

MARSHALL McMANUS

IBLA 90-285

Decided May 11, 1993

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dismissing a protest of Native allotment application F-031355.

Affirmed.

1. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Contests and Protests: Generally

Under sec. 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), any individual objecting to the approval of a Native allotment application must file a protest within the period established by ANILCA and must allege that the land described in the application is the situs of improvements claimed by the person filing the protest. Where an individual files a protest after the statutory deadline, the protest is properly dismissed.

APPEARANCES: Marshall McManus, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Marshall McManus has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 1, 1990, dismissing a protest filed against Native allotment application F-031355.

Native allotment application F-031355 was filed with BLM on June 19, 1963, by Jack J. Titus, pursuant to the Alaska Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed on Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), subject to applications pending before the Department on that date). Titus gave a metes and bounds description of the 160-acre parcel bordering on Boston Creek about 25 miles from Council, Alaska, claiming seasonal use and occupancy June through August from 1953 to 1969 for fishing. Titus added that the camp was also used for fall fishing. A protraction diagram included in the case file located Titus' parcel, as originally described, within secs. 14 and 23, T. 5 S., R. 22 W., Kateel River Meridian, Alaska.

In a land report for Titus' parcel, dated January 31, 1980, the BLM examiner noted that the "application location is 1 mile north of the actual location" which was shown as straddling Boston Creek in secs. 23, 24, 25, and 26, T. 5 S., R. 22 W. At the time the field examination was conducted on August 21, 1979, Jack Titus had died and his wife Dora Titus accompanied the BLM examiner. She claimed that her parents had lived on the land and that she was raised on the land until she was 14 years of age. She added that, after she married Titus, he used the land for a seasonal fishing camp. As evidence of use, the examiner listed the remains of a sod house, a cache, lumber, and 55-gallon drums cut in half. The examiner stated that Dora Titus was very familiar with the location of the parcel, led the examiner to the sod house, and explained the history of use by her husband and parents. The examiner stated that during the field examination, Marshall McManus, who had a camp across the river, gave the examiner information concerning use of the parcel by Titus and his wife, reportedly asserting that Dora Titus' parents lived and raised their children on this land and that Jack Titus used the area for fishing. Based on the information received from Dora Titus and McManus concerning use of the parcel by Jack Titus, the examiner concluded that the applicant had met the requirements of the Native Allotment Act of 1906. On April 9, 1980, the Bureau of Indian Affairs, on behalf of Jack Titus, verified that the new description correctly described the land Titus had used and for which he had intended to apply.

Subsequent to the adoption of section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1988), the State of Alaska filed a protest of the allotment under section 905(a)(5)(B), 43 U.S.C. § 1634(a)(5)(B) (1988), alleging that the land contained an existing trail and formed the only reasonable access to publicly owned resources. The attached documentation noted that the existing trail was staked on the bed of Fish River, itself, and was used in the winter. It further noted that there was no trail along the river banks due to trees. On June 30, 1982, however, the State withdrew its protest of the allotment. Thereafter, on September 30, 1983, BLM issued a decision finding that the allotment application had been legislatively approved under section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1988), effective June 1, 1981, pending confirmation of location. On April 5, 1988, special survey instructions were approved for the survey of the allotment and on July 22, 1989, the field work commenced.

On August 10, 1989, McManus filed his protest. In this protest, McManus argued that the allotment, by including land on both sides of Boston Creek, tied up about 2 miles of river bank. He further asserted that Boston Creek should be classified as a river because it is navigable and is the second largest tributary to Fish River.

A copy of McManus' protest was sent to Senator Ted Stevens who wrote BLM requesting that it address McManus' concerns. BLM responded by a letter to Senator Stevens dated September 7, 1989, in which it explained that the protest period under ANILCA had expired on June 1, 1981, and, since McManus' protest was not received until August 10, 1989, it was not

timely filed. Regarding the shore limitation and access concerns, BLM provided the following information:

Survey instructions provided for meandering the shore of Boston Creek, which will then be excluded from the allotment. The Native allotment regulations require that the lands need not be contiguous but should be compact and may not exceed 160 acres. The regulations also state Native allotment applications for lands extending more than 160 rods along the shore of any navigable waters shall be considered a request for waiver of the 160-rod limitation. This shore limitation may be waived if it is determined that the lands are not necessary for harborage, landing and wharf purposes and that the public interests will not be injured by waiver of the limitation. The BLM is required to meander streams, rivers, creeks, sloughs, etc. when they are three chains (198 feet) or more in width or, less than three chains, if they are determined to be navigable. The water area is then excluded from the survey.

According to our records, this is the only allotment straddling Boston Creek for several miles and is surrounded by public lands (see attached Master Title Plat). Boston Creek appears to be more than 3 chains wide and appears to be navigable. Therefore, the column of water will be available for travel by others. When the Certificate of Allotment is issued, travel along the bank will be dependent upon the allottee. However, there are enough other pullouts upstream and downstream for harboring and access to public lands and resources.

If Mr. McManus is interested in obtaining information on areas open to firewood cutting permits, he can contact our Kobuk District Manager * * *.

Having received a copy of this letter, McManus wrote another letter, received by BLM on November 28, 1989, in which he asserted that the protest period should not have ended on June 1, 1981, because the land for which Titus had originally applied did not include both sides of the river. McManus said that he was unaware that the application included parcels on both sides of the river until he was so informed by the surveyors. He contended that the 160-rod limitation and waiver applied to one side of the river, and reiterated his belief that an allotment could not include lands on both sides of the river.

McManus also noted that, during the summer when the water is low, he is unable to reach his cabin by boat and had constructed a road, now located within Titus' allotment, which he used for hauling supplies overland. A map accompanying the letter shows other roads also within Titus' allotment which McManus asserted he also used, including a road to a boat landing, and a road to Fish River. McManus claimed that these roads are in a most accessible place and are important to him as well as others. He asserted that he used the landing and wharf area regularly.

On January 12, 1990, BLM responded to appellant, noting that it was not unusual for a Native allotment application to embrace both sides of a river. BLM also pointed out that since Boston Creek had been determined to be navigable, it was meandered in accordance with the 1973 Manual of Surveying Instruction and excluded from the Native allotment survey, and would, therefore, provide boat access to public lands and resources upstream and downstream from the allotment. ^{1/}

On February 12, 1990, McManus again wrote to BLM. In this letter, he asserted that the 55-gallon drums listed by the BLM examiner as evidence of use were located on the east side of Boston Creek and were actually his mini-garden, which he had started in 1977, and, therefore, they should not be construed as "evidence of prior occupancy" by anyone else. Furthermore, while admitting that he crossed the river in 1979 to point out the sod house to the examiner, McManus denied that he had made the statements attributed to him in the field report.

By decision dated March 1, 1990, BLM formally dismissed McManus' protest on the ground that it was filed after the protest period provided by section 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), which had ended on June 1, 1981. BLM also found that the protest did not state that the land described in the allotment application was the situs of improvements claimed by McManus as required by ANILCA.

[1] Section 905(a)(1) of ANILCA legislatively approved Native allotment applications subject to valid existing rights and certain exceptions. Among the cases excepted from the legislative approval were situations in which, within 180 days of the adoption of ANILCA, either the State of Alaska filed a written protest declaring that the lands within the Native allotment application were necessary for access to public lands or the resources located thereon, or another person or entity filed a protest alleging that the land was the situs of improvements claimed by that person or entity. See 43 U.S.C. § 1634(a)(1)(B) and (C) (1988). The filing of any valid protest under either of these two provisions required that the allotment application be adjudicated under the substantive provisions of the 1906 Allotment Act. *Id.*

As noted above, the State of Alaska had filed a protest under 43 U.S.C. § 1634(a)(1)(B) (1988) asserting that an easement was needed over the bed of Fish River for access purposes. Thereafter, however, the State withdrew its protest and BLM subsequently treated the withdrawal of the State's protest as permitting a determination that the allotment had been legislatively approved. This was in error. In *Stephen Northway*, 96 IBLA 301 (1987), we examined this practice and expressly held that the timely filing of a valid protest operated as a bar to legislative approval and, unless such a protest were withdrawn within the 180-day period provided by the statute, a subsequent withdrawal of the protest would

^{1/} In this letter, BLM also noted that it would be issuing an appealable decision on his protest sometime in the future.

not operate to "revive" legislative approval. Thus, once the 180-day protest period had elapsed, BLM was required to adjudicate all validly protested allotment applications under the 1906 Act. Our review of the record on appeal, however, convinces us that the State's protest was not a bar to a determination that the allotment had been legislatively approved for a different reason, viz., it was not a valid protest under ANILCA.

In State of Alaska, 95 IBLA 196 (1987), we noted that:

[Section 905(a)(5)(B)] requires three affirmative statements, i.e.: (1) A statement that the land described in the allotment application is "necessary for access" to certain public (State or Federal) lands, resources, or bodies of water as enumerated in the statute; (2) a statement setting forth with specificity the facts upon which the conclusions concerning access are based; and (3) a statement that "no reasonable alternatives for access exist."

Id. at 200. The first two criteria are met by affirmative statements in the protest satisfying the first and third requirements and the second requirement is met if the protest "specifies the nature of any use of the lands subject to a Native allotment application for purpose of gaining access to any public lands, resources, or bodies of water, which could be jeopardized by conveying the land out of public ownership." Id. at 201. Where a protest fails to meet any of these three criteria, it is properly dismissed and does not serve as a bar to legislative approval.

While the statements submitted with the State's protest did facially comply with the statutory mandate, they were fundamentally flawed in a critical aspect: they did not relate to the land within the allotment application. Thus, the State's protest concerned winter access along the frozen surface of Fish River. The allotment application, however, is located on Boston Creek above its confluence with Fish River and no part of the allotment abuts Fish River. In United States v. Napouk, 61 IBLA 316 (1982), we held that a protest which describes land other than that embraced in the Native allotment being protested is legally insufficient to prevent legislative approval of that allotment. That principle is clearly applicable herein. We must conclude, therefore, that the State protest filed against Titus' allotment application was not a bar to legislative approval under section 905(a)(1) of ANILCA.

It is apparent, therefore, that unless some other bar to legislative approval existed, this allotment was legislatively approved on June 1, 1981, and is no longer subject to protest. Appellant's protest, filed on August 10, 1989, would generally be seen as untimely under the Act, since a protest under section 905(a)(5)(C) was also required to be filed within 180 days of the adoption of ANILCA, i.e., no later than June 1, 1981. See, e.g., Thelma M. Eckert, 115 IBLA 43, 47 (1990); Torgramsen v. Heirs of Carl G. Carlson, 96 IBLA 209 (1987). Appellant, however, argues that it was not until the field work for the survey was being performed that he

became aware that the Titus allotment was straddling both sides of Boston Creek and that his protest should be judged timely based on this fact.

Section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), does expressly provide that, where a Native allotment applicant amends the land description in his or her application because it describes land other than that which was intended to be applied for, notice must be given to interested parties, as shown in the records of the Department, and they must be afforded a 60-day period in which to protest the new description, which protest, if timely filed, would be deemed filed within 180 days of the adoption of ANILCA. In adjudicating this provision, the Board has noted that a new protest period is properly provided in those situations where subsequent adjudication of an allotment application results in changing the situs of the land applied for as theretofore shown on the status plats of the Department. See State of Alaska, 119 IBLA 260 (1991); Pedro Bay Corp., 78 IBLA 196 (1984). A review of the instant appeal, however, shows that this provision is simply inapplicable herein.

Thus, while there is no gainsaying the proposition that the situs of the land now described is different from that originally shown on the various use plats, it is also clear that the Use Plat was changed to correctly show the land embraced within the allotment application no later than May 16, 1980, prior to the adoption of ANILCA. Thus, the description of the allotment has not changed subsequent to the adoption of ANILCA and the original 180-day protest period properly applied. Moreover, even had the amendment occurred subsequent to adoption of ANILCA, there was nothing in the records of the Department, prior to the filing of appellant's protest in 1989, which would have indicated that appellant was an "interested party," and, therefore, appellant would not have been notified as to a subsequent amendment of the application. The fact that appellant may not have possessed actual knowledge that the claim straddled Boston Creek until after the running of the protest period does not serve to alter the fact that this allotment, under the provisions of section 905(a)(1) of ANILCA, must be deemed to have been legislatively approved on June 1, 1981, and is, therefore, no longer subject to the filing of a protest. Accordingly, the decision of BLM rejecting appellant's protest must be affirmed.

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.

James L. Burski
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

