

Appeal from a decision of the Alaska State Office, Bureau of Land Management, holding, inter alia, Native Allotment Application F-1042 for approval in part, dismissing the State of Alaska's protest to the Native allotment application, and rejecting in part Hot Springs Lease F-578.

Affirmed.

1. Alaska: Native Allotments--Rights-of-Way: Nature of Interest Granted

Where a Native initiates use and occupancy of certain lands in 1937, but prior to the filing of an allotment application, a conflicting hot springs lease is issued and a public access trail was used to the hot springs, the later filing of the allotment application vests the inchoate preference right arising from the prior use and occupancy. That right relates back to the initiation of the use and occupancy, thereby taking precedence over the intervening hot springs lease and use of the public access trail.

APPEARANCES: James E. Dawson, pro se; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

James E. Dawson has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated July 1, 1987, which held, inter alia, Native allotment application F-1042 for approval in part, dismissed the State of Alaska's protest as to this Native allotment, and held hot springs lease F-578 for rejection in part as to that section of the lease application in conflict with the Native allotment.

The record shows that on June 5, 1968, the Bureau of Indian Affairs (BIA) filed Native allotment application F-1042, parcels A, B, and C, along with evidence of use and occupancy for Alfred F. Wright. On July 16,

1969, the application and evidence of use and occupancy was amended to correct the description of parcel C and add parcel D to the original application. On March 17, 1971, BIA filed application and evidence of use and occupancy for parcel E of Native allotment application F-1042. The applications were filed pursuant to the Act of May 17, 1906, 43 U.S.C. § 270-1 (1970), repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1982), subject to applications pending before the Department on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.

Wright claimed use and occupancy since 1936 on parcel D and 1937 on parcels A, B, C, and E for fishing, hunting and trapping.

On June 1, 1981, the State of Alaska filed protests pursuant to section 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act of December 2, 1980 (ANILCA), 43 U.S.C. § 1634(a)(5)(B) (1982), against Native allotment application F-1042, parcels A, B, C, and D, alleging that the land described in parcels A and D of the allotment application was used for an existing trail and that the land formed the only reasonable access to publicly owned resources. The protest further stated that there was no reasonable alternative for access existing because this was an existing constructed public access route, transportation facility or corridor.

BLM dismissed the protest as to these parcels stating:

Based on a review of the casefile, topographic maps, field reports, survey plat and the State's Inventory of Alaska's Existing Trail System, (Department of Highways, 1973), it has been determined that there is no physical on the ground conflict with any access trail on Parcel A or D of Native allotment F-1042.

(BLM Decision at 3).

BLM also dismissed the protest as to parcels B and C, finding the State had failed to provide the specific facts upon which the conclusions concerning access are based (as required by section 905(a)(5)(B) of ANILCA).

Because the State of Alaska had filed a timely protest of Wright's Native allotment application alleging that certain lands in the allotment application were necessary for access to lands owned by the United States, the allotment application was not legislatively approved pursuant to section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982). Accordingly, BLM adjudicated the application and approved the allotment for certain lands in parcels A, B, C, D, and E, aggregating approximately 135 acres. BLM determined that the applicant had used the land and satisfied the use and occupancy requirements of the Native Allotment Act of 1906.

The record also shows that James E. Dawson had filed a conflicting hot springs lease application F-578 on September 11, 1967, for lands that

were also included within parcel A of Wright's allotment application. A lease for the Tolovana Hot Springs was executed February 16, 1968. BLM rejected Wright's application as to that portion of lot 2, U.S. Survey 5610A, Alaska, because that land was located within the existing Tolovana Hot Springs Withdrawal and, therefore, the land was not open to the initiation of Native allotment claims. BLM noted that these lands were with-drawn from sale, settlement, location, or entry under the public land laws by Executive Order (EO) No. 1324-1/2 dated March 28, 1911, as amended by EO No. 1883 of January 24, 1914, EO No. 5389 of July 7, 1930, and Public Land Order No. 399 of August 20, 1947, and were reserved for public use (BLM Decision at 2).

However, as to that portion of parcel A outside the withdrawn area described as lot 3, U.S. Survey No. 5610A, Alaska (within sec. 25, T. 1 N., R. 7 W., Fairbanks Meridian) containing 70 acres and also located within Dawson's hot springs lease F-578, BLM approved this area for Wright's allotment and rejected Dawson's lease covering this area stating:

The allottee's use and occupancy commenced in 1933 [sic], prior to lease issuance, and was sanctioned by the filing of the application and evidence of use and occupancy on June 5, 1968 at which time the inchoate rights of the applicant vested and the lands became segregated as of the date of occupancy. "Lands occupied by Indians, Aleuts, and Eskimos in good faith are not subject to entry or appropriation by others" (43 CFR 2091.6-3 and Cramer v. United States, 261 U.S. 219, 227 (1923)).

(BLM Decision at 4).

The State of Alaska has not taken issue with BLM's rejection of its protest. Dawson has appealed the decision only as it applies to parcel A, lot 3, stating that the allotment makes no right-of-way provision for Tolovana Hot Springs. He points out that the trail crossing parcel A, lot 3, was constructed in the summer of 1968 prior to U.S. Survey 5610A and has been used for 19 years as the only access to the Tolovana Hot Springs. He submits copies of the field notes for U.S. Survey 5610A which he contends makes reference to a "cat trail" as shown as a dashed line in the survey plat which "clearly documents the existence of a road accessing Tolovana Hot Springs."

BLM has responded denying that the trail crossing parcel A, lot 3, was constructed before the use and occupancy in 1937. BLM notes that the use and occupancy predates the trail by 31 years and therefore the allottee's rights had vested and the lands became segregated as of the date of occupancy.

BLM is correct in its conclusion that the allottee's prior use and occupancy of lot 3, parcel A, is determinative of this case. 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 160 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 July 1, 1987, decision, BLM found that Wright had satisfied the use and occupancy requirements of the Alaska Native Allotment Act. Appellant has not challenged the facts of Wright's use and occupancy with this appeal; therefore, the issue of whether or not his use and occupancy qualifies as "substantially continuous" has been finally resolved by BLM and is not a matter for further consideration.

[1] This Board has recently reaffirmed that a Native allotment applicant is accorded a statutory preference right to an allotment of land commencing with the first use and occupancy of the land in a qualifying manner. In Golden Valley Electric Association (On Reconsideration), 98 IBLA 203 (1987), we considered the effect of a previously issued right-of-way for power transmission lines on a subsequently filed Native allotment application. We noted that upon completion of the required 5 years of use and occupancy coupled with a timely filing of a Native allotment application that the inchoate right becomes a vested preference right even though the Native allotment application had not been filed with BLM before the right-of-way issued. Moreover, we found that once the preference right becomes vested, the preference or presumption "relates back to the initiation of occupancy and takes preference over competing applications filed prior to the native allotment application." Golden Valley Electric Association (On Reconsideration), *supra* at 205; State of Alaska v. 13.90 Ares of Land, 625 F. Supp. 1315, 1319 (D. Alaska 1985); Aguilar v. United States, 474 F. Supp. 840, 845 (D. Alaska 1979); United States v. Flynn, 53 IBLA 208, 234, 88 I.D. 373, 387 (1981).

Similarly, in the instant case, Wright's uncontested use and occupancy of lot 3, parcel A, preceded both the alleged construction of the cat trail and the issuance of the hot springs lease by many years. Even though the Native allotment application for parcel A was not filed until June 5, 1968, and therefore, the allottee's inchoate preference right did not become vested until that date, the preference right relates back to the initiation of use and occupancy in 1937 and preempts conflicting use and applications. Golden Valley Electric Association (On Reconsideration), *supra* at 208; *see also* State of Alaska, 110 IBLA 224 (1989). Accordingly, the lands in question were not available for appropriation by the public or the hot springs lessee as an access trail to the hot springs and BLM properly denied the State's protest as to Wright's allotment and approved the application.

Therefore, 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 affirmed.

John H. Kelly
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge