

STATE OF ALASKA (ELLIOT R. LIND) (ON RECONSIDERATION)

IBLA 85-685

Decided August 17, 1988

Reconsideration of State of Alaska (Elliot R. Lind), 95 IBLA 346 (1987), upon petition for reconsideration by the State of Alaska of the Board's decision affirming BLM approval of Native allotment application AA-5998. Reconsideration granted.

State of Alaska (Elliot R. Lind), 95 IBLA 346 (1987), vacated; BLM decision reversed; adjudication of Native allotment required.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Contest and Protests: Generally--Rules of Practice: Protests

A state protest against approval of a Native allotment application filed pursuant to 43 U.S.C. § 1634(a)(5)(B) (1982) which identifies with specificity the facts relied upon to show an access route is in conflict with the allotment requires adjudication of the allotment pursuant to 43 U.S.C. § 1634(a)(5)(B) (1982).

APPEARANCES: Lance B. Nelson, Esq., Assistant Attorney General, State of Alaska, Anchorage, Alaska, for petitioner State of Alaska; David C. Fleurant, Esq., Anchorage, Alaska, for Elliot R. Lind.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Alaska has sought reconsideration of a decision of the Board entitled State of Alaska (Elliot R. Lind), 95 IBLA 346 (1987). In that case, the Board affirmed a decision of the Alaska State Office, Bureau of Land Management (BLM), dated May 6, 1985, approving Lind's Native allotment application AA-5998, parcel B, and dismissing the State's protest against issuance of Lind's allotment. BLM dismissed the protest because it failed to "provide the specific facts upon which the conclusions concerning access are based."

The State's protest was filed pursuant to section 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5)(B) (1982), which provides that legislative approval of a Native allotment application shall not occur if:

(B) The State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the

State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist; * * *.

The State's protest was a two-page document, the first of which stated that Lind's allotment application 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. On this same page, the State indicated by check mark that Lind sought lands used for an "existing seaplane base," "existing boat launch," and "existing trail." Page one further stated that the allotment lands formed the only reasonable access to publicly owned resources. No reasonable alternative for access existed, the State said, because "[t]his is an existing constructed public access route, transportation facility or corridor." The form further indicated that public use documentation was attached.

The attached documentation described two "public trail easements" that had received past use for hunting and trapping and were presently heavily used during hunting season. One such easement was miles away from the allotment lands. The second easement approached Lind's allotment lands from the south and was described as ending in sec. 5, T. 43 S., R. 61 W., Seward Meridian. Lind's allotment lands occupy 80 acres of sec. 5 and border the northeast portion of Black Lake.

In its statement of reasons, the State has focused on two interim conveyance (IC) 1/ by which the United States conveyed all townships bordering Black Lake. Expressly excluded from the conveyed lands were certain parcels sought as Native allotments, including Lind's parcel AA-5998. In conveying available lands 2/ in sec. 5, T. 43 S., R. 61 W., Seward Meridian, the United States reserved a site easement 3/ for a campsite on Black Lake. It also reserved a trail easement 4/ from the campsite to public lands located to the northeast of Lind's allotment. These easements were reserved pursuant to section 17(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C.

1/ Interim conveyance No. 93 was issued by the United States to Chignik River Limited by date of May 22, 1978. Interim conveyance No. 99 was issued by and between the same parties by date of June 15, 1978.

2/ Excluded from those lands in sec. 5 conveyed to Chignik River Limited were Native allotments AA-5998 (Parcel B) and AA-6003 (Parcel B), and Black Lake.

3/ This site easement, designated EIN 20 C4 (20a) in IC No. 99, is one acre in area with an additional 25-foot wide easement on the shoreline of Black Lake along the entire waterfront of the site.

4/ This trail easement, designated EIN 20 C4 (20b) in IC Nos. 93 and 99, is for a proposed access trail 25 feet in width from campsite 20a, see note 3, northeasterly to public lands in sec. 33, T. 42 S., R. 61 W., Seward Meridian.

§ 1616(b) (1976). The State contends that this trail easement would be rendered meaningless by approval of Lind's allotment 5/ because the site easement "appears to be within the property claimed by Mr. Lind" 6/ and because the trail easement runs from the northeast shore of Black Lake in sec. 5 "at the very location of Mr. Lind's allotment site." 7/

In our decision of February 4, 1987, we stated that the site and trail easement reserved by the interim conveyances were not the prior existing uses that the State described in its 1981 protest. 95 IBLA at 350. Observing that BLM's 1985 review of the record failed to confirm the presence of a seaplane base, boat launch, or trail, as indicated by the protest, we concluded that this base, launch, and trail had never existed on Lind's allotment lands. There being no basis for allowing the State to amend its protest to include the site and trail easements, we concluded that the protest described "existing" uses with no basis in fact. BLM could properly dismiss such protest, we held, because the protest failed to describe with specificity the basis in fact upon which the protest was made.

In its petition for reconsideration, the State contends that BLM has no authority to adjudicate the factual accuracy of the State's protest. It further argues that the Board wrongly assumed that the State admitted inaccuracies in its protest and was attempting to amend its protest on appeal. The issue of the site and trail easements was raised, the State says, to point out that a discontinuous easement was involved. Finally, State of Alaska, 95 IBLA 196 (1987), is cited by petitioner as inconsistent with the Board's action in the instant appeal.

In support of these contentions, the State says that in 1981 there was an "existing constructed trail crossing the allotment running along the unnamed creek in section 5 at approximately the same location" as the trail easement reserved by interim conveyance. 8/ The trail identified by the State in its protest approached sec. 5 from the south and apparently terminated there.

As to the seaplane base, boat launch, and trail, all of which the State described in its protest as "existing," the State says on reconsideration:

[The State] also believes that the allotment was probably used for a boat launching and beaching spot for people traveling up the Chignik River and across Black Lake to reach the existing trail. The state believed in 1981 that the allotment was probably

5/ Request for Reconsideration at 7.

6/ Statement of Reasons at 4. But see letter to James E. Culbertson, Dept. of Natural Resources, State of Alaska, dated Dec. 15, 1982, from Terry R. Hassett, BLM, containing a draft easement memorandum that places the site easement to the west of Lind's allotment (at 12). File AA-6655-A, part 2.

7/ Id.

8/ Request for Reconsideration at 13.

the site of an existing seaplane base, used in connection with the existing trail on the property as a place to change modes of transportation for those utilizing the trail. The state does not know that any improvements were constructed in connection with boating or aircraft uses.

The context of this statement makes clear that the "existing trail" mentioned above is the trail proceeding north from sec. 5.

[1] The State's pleadings on reconsideration cause us to reverse our prior decision. It appears from the record now before us (attachment 2 to Elliot Lind's response to petition for reconsideration) that page 2 of the protest is a copy of an attachment to a March 24, 1975, letter from the Alaska Department of Fish and Game to BLM recommending easements across lands to be conveyed to the Village of Chignik under section 17(b) of ANCSA. The purpose of the recommended easement was cited as "[c]ontinued public use along the trail * * * from Chignik to the northwestern boundary of the withdrawal area." It appears that sec. 5 is on the northern boundary of the tract of land conveyed.

The fact that the reserved easement EIN 1 D9 terminated at the south shore of Black Lake and did not include the stretch of the trail on the east side of Black Lake and in sec. 5 did not contradict the assertion by the State that lands embraced in the allotment were necessary for access to the public lands to the north and to the lake. The decision not to extend the easement along the east side of the lake was reasonably predicated on the navigability of Black Lake as a public waterway, coupled with the reservation of the additional easement EIN 20 C4 (20b) from the lake shore in sec. 5 to the northeast to the public lands in the next township. It is this latter part of the trail access from the Village of Chignik to the public lands to the north which is threatened by the apparent conflict with the Lind allotment. It now appears the access route described by the State's protest was the same trail access route which the ANCSA easements were designed to preserve although the trail was broken into two segments connected by the navigable lake. While the access route in 1981, when the protest was filed, was not precisely the same as the 1975 description, this fact did not eliminate the need for access through sec. 5 to the public lands and Black Lake. We reverse our prior finding to the contrary and find that the State's protest was made with the specificity required by 43 U.S.C. § 1634(a)(5)(B) (1982).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, the decision so reconsidered is vacated, and

the decision of BLM is reversed. BLM is directed to adjudicate the allotment application of Elliot R. Lind pursuant to the requirements of the Act of May 17, 1906, as amended.

Franklin D. Arness
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Gail M. Frazier
Administrative Judge

