

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, holding that a certificate of allotment be issued subject to a continued right of public access. F-17649.

Affirmed as modified.

1. Alaska: Native Allotments -- Rights-of-Way: Generally
Whenever the Secretary of the Interior makes any conveyance of land under any of the public land laws, he may reserve a right-of-way for trails within the National Trails System to the extent he deems necessary to carry out the purposes of the National Trails System Act, 16 U.S.C. § 1241 (1982).
2. Alaska: Native Allotments -- Rights-of-Way: Generally
The Bureau of Land Management may issue a certificate of allotment subject to a continued right of public access along a segment of the Iditarod National Historic Trail crossing through allotment lands. Such a conveyance is an exercise of the discretion vested in the Secretary pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970).
3. Alaska: Native Allotments -- Rights-of-Way: Generally
In the absence of legislative approval of a Native allotment, title to the land in an approved allotment application rests with the United States and does not pass to the Native until the land described therein has been surveyed and a "Native Allotment" issued. Therefore, 25 CFR 169.3, which requires that the Secretary obtain written consent from Indians prior to granting a right-of-way across Indian land, does not apply to approved Native allotment applications prior to survey and issuance of the "Native Allotment."
4. Alaska: Native Allotments -- Constitutional Law: Due Process -- Hearings

In the absence of a dispute as to a material fact, the due process rights of an applicant for a Native

allotment are satisfied by an appeal to the Board of Land Appeals.

APPEARANCES: David C. Fleurant, Esq., Anchorage, Alaska, for appellant; Barbara L. Malchick, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska; and Dennis J. Hopewell, Esq., Deputy Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Edward A. Nickoli appeals from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated May 2, 1984, holding that a certificate of allotment be issued to him subject to the continued right of public access along the Kaltag-Topkok Trail. BLM's decision also alluded to an earlier decision of March 26, 1984, approving appellant's Native allotment application F-17649 and holding that this allotment was subject to the State of Alaska's R.S. 2477 trail, if valid. The lands at issue are located in unsurveyed secs. 16 and 17, T. 14 S., R. 1 W., Kateel River Meridian.

On April 3, 1972, the Bureau of Indian Affairs filed a Native allotment application and evidence of occupancy for Nickoli describing 160 acres of unsurveyed land located near Kaltag on the Kaltag River. This application was made pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), 1/ commonly known as the Alaska Native Allotment Act. Use and occupancy began in 1950, the application stated, and consisted of fishing, trapping, hunting, and berry-picking on the land.

Application F-17649 was not legislatively approved pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1982), because the State of Alaska filed a timely protest alleging that the land in the allotment application was necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State, to resources thereon, or to a public body of water regularly employed for transportation purposes. 43 U.S.C. § 1634 (a)(5)(B) (1982). The State's protest stated that the lands sought by Nickoli were used for an existing trail and for a public easement to be reserved under section 17(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1616 (1982). According to the State, lands sought by Nickoli formed the only reasonable access to publicly-owned resources. No reasonable alternative for access exists, the State concluded, because the aforementioned trail and easement was an existing constructed public access route, transportation facility, or corridor, and, in addition, the Kaltag River provided the only water access into the country.

On March 26, 1984, BLM approved Nickoli's allotment application with the following qualification:

According to records in our office, this allotment is crossed by the Kaltag-Topkok Trail, also known as the Kaltag Portage Trail,

1/ This Act was repealed on Dec. 18, 1971, by section 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1982), subject to applications pending on that date.

R.S. 2477 trail No. 156 on map No. 97 of the Inventory of Alaska's Existing Trail System, Department of Highways, 1973. The allotment is subject to the State's claimed R.S. 2477 trail, if valid.

Based upon adjudication of the application, it has been 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-17649 is hereby approved. [Emphasis supplied.]

On May 2, 1984, BLM issued the decision on appeal, stating in part:

In the approval decision [of March 26, 1984,] reference was made to the Native applicant being subject to the Kaltag-Topkok Trail, also known as the Kaltag Portage Trail, if valid.

Additional information has been reviewed and it has been determined that the Kaltag-Topkok trail has been publicly used since about 1910. Because Mr. Nickoli's use is claimed from 1950, the certificate of allotment will be issued subject to the continued right of public access along the Kaltag-Topkok trail. [Emphasis added.]

In his statement of reasons on appeal, appellant contends that section 8 of the Act of July 26, 1866 (R.S. 2477), 43 U.S.C. § 932 (1970), 2/ wherein Congress granted a right-of-way for the construction of highways over public lands, provides no authority for BLM's actions in this case. A determination of the validity of an R.S. 2477 trail is generally beyond the jurisdiction of BLM, appellant maintains.

We note that while BLM's decision of March 26, 1984, expressly referred to this Act, no reference to R.S. 2477 appears in BLM's subsequent decision of May 2 from which this appeal has been taken. BLM's May 2 decision appears to have been occasioned by Instruction Memorandum No. AK 84-283 from the Alaska State Director, dated March 26, 1984, requiring that certificates of allotment expressly recognize "non-granted" roads or trails where use of the road or trail predates the applicant's use and occupancy of the lands so crossed. Indeed, the language to which appellant objects ("subject to the continued right of public access") is set forth in the instruction memorandum itself. Authority for this reservation is based on the lack of exclusive use by the applicant, the memorandum advises, and not on an adjudicated R.S. 2477 right-of-way.

While we agree with appellant that determining the validity of an R.S. 2477 trail is generally beyond the jurisdiction of BLM, Alfred E. Koenig, A-30139 (Nov. 25, 1964), it does not appear that BLM ever determined the validity of the Kaltag-Topkok Trail or that its May 2 decision was based on the presence of an R.S. 2477 trail.

2/ Section 8 of the Act was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793, effective Oct. 21, 1976. Valid existing rights established under the Act were, however, recognized by section 701(a), 90 Stat. 2786.

Unstated in BLM's decision is the fact that the Kaltag-Topkok Trail is a segment of the Iditarod National Historic Trail, which is a part of the National Trails System created by the National Trails System Act, 16 U.S.C. §§ 1241-1251 (1982). Approximately two thousand miles long, the Iditarod Trail extends from Seward, Alaska, to Nome, Alaska, and is composed of a number of trails and side trails developed at different times during the gold rush era. This trail became a part of the National Trails System in 1978. 16 U.S.C. § 1244(a)(7) (1982); see 92 Stat. 3513.

[1] In the National Trails System Act, Congress anticipated that lands occupied by a national trail might one day be conveyed out of federal ownership. Accordingly, in section 7(h), 16 U.S.C. § 1246(h) (1982), it provided: "Whenever the Secretary of the Interior makes any conveyance of land under any of the public land laws, he may reserve a right-of-way for trails to the extent he deems necessary to carry out the purposes of this chapter." We note that a field report of appellant's parcel, finding that the parcel was crossed by the Iditarod Trail, specifically recommended that a right-of-way be retained "for public interest."

While we read section 7(h) as authorizing the reservation of a right-of-way in a conveyance of public lands, we do not construe that statute to deprive appellant of any vested rights. To determine what rights have vested in appellant, we must look to the terms of the Alaska Native Allotment Act.

In 43 U.S.C. § 270-1 (1970), Congress authorized the Secretary, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved land in Alaska to any Indian, Aleut, or Eskimo of full or mixed blood who resides in and is a native of Alaska. No allotment shall be made, however, until the applicant has made proof satisfactory to the Secretary of substantially continuous use and occupancy of the land for a period of 5 years. 43 U.S.C. § 270-3 (1970). The regulation defining the term "substantially continuous use and occupancy" calls for "substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use." 43 CFR 2561.0-5.

In its March 26 decision, BLM found that appellant had satisfied the use and occupancy requirements of the Alaska Native Allotment Act. Notwithstanding language in the instruction memorandum indicating that a reservation of public access is based on an applicant's nonexclusive use of allotment lands, BLM's May 2 decision did not contradict the earlier finding that appellant had satisfied the terms of the Act. In addition, each decision acknowledged the presence of the Kaltag-Topkok Trail through the lands sought.

[2] We regard BLM's resolution of this apparent inconsistency as an exercise of the discretion conferred upon the Secretary by 43 U.S.C. § 270-1 (1970) to grant the certificate of allotment subject to a continued right of public access. Under the circumstances of this case, we believe this exercise of discretion to be a proper one and, accordingly, affirm BLM's May 2 decision on that basis.

In Alyeska Pipeline Co., 52 IBLA 222 (1981), the Board emphasized the discretionary nature of a Native allotment grant. In that case Alyeska

appealed from a BLM decision approving a Native allotment application for land through which it held a right-of-way issued by the Secretary pursuant to the TransAlaska Pipeline Authorization Act of 1973, 43 U.S.C. §§ 1651-1655 (1982). In remanding this case for fact-finding, the Board stated that there may be public policy and equitable considerations weighing against BLM's granting the allottee full title. A hearing was ordered to determine, inter alia, whether there were valid public policy reasons which might justify the Secretary's exercising his discretion to deny or modify the allotment application.

Support for the conveyance of a less-than-fee interest to a Native allottee can be found in the Department's case law. Thus, in Golden Valley Electric Co., 85 IBLA 363 (1985), we held that a Native allotment must be made subject to a right-of-way previously granted pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1970). ^{3/} A decision by BLM declaring the right-of-way to be null and void was, accordingly, reversed.

Golden Valley was thereafter expressly approved in Leo Titus, Sr., 89 IBLA 323, 335, 92 I.D. 578, 585 (1985), involving an allotment arguably crossed by a preexisting trail. In Titus, BLM held that allotment lands were subject to a right-of-way reservation for a public trail. Although we remanded Titus for a further determination of the applicant's intent, we stated that an allotment may be subject to a right-of-way where a valid existing right-of-way is found which does not impede the allotment applicant's claim to the subservient land.

Finally in State of Alaska v. Heirs of Dinah Albert, 90 IBLA 14 (1985), we held that the vesting and subsequent approval of an allotment could not defeat highway rights-of-way previously issued pursuant to 23 U.S.C. § 317 (1982) and occupying lands sought by a Native.

[3] Nickoli also argues that when BLM approved his Native allotment application, ownership of the land passed to him, and that, under 25 CFR 169.3, the United States was required to obtain written permission in order to grant a right-of-way across his land. We do not agree. Under 25 CFR 169.3, the United States must obtain prior written consent from tribes or Natives to grant rights-of-way across land owned by them. That regulation, 25 CFR 169.3, provides in part:

(b) Except as provided in paragraph (c) of this section, no right-of-way shall be granted over and across any individually owned lands, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the owner or owners of such lands and the approval of the Secretary. [Emphasis added.]

"Individually owned land" is defined to mean "land or any interest therein held in trust by the United States for the benefit of individual Indians and land or any interest therein held by individual Indians subject to Federal restrictions against alienation or encumbrance." 25 CFR 169.1(b).

^{3/} Section 706(a) of FLPMA, repealed this Act subject to valid existing rights.

Contrary to appellant's assumptions, a Native has no title to the land claimed prior to receiving an allotment. Akootchook v. United States, 747 F.2d 1316, 1320 (9th Cir. 1984). Absent legislative approval of an allotment under section 905(a) of ANILCA, title to land continues in the United States when an application is approved because approval is only an interim step in conveying the land. An allotment is not made until the lands are surveyed by BLM and BLM has satisfactory proof that the applicant has met the continuous use and occupancy requirements of 43 U.S.C. § 270-3 (1970). 43 CFR 2561.2(a). Thereafter, BLM will issue to the applicant an instrument termed a "Native Allotment." State of Alaska, 45 IBLA 318, 321 (1980). In the instant case, BLM found that Nickoli had met the use and occupancy requirements, ^{4/} but the land has not been surveyed by BLM and the Native Allotment has not been issued. Therefore, title to the land has not been transferred to Nickoli, and 25 CFR 169.3, which pertains to Native and tribal land, has no applicability here.

Nickoli further argues that BLM should have rejected his claim to the narrow corridor of land occupied by the Kaltag-Topkok Trail if BLM found that he failed to establish at least potentially exclusive use of this area. In support, appellant cites 43 CFR 2561.0-5(a), supra, calling for a Native applicant to demonstrate possession and use of the land at least potentially exclusive of others.

The short answer to this argument is that BLM does not appear to have concluded that appellant failed to establish at least potentially exclusive use of the area occupied by the Kaltag-Topkok Trail. Neither the May 2 decision on appeal nor the March 26 decision contains such a finding. Although the instruction memorandum from the State Director of March 26, 1984, states that the basis for a reservation of a right of public access is a finding of a lack of exclusive use, we do not read this memorandum to alter terms of a specific decision. If BLM found that appellant had failed to satisfy use and occupancy requirements, it had only to say so.

Finally, Nickoli argues that BLM's approval of his Native allotment application with a reservation for a public access trail is, in effect, a partial rejection of his application based on a factual determination. Failure to notify him of the specific reasons for this adverse decision and to provide him with the opportunity to be heard on the facts, appellant contends, violated his right to due process under Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976).

^{4/} Upon an applicant's completion of use and occupancy requirements and the timely filing of a Native allotment application, a preference right to the lands sought is vested in the applicant. United States v. Flynn, 53 IBLA 208, 234 (1981). This preference right in the applicant does not, however, remove the discretion vested in the Secretary to grant the allotment. Such discretion is course not unfettered. Pence v. Kleppe, 529 F.2d 135, 140 (9th Cir. 1976). An Alaska Native who meets the statutory requirements on land statutorily permitted to be allotted is entitled to an allotment of that land, and the Secretary may not arbitrarily deny such an applicant Id. at 142; United States v. Flynn, supra at 239. See also Andrew Petla, 43 IBLA 186, 195 (1979), for a discussion of Secretarial discretion.

[4] A similar argument was voiced in Leo Titus, *supra*. Therein at pages 326-27, 92 I.D. at 580-81, we stated:

Following the Pence decision, this Board established that a contest must be initiated where factual issues exist as to the applicant's compliance with the use and occupancy requirements of the statute and implementing regulations, and BLM determines the application should be rejected. Mary Devaney, 51 IBLA 165 (1980); John Moore, 40 IBLA 321, 86 I.D. 279 (1979). BLM's decision at issue here cannot be accurately characterized as a rejection of appellant's claim but instead comprises a determination to subject a small portion of the approved allotment to a purported preexisting use. Under the circumstances, prior notice and contest proceedings pursuant to the Pence decision are not required, for appellant is not left without due process safeguards. BLM provided sufficient rationale for its determination and informed appellant of the opportunity to appeal to this Board. Consideration of appellant's argument on appeal fulfills the Department's due process responsibilities under the circumstances. See John D. Archer, 75 IBLA 128, 132 (1983).

In the instant case, appellant appears to argue that BLM made a factual determination in its May 2 decision that the public has a superior claim or right to the lands occupied by the Kaltag-Topkok Trail. Appellant does not identify the specific facts that are in dispute but instead raises questions as to when public use of the trail began, how continuous was its use, and whether it interfered with his use and occupancy. Appellant need only reread BLM's decisions of March 26 and May 2 for answers to these questions. In the absence of any dispute of material facts, we reiterate our holding in Titus that appellant's due process rights are satisfied by an appeal to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Fairbanks District Office is affirmed as modified.

Will A. Irwin
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge

