

Editor's Note: appeal filed, Civ. No. A98-0068 (D. Alaska March 4, 1998); dismissed, Oct. 30, 1998; order of dismissal withdrawn, dismissed after reconsideration, Dec. 7, 1998

IRA WASSILLIE (ON RECONSIDERATION)

IBLA 84-758

Decided September 20, 1989

Petition for reconsideration of Ira Wasillie, 103 IBLA 112 (1988).

Petition for reconsideration denied; previous decision affirmed.

1. Alaska: Native Allotments--Board of Land Appeals--Secretary of the Interior

When it appears an applicant for a Native allotment may not have presented satisfactory proof of his substantially continuous use and occupancy of the land for a period of 5 years, the Board may, in the absence of legislative approval, review the record and act to prevent the mistaken issuance of a patent to the land to one not entitled to it, even if the Bureau of Land Management has already approved the application.

2. Administrative Procedure: Administrative Review--Alaska: Native Allotments--Appeals: Generally--Evidence: Preponderance--Rules of Practice: Private Contests

When the Board conducts de novo review of a decision of an Administrative Law Judge who erroneously allocated the burden of proof in a private contest proceeding to the applicant for a Native allotment rather than to the contestant, the Board properly reviews the entire record to determine whether the applicant established by a preponderance of the evidence that he satisfactorily proved he was entitled to an allotment.

APPEARANCES: Tred R. Eyerly, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant; Lance B. Nelson, Esq., Office of the Attorney General, State of Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

In response to a petition for reconsideration of Ira Wassillie, 103 IBLA 112 (1988), we allowed appellant, Ira Wassillie, to "file exceptions to our decision and supporting reasons for those exceptions" by order

dated November 29, 1988. We stated that if the exceptions and reasons presented sufficient reason to do so, we would reconsider our decision, citing 43 CFR 4.403. That regulation provides that "[t]he Board may reconsider a decision in extraordinary circumstances for sufficient reason."

Appellant filed his exceptions on February 10, 1989. On February 24 and June 19, 1989, respectively, he filed copies of the February 16, 1989, order of the U.S. District Court for the District of Alaska in Degnan v. Hodel, No. A87-252 Civil, and of the Board's June 8, 1989, decision in Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (1989), as "supplemental authority." The State of Alaska filed a response on May 17, 1989.

The facts are fully set forth in our previous decision. We iterate here the ones important to the issues raised by appellant's exceptions. Appellant filed his application for an allotment under the Act of May 17, 1906, in April 1971. After a field examination in 1973, the Bureau of Land Management (BLM) rejected his application in February 1975. In April 1975, BLM vacated its February decision and approved the application. In May 1979, the State of Alaska filed a private contest complaint; as a result, appellant's application was not approved by section 905 of the Alaska National Interest Lands Conservation Act. See 43 U.S.C. @ 1634(a)(5)(C) (1982). In September 1982 Administrative Law Judge Clarke conducted a hearing; in June 1984 he issued a decision concluding that appellant had failed to preponderate on the issue of whether he had possessed the land for 5 years in a potentially exclusive way (see 43 CFR 2561.0-5(a)) and that his application should be rejected. Appellant filed a notice of appeal. Later appellant and the State of Alaska filed a settlement agreement with the Board proposing to divide the disputed land between them. BLM expressed reservations, and, in light of the Administrative Law Judge's conclusion, rather than approving the settlement agreement, we examined the record de novo to determine whether appellant had demonstrated his entitlement by submitting satisfactory proof of substantially continuous use and occupancy of the land for a period of 5 years. We concluded he had not.

Appellant argues that BLM's April 1975 decision "became the Department's final act of adjudication on Mr. Wassillie's claim," (Exceptions at 3) because the State of Alaska did not appeal it to the Board within 30 days (see 43 CFR 4.411) and did not file its private contest complaint until May 1979. Appellant acknowledges that 43 CFR 4.450-3 does not provide any time limit for initiating a private contest, but states "it was unreasonable for the State to assume it had over four years to file its private complaint." Id. (emphasis in original). Appellant suggests that in State of Alaska, 41 IBLA 309 (1979), "the Board ruled that a private contest proceeding must be initiated within sixty days" (Exceptions at 3).

The passage in State of Alaska appellant cites states: "It [the State] may, within the 60-day period prescribed, initiate a private contest proceeding pursuant to 43 CFR 450-1." 41 IBLA at 312. The period referred to is not prescribed by the regulation governing the initiation of a private contest, however, but was prescribed by the notice BLM served on the State in that case stating BLM had determined the Native allotment applicant was

qualified to receive the lands and allowing the State 60 days from receipt of the notice to file a private contest. No such notice was issued in this case, however, nor was any period limiting the State's right to file a private contest indicated in BLM's April 1975 decision.

The record does not support appellant's argument that the State unreasonably assumed it had 4 years to file its private contest. The file contains letters from the State to BLM dated June, August, and October 1975 about the April 1975 decision before the January 1976 BLM response saying it would inform the State of its action referred to in our decision, see 103 IBLA at 114 n.2, and then is silent, except for slips indicating Alaska Legal Services Corporation representatives examined the case file in August 1977 and October 1978, until November 1978. In that month appellant's attorneys filed an entry of appearance and a request for a hearing "[i]n the event that the documentary evidence heretofore submitted is not found to be sufficient to enable the Bureau of Land Management to approve his allotment." In March 1979, the State gave BLM notice that it intended to initiate formal private contest proceedings, which it did on May 1, 1979. An October 31, 1979, BLM Report of Telephone Conversation with the State Attorney General's Office explains:

Barbara [Miracle, Assistant Attorney General] called to ask me to keep holding on their private contest proceedings; that an agreement was being worked out between the State, the Alaska Legal Services, BIA [Bureau of Indian Affairs] and Mr. Wassillie. She stated she would finally withdraw the protest as soon as the agreement was signed. I knew of this agreement through Alaska Legal Services and have been holding.

A February 28, 1980, BLM Report of Telephone Conversation states that BLM informed the Regional Solicitor of the Department that the State's private contest was "being held awaiting an agreement between the State, Alaska Legal Services Corporation, BIA, and Mr. Wassillie." An August 4, 1980, note from BLM's Branch of Lands and Minerals Management to its Branch of Lands and Minerals Operations reads:

It is not at all clear what the question is; the record clearly shows that the next move is the "4-way" agreement & if all bets are off, the file ought to show it. The file also ought to show that the 4/17/75 request for survey has been rescinded, as I have been told.

There are a lot of factual questions which should be resolved by contest. If an attempted agreement has failed, the State should pursue its private contest. There should be a formal letter from ALSC [Alaska Legal Services Corporation] or the State saying what happened to the agreement proposal & what the State wants to do.

A BLM Report of Telephone Conversation dated August 5, 1980, between BLM and the Regional Solicitor's office indicates BLM was asked "if we were

going to contest or let approval stand." The Regional Solicitor's representative "said the State told him the agreement was off between the State and the applicant." Finally, when BLM transmitted the file to the Office of Hearings and Appeals for hearing on April 7, 1981, it noted: "Private contest was not transmitted in 1979 because of pending agreement between applicant and State of Alaska. Apparently the Bureau of Indian Affairs would not approve the agreement."

Although it is evident the case file does not reflect everything that took place, apparently this dispute was in some stage of discussion and negotiation among the parties continually from 1975 to 1980. Under the circumstances, we do not believe the State unreasonably delayed filing its complaint for a private contest.

[1] Appellant also argues that "once his application was approved, it could no longer be disturbed by the filing of a private contest complaint" (Notice of Supplemental Authority filed Feb. 24, 1989, at 1). He argues that the Board's decision in Clarence Lockwood, 95 IBLA 261 (1987), that the Department may modify a Native allotment application after it has been approved is incorrect and that the U.S. District Court for the District of Alaska so held in Degnan v. Hodel, No. A87-252 Civil (Order - Plaintiffs Granted Summary Judgment, Feb. 16, 1989; Order - Summary Judgment Order Reaffirmed, May 6, 1989). In Lockwood we upheld BLM's reservation of rights-of-way for the Iditarod Trail under the National Trails Systems Act. BLM had reserved the rights-of-way in 1985, after it had approved the applicants' applications in March 1975 and issued "final certificates" in 1983 but before BLM had issued them their "Native Allotments." See 95 IBLA at 262-63. In Degnan, relying on State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alaska 1985), aff'd sub nom. Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987), the court held that the applicants "acquired equitable title to their allotments when the Secretary granted interim approval of their respective allotment applications in 1975. The Secretary was thereafter without power to diminish that title by reserving rights-of-way across the allotment lands under the [National Trails Systems Act]" (Feb. 16, 1989, order at 8). The court's May 6, 1989, order stated it had assumed the certificates of allotment had been issued in 1975, but the fact they were not did not alter its view that

with the use determinations having been made in favor of the plaintiffs and the applications having been generally accepted subject only to survey, the lands in question are deemed segregated and the plaintiffs had equitable title before enactment of the 1978 National Trails Systems Act amendments which defendants employed to attempt modification of plaintiffs' applications.

(May 6, 1989, order at 4). That is, its order was not "founded upon an assumption * * * that a native allotment formally setting aside the property in question had issued in favor of any of the plaintiffs." Id. at 3.

We do not believe Degnan supports appellant's broad assertion that "once his application was approved, it could not be disturbed." In Degnan there was no question whether the applicants were entitled to the Native

allotments for which they had applied. Degnan holds that the National Trails Systems Act was insufficient authority for BLM to unilaterally impose a right-of-way on a Native allotment after the applicant had met the substantially continuous use and occupancy requirement of the Native Allotment Act; the court observed that the Department has the power under the National Trails Systems Act to enter into a cooperative agreement for a right-of-way or to acquire one by condemnation (Feb. 16, 1989, order at 8). Degnan does not, however, contradict the Board's authority on behalf of the Secretary, which exists in the absence of legislative approval, to prevent the mistaken issuance of a patent to land to one not entitled to it, which is the situation in this case. ^{1/} That authority has been clear ever since Knight v. United States Land Association, 142 U.S. 161, 178-81 (1891). It is that authority we invoked when we undertook de novo review of the record in this case. See 103 IBLA at 116.

The soundness of the doctrine authorizing the Secretary to "review, reverse, amend, annul or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public lands * * * with a just regard to the rights of the public and of private parties," 142 U.S. at 178, is evident from the circumstances of this case. The record is replete with indications that it has always been doubtful whether appellant was entitled to an allotment of this land. His first application for it had been denied in 1963 based on a 1961 field examination of his application and a 1963 field examination of a conflicting trade and manufacturing site application. The field report on his second application recommended denial. BLM denied the application a second time in February 1975. It then reversed itself 6 weeks later on the basis of two affidavits, one from appellant himself, one from his son; the affidavits themselves indicated appellant's use had not been potentially exclusive. See 103 IBLA at 116-17. There were immediately questions about the April 1975 decision, both from outside BLM, as stated above, and from within. A June 20, 1975, memorandum by the Area Manager of the BLM Peninsula Resource Area concerning the "April 17, 1975 Decision - Ira Wassillie Allotment," which was concurred in by the District Manager, indicates that the decision was made under circumstances inconducive to circumspection or careful staff work. The memorandum reads in part:

The subject decision points out several problem areas with regard to the hurried mass processing of allotments through adjudication. First, is that certain allotments are located in extremely sensitive nonselectable areas under ANCSA and should be looked at in a balanced perspective with all factors considered. Second, the self serving affidavits being invited to the exclusion of the opportunity for opposition affidavits from the

^{1/} In State of Alaska/Golden Valley Electric Association, 110 IBLA 224 (1989), we held that legislative approval of a Native allotment application by section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. @ 1634(a) (1982), precludes any later inquiry into the applicant's use and occupancy. As noted above, appellant's application was not approved by ANILCA.

public (occasioned by the lack of a publication requirement) have a tremendous potential to boomerang. ^{2/} [Emphasis in original.]

As we indicated in our decision, see 103 IBLA at 114 n.2, the BLM official who made the April 1975 decision wrote the State in January 1976, based in part on this memorandum, that the February 1975 decision "should have been vacated only for the purpose of further review and not for the purpose of approval."

Appellant observes that this letter was not admitted into evidence in the hearing before the Administrative Law Judge and that BLM never took any action to reject any part of the appellant's allotment (Exceptions at 2 n.1). That does not of course preclude us from considering the letter as part of our de novo review of the entire record, including the evidence produced at the hearing, or from taking action to correct BLM's April 1975 decision if we determined, based on that review, that it was not supported by the record. Our decision recounted that review and concluded that appellant had not "shown by a preponderance of the evidence that he is entitled to the lands described in his Native allotment application." 103 IBLA at 119-20. It is not surprising that appellant would like BLM's April 1975 decision to be the Department's last chance to review his application; we think the record in this case demonstrates convincingly why that should not be so. As the Supreme Court said in Knight v. United States Land Association, *supra*, at 178:

When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are

^{2/}The memorandum continues:

"The subject allotment, a case in point, is on D-1 lands and for at least 30 years has been an area used overwhelmingly by the public, Native and non-Native alike. The last field report, a comprehensive summary by Moreland with ample casefile back-up in the form of third party testimonial letters, prior field reports, etc., all rather strongly point to a negative finding. Yet this was apparently ignored or outweighed by additional evidence in the form of two affidavits. One of these was the applicant's and one by another Wassillie, probably a relative. While we do not necessarily question the use of the tract by the applicant as stated in his affidavit, we do strongly question the implied interpretation by adjudication that this individual's use is superior and potentially exclusive of the multitude of other individuals who use the area. Indeed, the supporting Alex Wassillie affidavit itself, item 9, indicates use by 'Relatives, friends and fish and game has a building on it.' Moreover, how the applicant's use can be concluded to be substantial and potentially exclusive of others in the face of a private headquarters site and a fish and game project which have occupied the site since 1962 to the present is obscure. The June 1973 photographs should illustrate the actual use of the site. If the Bureau lets such areas of high public use go to private ownership based on one-sided affidavits, we are derelict in our duty to the public."

brought to his notice. The rules prescribed are designed to facilitate the Department in the despatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul.

[2] Appellant also complains that the Administrative Law Judge "committed reversible error by finding that the burden of proof in a private contest proceeding rests with the allotment applicant" (Exceptions at 5). Appellant sets forth at length the "numerous errors in fact and in law" he believes the Administrative Law Judge made as a result (Exceptions at 8-21). Appellant states he "believes the Board's statement [quoted above] indicating that he had the burden of proof was an oversight" (Exceptions at 8 n.7). As supplemental authority he submitted our decision in Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (1989), which states that "in order to prevail in this [private contest] proceeding, contestant * * * must establish by a preponderance of the evidence that BLM's decision was wrong." 109 IBLA at 136.

Administrative Law Judge Clarke stated at the conclusion of his decision:

Even though this is a private contest[,] the burden of proof still rests with the person making the application for the land. The contestant here stands in the place of the governmental agency. It is still the Secretary of the Department of the Interior who must make a determination as to whether the laws and regulations for the particular type of land transaction have been complied with.

(Decision at 12). Although the first part of this statement is in error, the last part is an accurate description of the Board's role on behalf of the Secretary under 43 CFR 4.1. United States Fish & Wildlife Service, 72 IBLA 218, 220-21 (1983); Knight v. United States Land Association, *supra*, at 181; Schade v. Andrus, 638 F.2d 122, 125 (9th Cir. 1981). As contestant, the State had the burden of going forward with the evidence and the ultimate burden of persuasion that appellant was not entitled to the land under the Native Allotment Act. The error in Judge Clarke's decision on this point was irrelevant to our decision, however. When we undertook *de novo* review of the record, the issue was whether the evidence demonstrated that appellant, as applicant for the land, satisfactorily proved his substantially continuous use and occupancy of the land for a period of 5 years, for it is settled that the applicant for a Native allotment bears the burden of establishing he is entitled to an allotment. Based on our *de novo* review of all

the evidence of record in this case, we concluded appellant had not met this requirement. After reviewing appellant's exceptions based on the evidence, our conclusion remains that he has not demonstrated substantial actual possession and use of the land, at least potentially exclusive of others.

For the reasons set forth above, we find no sufficient reason to reconsider our previous decision.

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 is denied and our previous decision is affirmed.

Will A. Irwin
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

