

**EDITOR's NOTE: Decision set aside and case remanded by order dated April 15, 1987, found at 90 IBLA 172A & B below.**

GLADYS BOQUIST

IBLA 84-788 Decided January 8, 1986

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, holding, inter alia, that a certificate of allotment be issued subject to the continued right of public access. F-14015.

Dismissed.

1. Administrative Procedure: Standing -- Alaska: Native Allotments -- Appeals -- Conveyances: Reservations -- Rights-of-Way: Revised Statutes Sec. 2477 -- Rules of Practice: Appeals: Dismissal

An appeal from a decision of the Bureau of Land Management will be dismissed for appellant's failure to show that she has been adversely affected where BLM's decision held that appellant's certificate of allotment be issued subject to the continued right of public access across allotment lands if survey verifies that a trail crosses the allotment.

APPEARANCES: David C. Fleurant, Esq., Anchorage, Alaska, for appellant; Michael G. Hotchkin, Esq., Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Gladys Boquist has appealed from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated June 25, 1984, holding, inter alia, that a certificate of allotment be issued to her subject to the continued right of public access across two parcels within her allotment if survey verifies that a trail, in use since 1917, crosses these parcels. The parcels at issue, known as parcel B and parcel C, are two of four parcels sought by appellant in Native allotment application F-14015. This application sought 160 acres in T. 11 N., R. 17 E., and T. 12 N., R. 18 E., Fairbanks Meridian, pursuant to the Act of May 17, 1906, 43 U.S.C. § 270-1 (1970), repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1982), subject to applications pending before the Department on December 18, 1971.

Two of the parcels described in appellant's application were legislatively approved and need not concern us further. 1/ Parcels B and C, however, were the subject of a protest filed by the State of Alaska pursuant to section 905(a)(5)(B), 43 U.S.C. § 1634(a)(5)(B) (1982), stating that application F-14015 identified land that was necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State, to resources located thereon, or to a public body of water regularly employed for transportation purposes. 2/ The protest further stated that the land is used for an existing trail and that no reasonable alternative access exists because the trail is an existing constructed public access route, transportation facility, or corridor. 3/

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BLM responded to the protest in this manner:

The State of Alaska's protest of Parcels B and C was based on an existing trail. Parcels B and C of the allotment may be crossed by the Eagle-Circle Mail Trail according to records in our office, including map No. 104 of the State's Inventory of Alaska's Existing Trail System, (Department of Highways, 1973). This trail has been publicly used since on or about 1917. Because the applicant's use is claimed from 1935 on Parcel B, and from 1948 on Parcel C, the certificate of allotment will be issued subject to the continued right of public access across Parcels B and C if survey verifies the trail crosses these parcels.

Based upon adjudication of Parcels B and C of the application, this office has determined that the applicant has used the land and satisfies the use and occupancy requirements of the Native Allotment Act of 1906. Therefore, allotment application F-14015, Parcels B and C are hereby held for approval.

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Maps showing the approximate location of the allotment are enclosed.  
Before certificate of allotment can be issued for the

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1/ Legislative approval of parcels A and D was effected by section 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1982).

2/ Parcels B and C are described in BLM's decision as follows:

Parcel B: T. 12 N., R. 18 E. (unsurveyed) Within Secs. 19 and 20. Containing approximately 40 acres.

Parcel C: T. 12 N., R. 18 E. (unsurveyed) Within Sec. 18. Containing approximately 40 acres.

3/ Documentation accompanying the State's protest consisted of 5 pages of easement recommendations by the Federal State Land Use Planning Commission for the Fort Yukon Village Selection F-14857-A, B, A2, and B2. The State did not specify therein which of the numerous routes identified supported its protest.

land, the boundaries must be surveyed by the Government. The survey will be done in the regular order of business, but may require several years due to the large number of allotments already scheduled. The applicant will be notified when the official plat of survey is filed. [Emphasis supplied.]

BLM's decision concluded by granting the State and the Danzhit Hanlaih Corporation 60 days to file a private contest against parcels B and C. Failure to contest, BLM stated, would result in the Native allotment being approved and the Corporation's selection being rejected as to the lands in parcels B and C. Following this 60-day period, a 30-day period within which an appeal would lie would commence, BLM advised.

The record does not indicate that any private contest was filed or that the State or Danzhit Hanlaih ever appealed this decision. The applicant, Gladys Boquist, did appeal, however, and in support thereof contends that BLM has denied her due process by failing to inform her of its intent to reserve a nongranted public access easement across her allotment, thus precluding the opportunity for her to submit evidence contrary to that offered by the State. Appellant also argues that on-the-ground field examinations revealed no evidence of any public easements on either parcel. Finally, appellant points out that the Eagle-Circle Mail Trail identified by BLM as possibly crossing her allotment cannot do so because both towns (Eagle and Circle) are south of her lands.

The State of Alaska has responded to appellant's arguments by denying any due process violation, pointing to a field sketch depicting a trail crossing parcel B, and suggesting that the relevant trail here is variously referred to as Circle-to-Fort Yukon or Circle-to-Chalkyitsik. The State contends that BLM is fulfilling the Secretary's obligation under section 17(b) of ANCSA, 43 U.S.C. 1616(b) (1976), in preserving the public's right of access.

[1] The pleadings disclose a factual issue which must be resolved before appellant can be regarded as "adversely affected" within the meaning of 43 CFR 4.410. That factual issue is whether or not the trail whose use the State seeks to preserve crosses either parcel B or C. If that question is decided in the negative, any discussion of legal issues would be purely advisory. If that question is decided in the affirmative, the issues may then be subject to review. 4/

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4/ Whether these issues will then be subject to review will depend on whether the State of Alaska continues to assert that section 17(b) of ANCSA can serve as authority for BLM to reserve a right of access or asserts that the trail is a right of way under R.S. 2477, 43 U.S.C. 932 (1970) (repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2793, subject to valid existing rights). Whether a state has an R.S. 2477 right of way is a matter of state law, and therefore is not a matter for Departmental adjudication. Alfred E. Koenig, A-30139 (Nov. 25, 1964); see Leo Titus, Sr., 89 IBLA 323, 334-40 (1985).

Regulation 43 CFR 4.410 provides that any party to a case who is "adversely affected" by a decision of an officer of BLM shall have a right of appeal to this Board. In the absence of a survey determining whether or not appellant's parcels are crossed by the trail at issue, it is impossible to say now whether appellant's certificate of allotment will contain the access provision that appellant finds offensive. In short, injury to appellant is at best speculative at this time. For this reason, the instant appeal is dismissed.

In Lone Star Steel, 77 IBLA 96 (1983), this Board reached a similar conclusion. In that case Lone Star sought review by this Board of a provision in its coal lease subjecting the lease to all regulations of the Secretary which are now or hereafter in force. At page 97, the Board stated:

Moreover, appellant's concern is focused on what it describes as "presently unknown terms embodied in future regulations" which might "govern economic obligations and operating requirements on Lone Star." Appellant has not asserted that it is presently affected adversely; its concern is hypothetical, conjectural and future-oriented. Although it may be argued that the present imposition of the provision as part of readjusted lease terms constitute[s] an exposure to possible harm in the future, we cannot agree that appellant has been "adversely affected" thereby, as required by 43 CFR 4.410 to confer upon a party standing to appeal.

Accord, James W. Smith, 85 IBLA 237 (1985), and Mid-Continent Coal & Coke Co., 83 IBLA 56 (1984).

We note that in Leo Titus, Sr., *supra*, this Board set aside a BLM decision reserving a public trail right-of-way in a Native allotment because it was unclear whether the Native claimed the trail as part of his allotment. Titus also discussed the Act of July 26, 1866, 43 U.S.C. § 932 (1970), 5/ commonly known as R.S. 2477, and cited Golden Valley Electric Association, 85 IBLA 363 (1985), in which this Board held that a Native allotment must be made subject to a prior transmission line right-of-way issued pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1970). 6/ Since Titus, this Board has also issued State of Alaska v. Heirs of Dinah Albert, 90 IBLA 14 (1985), involving rights-of-way issued pursuant to 23 U.S.C. § 317 (1982), and a subsequently vesting Native allotment.

Resolution of the legal issues posed herein must await the survey of parcels B and C. 7/ Therefore, pursuant to the authority delegated to the

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5/ Repealed by section 706(a) of FLPMA, P.L. 94-579, 90 Stat. 2793, subject to valid existing rights.

6/ This provision was repealed by section 706(a) of FLPMA, *supra*, note 5. Valid existing rights established under such terminated authority were recognized pursuant to section 701(a) at 90 Stat. 2786.

7/ In so holding, we make no suggestion that BLM give these parcels priority in its survey program.

Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Will A. Irwin  
Administrative Judge

We concur:

Bruce R. Harris  
Administrative Judge

R. W. Mullen  
Administrative Judge.

April 15, 1987

IBLA 84-788	:	F-14015
90 IBLA 168 (1986)	:	:
	:	Native Allotment
GLADYS BOQUIST	:	:
	:	Reconsideration Granted
	:	Board Decision Vacated
	:	BLM Decision Set Aside
	:	and Remanded

ORDER

Gladys Boquist has petitioned for reconsideration of our decision dismissing her appeal from a June 25, 1984, decision of the Fairbanks District Office, Bureau of Land Management (BLM), on the grounds she was not adversely affected. Gladys Boquist, 90 IBLA 168 (1986).

The BLM decision stated in part:

The State of Alaska's protest of Parcels B and C was based on an existing trail. Parcels B and C of the allotment may be crossed by the Eagle-Circle Mail Trail according to records in our office, including map No. 104 of the State's **Inventory of Alaska's Existing Trail System**, (Department of Highways, 1973). This trail has been publicly used since on or about 1917. Because the applicant's use is claimed from 1935 on Parcel B, and from 1948 on Parcel C, the certificate of allotment will be issued subject to the continued right of public access across Parcels B and C if survey verifies the trail crosses these parcels. (Emphasis added.)

The petition for reconsideration alleges that BLM's field examination report did not locate any public use trail crossing either Parcel B or C and provides several reasons why postponing a determination whether or not one does adversely affects her. Neither BLM nor the State of Alaska responded to the petition.

90 IBLA 172A

We are persuaded appellant is adversely affected by BLM's decision. We therefore grant the petition for reconsideration and vacate our decision of January 8, 1986. In view of the tentativeness of BLM's June 25, 1984, decision concerning the existence of a trail on Parcels B and C and the allegation that its field report found none, we hereby set aside that portion of the decision subjecting Parcels B and C to a continued right of access across these parcels conditioned on an eventual determination of the question by the survey. BLM shall make that determination promptly, based on additional information from the State of Alaska, if it wishes to provide it, and further field examination if it is necessary, and issue a decision providing all parties a right of appeal.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, appellant's petition for reconsideration of Gladys Boquist, 90 IBLA 168 (1986), is granted, that decision is vacated, the portion of BLM's decision of June 25, 1984, that was appealed from is set aside, and the case is remanded to BLM for action consistent with this order.

Will A. Irwin  
Administrative Judge

We concur:

Bruce R. Harris R.W. Mullen  
Administrative Judge

Administrative Judge

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