

STEPHEN NORTHWAY

96 IBLA 301

Decided April 2, 1987

Appeal from a decision of the Fairbanks District Office, Alaska, Bureau of Land Management, upholding correctness of the survey of Native allotment F-12950.

Set aside and referred for hearing.

1. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments

If a legally sufficient protest is timely filed pursuant to sec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1982), the protest takes a Native allotment application out of the purview of sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and the allotment is not legislatively approved. A subsequent withdrawal of the protest would not result in a "revival" of the legislative approval.

2. Alaska: Native Allotments -- Rules of Practice: Appeals: Generally

When, on appeal, a Native allotment applicant is challenging a survey of the land described in an allotment application claiming it is not the land he intended to apply for, and evidence is submitted indicating the applicant may have executed and submitted a later application prior to repeal of the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), the case will be referred for a hearing before an administrative law judge who will determine whether the later application was an amended application pending before the Department on or before Dec. 18, 1971.

Luke F. Kagak, 84 IBLA 350(1985), overruled to the extent inconsistent.

APPEARANCES: Andrew Harrington, Esq., Fairbanks, Alaska, for appellant;
Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Stephen Northway has appealed from a decision of the Fairbanks District Office, Alaska, Bureau of Land Management (BLM), dated July 11, 1985, upholding the correctness of a survey of Native allotment F-12950.

On May 19, 1970, appellant filed a Native allotment application with BLM pursuant to section 1 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 (1970) (repealed, subject to applications pending on Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1982)). This application was for 80 acres of land situated in protracted secs. 29 and 30, T. 15 N., R. 19 E., Copper River Meridian, Alaska. 1/ Appellant claimed seasonal use and occupancy of the land since 1930 for hunting and trapping. The only improvement listed on the application was a "tent camp." The application was certified by the Bureau of Indian Affairs (BIA) on May 18, 1970.

On August 17, 1974, a BLM realty specialist examined the land claimed in appellant's allotment application in the company of appellant. The August 19, 1974, "Native Allotment Field Report" for this examination stated that the land was found to be "posted" by appellant at the time of the examination, and that the improvements consisted of several cabins and trails. The report verified, through the testimony of local residents, appellant's use and occupancy in compliance with the applicable statute and Departmental regulations. By letter dated October 31, 1974, BLM notified appellant that his allotment application had been approved and that an allotment certificate would be issued after a survey of the land. On that same date, the District Manager, Fairbanks District Office, requested a survey of appellant's Native allotment. 2/ A survey of the land (U.S. Survey No. 5349) was conducted between September 26 and 29, 1978, pursuant to special instructions approved September 19, 1975. The survey plat was accepted by the Chief, Division of Cadastral Survey, Alaska, on October 6, 1980, and was officially filed in the Fairbanks District Office on October 20, 1980. The total acreage surveyed was 79.97 acres.

On December 2, 1980, Congress enacted section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a) (1982), which legislatively approved Native allotment applications pending before the Department on December 18, 1971, for land unreserved on December 13, 1968, effective 180 days from the date of enactment of ANILCA, subject to valid existing rights and certain exceptions. In the case of the exceptions, the

1/ The land applied for is described in the application as

"[b]eginning at corner 4 of U.S. Survey 2911, thence S. 2 degrees 04'E. 43 chains to a point on the right bank of the Tanana River and corner 2, thence northwesterly 29 chains along the bank to corner 3, thence north 24 chains to corner 4, thence easterly 20 chains to the point of beginning."

2/ That memorandum stated: "See Field Report for survey instructions." The field report contains survey instructions which are simply a copy of the description of the land claimed by appellant, as set forth in his application.

Department was required to adjudicate applications "pursuant to the requirements of the Act of May 17, 1906, as amended." 43 U.S.C. § 1634(a)(5) (1982). One of the exceptions is where the State of Alaska has filed a "protest" within the 180-day period, stating that the land sought is necessary for access to public land, water, or resources and no reasonable alternatives for access exist. 43 U.S.C. § 1634(a)(5)(B) (1982).

On June 1, 1981, the State filed a section 905(a)(5)(B) protest with respect to appellant's Native allotment application. On October 19, 1981, the State withdrew its protest. See Exhibit B attached to the State's October 16, 1981, letter to the BLM State Director. By decision dated November 27, 1981, BLM summarily dismissed the State's protest.

On March 10, 1981, BLM sent appellant a copy of the "official plat of survey outlining your allotment claim" and asked appellant, in an accompanying letter, "whether this surveyed lot contains improvements you may have placed on the land." By letter dated March 24, 1981, Rosemarie Maher, President, Northway Natives, Inc. (Northway), responded to BLM's letter on behalf of appellant, stating that appellant refused to accept the survey "until he receives answers to his questions," namely:

U.S. Survey No. 5349, Alaska does not include improvements established by Mr. Northway. He cannot understand why he is given acreage along the river bank and required to receive title to a mud flat, when he has land above his cabin which includes several structures and trail to his trapline which is not included in the survey. He also does not understand why he is only receiving 79 acres when he is entitled to receive 160 acres. Since this is not designated as a parcel it would appear that there are no other parcels.

On September 26, 1984, the Tanana Chiefs Conference (TCC) sent a letter to BLM. In this letter, the Rights Protection Specialist for TCC noted "there is a definite problem with the location of this allotment * * *," and asked BLM to determine whether it was possible to make an adjustment of the allotment boundaries to conform with the land Northway was seeking. The Fairbanks Office, BIA, concurred in this request. In a letter dated November 21, 1984, addressed to the Superintendent of the BIA Fairbanks Office, BLM responded to the TCC letter. In its response, BLM stated that it had reviewed Northway's application, the survey, and supporting documents and that, in the absence of a timely filed amendment, BLM found the land to have been properly surveyed. BLM asked BIA to contact the applicant and submit additional information, and stated that, if no evidence was received within 60 days, a notice of survey conformance would be issued.

In its July 1985 decision (styled a "Notice"), BLM essentially responded to the March 1981 letter of Northway, stating that BLM had "found no evidence that the survey of your allotment, U.S. Survey No. 5349, Alaska, was incorrectly performed and/or erroneously approved." BLM stated that the survey plat "agrees with the approximately 80 acres of land described on your application and as verified by field examination in your presence, on August 17,

1974," and contains the "structures found during the field examination." BLM noted that appellant had not filed an amended allotment application prior to the repeal of the Act of May 17, 1906.

On August 12, 1985, Avis Sam, appellant's daughter, filed a notice of appeal from the July 1985 BLM decision on behalf of her father, stating: "At the time it was surveyed a letter was written by Rose-Marie Maher stating that the land was not surveyed properly. The survey mistakenly includes mud flats and does not include improvements and uses farther up the hill." On April 21, 1986, the Alaska Legal Services Corporation (ALSC), also on behalf of appellant, filed a "Supplemental Memorandum" in support of appellant's appeal. ALSC argues that BLM should reform its survey, pursuant to section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1982), in order to correctly reflect the land appellant "used and applied for." ALSC states:

The land as currently described by the survey includes an area of mud flats next to the river which Mr. Northway has not used and will not use. A slight shift to the north would eliminate the mud flats and encompass an old tent frame site which belongs to Mr. Northway, currently excluded from the survey.

On April 28, 1986, the Regional Solicitor filed a motion to dismiss appellant's appeal because a statement of reasons was not filed timely. ALSC opposes the motion to dismiss on the basis that appellant's original notice of appeal contained a statement of reasons. The applicable regulation, 43 CFR 4.412(a), requires that a "statement of reasons for the appeal" be filed "within 30 days after the notice of appeal was filed" where "the notice of appeal did not include a statement of reasons." We agree that appellant's notice of appeal contained a statement of reasons to the extent it argued, relying on the "letter * * * written by Rose-Marie Maher," that the survey was improper. In essence, the notice of appeal incorporated by reference the March 1981 "letter" included in the record. Moreover, regardless of the merits of the statement of reasons, it set forth appellant's principal objection to the survey, namely, that the survey "does not include [appellant's] improvements." BLM's motion to dismiss is denied. See Ouzinkie Native Corp. v. Opheim, 45 IBLA 198 (1980).

On August 21, 1986, the Fairbanks District Office, BLM, filed additional documents with the Board which BLM had received on August 12, 1986. In one of the documents, an August 6, 1986, memorandum, the Acting Superintendent, Fairbanks Agency, BIA, informed the Fairbanks District Office that the original Native allotment applications of appellant "have been found and [it has] been certified that the [applicant is] Native and entitled to an allotment." The Acting Superintendent stated that the applications "need to be incorporated into the system." The applications to which the Acting Superintendent refers are apparently four applications, not serialized by BLM, which ALSC had filed with BIA on April 21, 1986. ^{3/} These applications, all signed by

^{3/} In an Apr. 18, 1986, letter which accompanied the submittal, ALSC stated: "We are submitting these * * * forms for BIA certification. This is necessary because a thorough search of records at BLM has failed to turn up these applications for Native Allotment for Mr. Northway."

appellant and dated December 2, 1970, were for four 40-acre parcels at various locations where appellant claimed use and occupancy.

One of the parcels overlaps part of the land involved herein. This parcel is described as "20 acres at Northside and 20 acres at Southside * * * along Alaska [Highway] toward Northway [Junction] in section 29," and is depicted on an attached map. The outlines of the parcel have also been placed on a copy of the survey plat (U.S. Survey No. 5349). That plat contains handwritten notations which refer to appellant's tent frame just north of the surveyed land, but included in the 40-acre parcel, and submerged land (apparently the mud flats) within the surveyed land, but not included in the 40-acre parcel. The four allotment applications are not date-stamped by BIA or BLM, but were certified by BIA on August 4, 1986.

Also included in the August 1986 filing with the Board were two affidavits ALSA had filed with BIA. In one affidavit, dated April 17, 1986, George Tobuk, an employee of the Realty Department, TCC, stated that he was aware of appellant's "original" December 1970 applications and had seen them in the TCC files "several years ago," and that the applications were probably transferred from BIA to TCC, which had subcontracted to do "BIA realty work * * * back in 1976 or 1977." In the other affidavit, dated April 18, 1986, appellant states that he had "applied for a Native allotment several times," and that the "last time [was] * * * for four parcels." Apparently referring to his four applications, appellant stated:

I gave this application to a BIA worker. I do not remember who it was. I would not be able to say on my own when it was, but I know it was before the deadline for applying. I have been told that the applications have been found with a date of December 1970 and that seems right to me.

Appellant further explained:

I got a letter in 1981 from the Bureau of Land Management which I took to Rosemarie Maher to read to me. I was quite concerned to learn that I had only one parcel for 80 acres, and that that included a section of mud flats I had not applied for. I had Rosemarie Maher write a letter for me explaining that this was not the land I had applied for. (I do not read or write beyond my name.)^{4/}

This case plainly does not involve whether the disputed survey is an accurate depiction of the land described in the May 1970 allotment application. Indeed, no evidence has been introduced that it is not accurate. Rather, this case concerns whether the survey depicts the land for which appellant actually applied.

^{4/} The affidavit contains a certificate that someone fluent in English and Athabascan translated the affidavit to appellant and that he "understood what it said."

[1] Preliminary to our discussion of the claim by appellant, we will address the issue of the effect of the filing of a protest by the State and the State's subsequent withdrawal of that protest. In our decision entitled Luke F. Kagak, 84 IBLA 350 (1985), the Board held that withdrawal of a State protest had the effect of reviving the legislative approval set forth in section 905(a)(1) of ANILCA, in the absence of "any other action which may have arisen before the end of the 180 day period which would preclude approval," Id. at 351-52, relying on United States v. Napouk, 61 IBLA 316 (1982).

Upon review, we find our decision in Napouk to be sound, but distinguishable from the present case. In Napouk the Board found the protest of parcel B to be "legally insufficient" because it did not describe the land in the Napouk Native allotment. The Board held the protest not to be a "statutory barrier against legislative approval." Id. at 322.

On the other hand, in Kagak, there was a legally sufficient protest which was timely filed, but later withdrawn as a part of a stipulated settlement. When it enacted the provisions found at section 905(a)(1) of ANILCA, "Congress intended to make its legislative approval as final as actual issuance of the 'Native Allotment,' removing the Department's general authority to reexamine the question of entitlement in all cases where the allotment was subject to legislative approval, and leaving the Department the purely ministerial task of surveying the allotment." Eugene M. Witt, 90 IBLA 265, 270 (1985). Thus, for an allotment which properly falls within the purview of section 905(a)(1) of ANILCA, the Department would have no authority to impose conditions or reservations.

An application of our holding in Kagak in cases such as the one now before us could lead to untenable and unanticipated results. For example, if the State were to file a timely protest because the Alcan highway passed through what it believed to be allotment land, and subsequently found the description in the application to be a full township from the highway, it would be justified in withdrawing its protest. Although it could be argued that such a protest was "legally insufficient," a situation could arise where, after withdrawal of the protest, the allottee would produce a timely filed amendment showing the placement of the allotment in the position the State originally believed to be the description of the allotment land, and which, in fact, contains the Alcan highway. Under Kagak, the allotment land would pass without reservation of a right-of-way. Because of this possibility, we now find it necessary to overturn our holding in Kagak. If a legally sufficient protest is timely filed pursuant to section 905(a)(5)(B) of ANILCA, the protest takes the Native allotment application out of the purview of section 905(a)(1) and the allotment would not be legislatively approved. Further, a subsequent withdrawal of the protest would not result in "revival" of the legislative approval. See Clarence Lockwood, 95 IBLA 261 (1986).

[2] The overriding question raised by this case is whether the December 1970 applications of appellant can be considered viable given repeal of the Act of May 17, 1906, by section 18(a) of ANCSA on December 18, 1971. Section 18(a) of ANCSA states that "any application for an allotment that is pending

before the Department of the Interior on December 18, 1971, may, at the option of the Native applicant, be approved and a patent issued in accordance with [the] * * * 1906 Act." 43 U.S.C. § 1617(a) (1982). Prior to repeal, an applicant had the right to submit an allotment application or to amend an existing application to include new or additional land. See Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985). However, following repeal, such an application or amendment would only continue to be viable under section 18(a) of ANCSA, if it were "pending" before the Department on December 18, 1971. Ouzinkie Native Corp. v. Opheim, 45 IBLA at 201-202. After that date, the authority to submit a new application or to amend an existing application to include new or additional land simply did not exist. ^{5/} As we said in Andrew Petla, supra at 193, such an attempt would be "barred by the statute."

We have often considered the question of whether a Native allotment application or amendment was "pending" before the Department on December 18, 1971, in light of the interpretation given in an October 18, 1973, memorandum to the Director, BLM, from Assistant Secretary Horton. See Ouzinkie Native Corp. v. Opheim, 83 IBLA 225 (1984), and cases cited therein. That memorandum provides that an application will be deemed to be "pending" where it "[has] been on file in any bureau, division, or agency of the Department of the Interior or on before December 18, 1971":

Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency, or division time stamp, the affidavit of any bureau, division, or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971.

See Katmailand, Inc., 77 IBLA 347, 354 (1983).

In the present case, as noted supra, there is no date-stamp on the December 1970 applications. We also have no affidavit signed by a BIA or BLM officer acknowledging receipt of the applications on or before December 18,

^{5/} There is one exception to the rule precluding amendment of a claimed allotment to claim additional lands after repeal of the Act of May 17, 1906, i.e., where the erroneous description in the original application "arose from the inability to properly identify the site on protraction diagrams." Edith Szmyd, 50 IBLA 61, 63 (1980) (quoting from Oct. 18, 1975, memorandum to Director, BLM, from Assistant Secretary Horton); see also Nora L. Sanford (On Reconsideration), 63 IBLA 335, 338 (1982); Raymond Paneak, 19 IBLA 68 (1975). There is no indication that the description of land in the May 1970 application arose from any difficulty identifying the allotment site on the protracted survey plat. Indeed, the land was described principally by metes and bounds tied to an existing survey. See Andrew Petla, 43 IBLA 186, 193 (1979).

However, as to amendment of the land description in the application to conform to the land the applicant originally intended to describe, see footnote 8, infra, and accompanying text.

1971. In his April 1986 affidavit, appellant states that he handed these applications to a "BIA worker * * * before the deadline for applying," presumably December 18, 1971. We cannot determine from the record whether BIA has any record of receiving these documents. In his August 1986 memorandum, the Acting Superintendent, Fairbanks Agency, states that the "applications have been found." We are unsure whether this means that BIA found the documents in its records or, as seems more likely, it was acknowledging discovery of the documents by ALSC, which then filed them with BIA on April 21, 1986. Moreover, there is the question of whether BIA admits receipt of the December 1970 applications on or before December 18, 1971.

The packet of documents transmitted to the Board in August 1986 also contains a copy of a document signed by Stephen Northway and dated February 14, 1966, which, referring to an earlier application by Stephen Northway (F-024726), states: "I wish to amend my application to include more than one tract of land, I am now requesting assistance from the Bureau of Indian Affairs in the preparation of my application." In a March 30, 1966, letter to the Fairbanks District Office, BIA acknowledged that Stephen Northway had requested its assistance in preparing a "revised application," which would include "additional tracts of land." We do not know whether this "revised application" consists of the December 1970 applications of appellant. However, in his April 1986 affidavit, Tobuk stated: "I believe that the handwriting on the [December 1970] applications is that of Bill Mattice, who was an employee of the BIA attempting to help Native Allotment applicants in the Tok and Northway area during that period." This evidence indicates that BIA assisted appellant in preparing the December 1970 applications. However, the evidence does not permit the Board to draw the conclusion that the December 1970 applications were "on file" with BIA or any other bureau, division, or agency of the Department on or before December 18, 1971. It may be that a BIA employee assisted appellant in preparing the applications, but the documents were never filed with the Department of the Interior.

We would ordinarily remand this case to BLM to determine, with the assistance of BIA, whether appellant's December 1970 applications were "on file" with BIA or any Departmental office on or before December 18, 1971. In the event that BLM concluded that appellant's December 1970 applications were not pending before the Department on December 18, 1971, and thus must be rejected, the Board would be required to refer the matter to a hearing at the request of appellant, in accordance with Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), because the question raised is one of material fact. Even in the absence of a request, on appeal it is likely we would refer the matter for hearing. See Pedro Bay Corp., 88 IBLA 349 (1985). Thus, we conclude that the better approach in the interest of expediting resolution of this case, is to now refer the matter to the Hearings Division, Office of Hearings and Appeals (OHA), for the assignment of an Administrative Law Judge, pursuant to 43 CFR 4.415. The Judge will hold a hearing on the question of whether appellant's December 1970 applications were pending before the Department on December 18, 1971. 6/ Notice of the hearing should be served on the State of Alaska, which will be given an opportunity to intervene in the proceedings.

6/ It should be remembered that, as we said in William Yurioff, 43 IBLA

In addition to the question of whether the December 1970 applications were pending before the Department on December 18, 1971, the Administrative Law Judge should address the question of whether these applications were intended by appellant to amend the May 1970 application. 7/ The answer to this question is complicated by the fact that the December 1970 applications do not refer to the May 1970 application and, indeed, do not state whether they intended to supersede that application

An allotment applicant is only entitled to 160 acres (see 43 U.S.C. § 270-1 (1970)), it would thus appear that the December 1970 applications were intended to supplant the May 1970 application. See Andrew Petla, supra. In fact, in his April 1986 affidavit, appellant indicates that this was his intent: "I want the applications which I handed in to be processed by the BLM so I can get my land." As noted supra, Northway essentially states that the May 1970 application does not reflect his intent. On the other hand, with particular relevance to the land claimed in the May 1970 application, the fact that appellant accompanied the BLM realty specialist during the August 1974 field examination and posted the land at that time indicates that appellant only intended to apply for the land claimed in that application at that particular location. In any case, this question must also be addressed by the Administrative Law Judge on remand to ensure that the December 1970 applications were intended by appellant to amend the May 1970 application. 8/

fn. 6 (continued)

14, 17 (1979), "a general statement that an appellant had an application on file with BIA is not sufficient to establish that the particular application under review had been timely filed." See also Nora L. Sanford (On Reconsideration), supra at 337.

7/ There is also some question whether the May 1970 application is in fact the application of appellant. In his April 1986 affidavit, appellant only acknowledges the Dec. 1970 applications. We note that the May 1970 application refers to seasonal use and occupancy, between August and February, dating from Aug. 10, 1930, whereas the Dec. 1970 application with respect to some of the same land refers to seasonal use and occupancy between June and November, dating from June 1910. In addition, in his April 1986 affidavit, appellant stated that the land described in the May 1970 application "was not the land I had applied for." This raises the possibility that the May 1970 application is not appellant's application. But see Katmailand, Inc., supra at 356-57.

8/ We note that section 905(c) of ANILCA provides that an allotment applicant may amend the land description in his application "if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed." 43 U.S.C. § 1634(c) (1982). Section 905(c) of ANILCA, thus, provides authority for an applicant to amend his allotment application following passage of ANILCA, provided there is notice to the State and other interested parties. Pedro Bay Corp., supra. Such an amendment may include new land so long as it is consistent with the applicant's original intent. Olympic v. United States, supra. However, such an amendment may not include additional land. Charlie R. Biederman, 61 IBLA 189, 192 n.1 (1982). Section 905(c) of ANILCA provides that, following the amendment,

Following the hearing, the Administrative Law Judge will issue a decision, which will be appealable to the Board pursuant to 43 CFR 4.410. However, in the absence of an appeal, the decision of the Administrative Law Judge will be final for the Department. This referral of the case for a hearing should, of course, not preclude the parties, including the State, from undertaking settlement negotiations in an attempt to resolve the matter without the time and expense of a hearing.

We note that the new land appellant seeks in sec. 29, T. 15 N., R. 19 E., Copper River Meridian, Alaska, was included in an August 21, 1980, interim conveyance (Nos. 364 and 365) of the surface and subsurface estates to the village of Northway and Doyon Limited, respectively, which conveyances specifically excluded Native allotment F-12950. These interim conveyances had the effect of removing the Department's jurisdiction to adjudicate claims to the land. City of Klawock, 94 IBLA 107, 111-12 (1986). However, in the event there is a finding that the December 1970 applications were pending and valid amendments, the Department may pursue the question of appellant's entitlement to this land in the interest of determining whether to pursue recovery of the land. Oleanna Hansen, 84 IBLA 150 (1984). This approach may be applicable to the other three parcels included in appellant's December 1970 applications.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is referred to the Hearings Division, OHA, for further action consistent herewith.

R. W. Mullen
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris

Administrative Judge.

fn. 8 (continued)

section 905 of ANILCA "shall operate to approve the application or to require its adjudication, as the case may be, with reference to the amended land description only." 43 U.S.C. § 1634(c) (1982); cf. Richard L. Nevitt, 78 IBLA 300 (1984), aff'd, Nevitt v. United States, No. A80-226 (D. Alaska June 14, 1985).

