a portion of it.

^{1/} The record contains a form titled "Native Allotment Review," signed by three BLM employees and dated July 22, 1984. Under the heading "Application reconsidered because:" are a number of boxes. The box labeled "Other" is checked, and the following notation appears: "Relinquishment of Parcel C was involuntary and unknowing." There is a complete lack of rationale in the record for this conclusion by BLM. I must assume that BLM merely accepted Showalter's statement that his relinquishment was unknowing and involuntary.

It was my understanding that I would get something back if I relinquished.

I would hold that the acceptance by BLM of a BLM form relinquishment establishes a presumption that the relinquishment was voluntary and knowing. Such a presumption may be buttressed by additional evidence such as that presented in this case. Herein, Showalter filled out not only a BLM form relinquishment but also presented a separate statement expressly indicating the voluntary nature of his action. BIA approved Showalter's relinquishment. Presumably approval was given only after BIA assured itself that Showalter had properly relinquished parcel C. The relinquishment was filed with and accepted by BLM.

While the presumption may be rebutted by persuasive evidence to the contrary, in this case Showalter failed to present any evidence that would support his assertion.

I cannot find Showalter's self-serving affidavit provides any support for his claim that his relinquishment was unknowing and involuntary. To the contrary the affidavit shows he clearly knew he was relinquishing parcel C, and he did so voluntarily in the hope he would somehow "retain portions of it" and/or that he would "get something back" if he relinquished. At best, if the affidavit could be construed as indicating he expected to be compensated by Kenai, the affidavit might support a claim that there was some failure of consideration on the part of Kenai. However, evidence of unknowing and involuntary relinquishment is totally lacking.

BLM's conclusion to reinstate the allotment application on the basis the relinquishment was unknowing and involuntary is not supported by the record. See Peter Andrews, Sr., 83 IBLA 344, 348 (1984) (A.J. Irwin concurring in part and dissenting in part). Since parcel C was properly relinquished, Showalter's allotment application for that parcel did not constitute a valid existing right to which the interim conveyance to Kenai was subject. I would reverse the BLM decision and direct that BLM deny Showalter's request for reinstatement of his allotment application as it relates to parcel C.

Bruce R. Harris
Administrative Judge.

