

STATE OF ALASKA (HENRY J. EKADA)

IBLA 89-456

Decided February 7, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving the issuance of a Certificate of Allotment pursuant to Alaska Native allotment application F-13525 and dismissing a protest of the allotment based on a purported trail easement.

Dismissed.

1. Administrative Procedure: Standing--Alaska: Native Allotments-- Appeals: Generally--Res Judicata--Rules of Practice: Appeals: Standing to Appeal

Where a State of Alaska protest against a Native allotment under sec. 905 of the Alaska National Interest Lands Conservation Act was granted in 1982 and, as a result, the allotment was adjudicated pursuant to the Alaska Native Allotment Act of 1906, no further adjudication of the allotment was required. In the absence of a timely appeal of the decision approving the allotment, the doctrine of administrative finality precludes review of the allotment on appeal from a subsequent decision.

APPEARANCES: Bonnie E. Harris, Esq., Assistant Attorney General, State of Alaska, Anchorage, Alaska; Kathy J. Keck, Esq., Alaska Legal Services Corp., Fairbanks, Alaska, for Henry J. Ekada; Regina L. Sleater, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Alaska has appealed from an April 21, 1989, decision of the Alaska State Office, Bureau of Land Management (BLM), approving the issuance of a Certificate of Allotment to Henry J. Ekada pursuant to his Native allotment application F-13525. The decision also dismissed protests filed by the State of Alaska alleging that publicly used trails were in conflict with the Ekada allotment.

Henry J. Ekada filed for a Native allotment on November 9, 1970. He claimed use and occupancy from 1949 of a parcel of land along the Yukon River downstream from the village of Nulato, described in his application as follows:

Beginning at a point on the Right side of the Yukon River at approximate latitude 64°39'25" North. longitude 158°15'02" West. thence North West 40 chains to corner 2. thence South West 40 chains to corner 3 and corner 3 of Esther Mc quinly's allotment. thence South East 40 chains to corner 4 and Right bank of the Yukon River and corner 4 of Esther Mc quinly's allotment. thence North Easterly 40 chains to the point of beginning Con-tains 160 acres. located in section 3 and 4 T 10 S and 33 and 34; T 9 S. R 3 E. K.R.M.

(Allotment Application dated Nov. 9, 1970). Following a field examination conducted in July 1977, the examiners recommended approval of the allotment, describing the parcel as "approximately" 40 chains square with one boundary along the shore of the Yukon River. The field examiners advised surveying the boundaries of the allotment using markers set during their examination.

On June 1, 1981, the State of Alaska filed three protests, one for each of the three sections encompassed by the allotment application, pursuant to section 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1988), claiming that an existing access trail, EIN 9, traversed these lands. ^{1/} On December 22, 1982, BLM sent the State

^{1/} The relevant portion of one of the protests reads as follows:

"Brief Description of Easement: Trail from Kalteg to Galena along the Yukon passing through Nulato.

"Past Use: Moderate use by hunters and trappers and as a transportation corridor between villages.

"Present Use: Continued year-round moderate use by hunters and trappers and as a overland access between villages along the Yukon.

"Future Anticipated Use: Utilization is expected to increase as interior populations and recreational demands increase.

"Purpose of Easement: To allow a full right of continued public use and access as per 17(b)(1) of the Alaska Native Claims Settlement Act.

"Justification of Easement: In the past this trail has provided for public access and recreational opportunities. In the future this link must be maintained to continue to provide public access across private lands to public lands and waters outside the withdrawal areas."

A decision was issued by BLM on May 21, 1980, holding the land exclusive of Native allotment F-13525 proper for village selection subject to reservation of a trail easement across the land, beginning at the bank of the Yukon River in sec. 4, T. 10 S., R. 3 E., Kateel River Meridian, and extending westward. On Apr. 5, 1985, the land surrounding Ekada's allotment claim was granted to Gana-a 'Yoo, Ltd., by Interim Conveyance No. 1019, pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 (1988), reserving easement EIN 9 to the United States as follows: "An easement for a proposed access trail twenty-five (25) feet in width from the right bank of the Yukon River in Sec. 4, T. 10 S., R. 3 E., Kateel River Meridian, westerly to public lands in Sec. 36, T. 9 S., R. 2 E., Kateel River Meridian." However, the interim conveyance expressly excludes those lands within Native allotment F-13525. Id. at 1. Although protests were made against lands in secs. 3 and 4, T. 10 S., R. 3 E., and sec. 33, T. 9 S., R. 3 E., the proposed easement would affect sec. 4 only.

notice that the allotment had been adjudicated and was approved. The protest filed by the State had, therefore, been granted, requiring adjudication of the allotment pursuant to the Alaska Native Allotment Act of 1906. The notice also informed the State of the right to file a private contest pursuant to 43 CFR 4.450-1. No private contest was filed by the State.

A 1985 survey of the allotment, U.S. Survey No. 7456, was accepted by BLM on March 19, 1986, and entered into the public records of the United States on April 7, 1986. However, the surveyed tract was not 40 chains square. Rather, the survey described a parcel of 159.98 acres with the following boundary dimensions: Corner 1 to Corner 2 - 30.59 chains, Corner 2 to Corner 3 - 55.00 chains, Corner 3 to Corner 4 - 24.03 chains, and Corner 4 to Corner 1 - 56.04 chains meandered along the Yukon River. On April 21, 1989, BLM issued a decision dismissing the protests of the State of Alaska and determined that allotment F-13525, as described in U.S. Survey 7456, had been legislatively approved.

The State of Alaska argues that BLM's April 21, 1989, decision should be set aside because the allotment claim as approved extends 224.16 rods along the shore of the Yukon River in violation of a statutory limitation that an allotment may not extend more than 160 rods along the shore of any navigable body of water (see 43 CFR 2094.0-3). To establish it has standing to bring an appeal, the State asserts that the determination to dismiss its protests ignores the public interest. The State contends that BLM's 1980 decision to reserve easement EIN 9 constitutes a factual showing of the need for a public landing, one of the purposes specifically enumerated in the statute, and asks that BLM's decision to approve the allotment as surveyed be remanded in order that BLM may limit the shore space approved for the allotment and "accommodate the location of easement EIN 9" or make the proper analysis to waive the 160-rod limitation required under 43 CFR 2094.2(a).

In separate answers, counsel for Ekada and BLM assert that the State's appeal should be dismissed because it did not appeal from the December 22, 1982, notice that the allotment had been adjudicated. They argue that the State was given notice of the right to initiate a private contest in this matter, but did not do so. Further, both argue that the State had no interest that was adversely affected by waiver of the 160-rod limitation inasmuch as the allotment, whether it be square or rectangular, will preclude accommodating the easement and, therefore, this argument is irrelevant. We find that the motions are properly granted and the appeal is properly dismissed.

[1] The now repealed Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), granted the Secretary the authority to allot "in his discretion and under such rules as he may prescribe" up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo of full or mixed blood who resides in Alaska and is the head of a family or 21 years of age. Under the Act and implementing regulations, entitlement to an allotment was

dependent upon satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. See 43 CFR 2561.0-5(a). Such use and occupancy contemplates substantial actual possession or use of the land, at least potentially exclusive of others. Id. In December 1971, ANCSA repealed the Alaska Native Allotment Act, saving those applications pending before the Department on December 18, 1971. 43 U.S.C. § 1617(a) (1988). In December 1980, section 905 of ANILCA automatically approved Native allotment applications subject to certain exceptions where no pro-test was filed within 180 days. 43 U.S.C. § 1634(a)(5) (1988). As the State had lodged a timely protest of Ekada's allotment claim, his application was removed from the automatic vesting provision of ANILCA and became subject to adjudication in accordance with the 1906 Alaska Native Allotment Act. E.g., William J. Felix, 114 IBLA 86 (1990); State of Alaska, (Elliot R. Lind) On Reconsideration, 104 IBLA 12 (1987); Stephen Northway, 96 IBLA 301 (1986).

Thus, the State's protest was allowed in 1982. When the allotment claim was adjudicated, the matter was entirely resolved, apparently to the satisfaction of the State, which did not appeal, as it could have done. At that point, the matter was settled. Why BLM issued a redundant decision again approving the allotment in 1989 is not clear. This action was, as BLM admits, unnecessary. As such it lacks any legal effect. This matter was considered and adjudicated in 1982. The State's protest was granted by the decision to adjudicate the allotment. The matter has been decided. The doctrine of administrative finality precludes reconsideration of the matter now. Village of South Naknek, 85 IBLA 74 (1985).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Franklin D. Arness
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge