

NAKNEK ELECTRIC ASSOCIATION, INC.

IBLA 90-189

Decided June 2, 1993

Appeal from a decision of the Anchorage District Office, Bureau of Land Management, declaring a right-of-way null and void in part. A-051081.

Reversed and remanded.

1. Alaska: Native Allotments--Rights-of-Way: Generally

A BLM decision finding a right-of-way for an electric distribution line null and void to the extent it conflicts with a Native allotment application is reversed and remanded to permit issuance of the Native allotment subject to the right-of-way where the record shows occupancy of the land by the power line was approved, and it was constructed and operated for 4 years before the Native allotment applicant began use and occupancy of his allotment.

APPEARANCES: Bobby Dean Smith, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Naknek Electric Association, Inc. (NEA), has appealed from a December 19, 1989, decision of the Anchorage District Office, Bureau of Land Management (BLM), finding right-of-way grant A-051081 null and void to the extent that it conflicted with parcel A of Native allotment application AA-6119 filed by Alfred A. Ivanoff.

By letter dated January 20, 1960, NEA applied for a right-of-way for a 40-foot wide electrical distribution line pursuant to the Act of February 15, 1901, 31 Stat. 790, repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793 (subject to a saving clause preserving pending applications provided by 43 U.S.C. § 1770 (1988)). The right-of-way was located in the Naknek-King Salmon-South Naknek area parallel to an existing highway. Responding to the NEA request, BLM, by decision dated September 22, 1960, granted NEA permission to commence construction work in advance of approval of the right-of-way pursuant to 43 CFR 244.8 (1954). In a letter dated November 22, 1963, NEA informed BLM that the entire line was constructed "as of about January 1, 1961." On July 10, 1978, BLM issued right-of-way grant A-051081 to NEA for a 40-foot wide electrical distribution line 7.2/12.5 kV. pursuant to Title V

of FLPMA, 43 U.S.C. § 1761 (1988). The right-of-way grant shows that it crossed sec. 2, T. 17 S., R. 47 W. Seward Meridian.

On January 12, 1971, the Bureau of Indian Affairs (BIA) filed a Native allotment application on behalf of Alfred A. Ivanoff for 5 acres of land located in the E. SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 2, T. 17 S., R. 47 W., Seward Meridian, Alaska, pursuant to the Alaska Native Allotment Act, as amended, 43 U.S.C. § 270-1 (1970), repealed 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 December 18, 1971. In his application Ivanoff stated that he had occupied the land from October through April since 1965. On March 12, 1979, BLM informed Ivanoff that he had met the substantial use and occupancy requirements under the provisions of the Alaska Native Allotment Act of May 17, 1906, as to parcel A and that it was approved. BLM issued a certificate of allotment for parcel A to Ivanoff on September 9, 1983. By decision dated September 3, 1986, Ivanoff's allotment, parcel A, was conformed to survey.

On April 12, 1979, BLM approved an application by NEA for an amended right-of-way grant to authorize improvement of the existing electrical distribution system and to include a 30-foot wide additional right-of-way for expansion of the system. The amendment affected that portion of the right-of-way located in sec. 2, T. 17 S., R. 47 W. The December 19, 1989, decision here under review determined that Ivanoff's use and occupancy of parcel A constituted a valid existing right that existed prior to issuance of right-of-way grant A-051081. Therefore, BLM declared the right-of-way null and void as to those lands in the E $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 2, T. 17 S., R. 47 W., Seward Meridian.

NEA asserts that the December 1989 decision overlooked use by NEA of the subject lands prior to Ivanoff's claimed date of use and occupancy. NEA refers to the decision of September 22, 1960, in which BLM granted NEA permission to commence construction in advance of approval of the right-of-way. NEA also points out that by letter dated November 22, 1963, it had informed BLM that construction of the electric distribution line was completed by January 1, 1961. Thus, according to NEA, it is clear that use of the lands was made by NEA before Ivanoff began his occupancy and that he was on notice of power company use of the land prior to October 1965. NEA contends that this prior authorized use was a valid existing right that diminished the allotment grant. NEA argues that the fact that BLM did not formally issue a FLPMA right-of-way grant until 1978 does not detract from its prior authorized use of the property.

[1] The Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), granted the Secretary of the Interior 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 the family or 21 years of age. 43 U.S.C. § 270-1 (1970). Entitlement to an allotment was dependent upon satisfactory proof of

substantially continuous use and occupancy of the land for a period of 5 years. 43 U.S.C. § 270-3 (1970). By regulation, "substantially continuous use and occupancy" includes

the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

43 CFR 2561.0-5(a).

The December 1989 decision finding the power line right-of-way null and void to the extent that it conflicted with Ivanoff's allotment was made in reliance on Golden Valley Electric Association (On Reconsideration), 98 IBLA 203 (1987), a case holding that once a Native allotment right becomes vested, the preference or preemption "relates back to the initiation of occupancy and takes preference over competing applications filed prior to the native allotment application." Golden Valley Electric Association, 98 IBLA at 205, quoting State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315, 1319 (D. Alaska 1985), aff'd sub nom. Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987).

The facts of the instant case distinguish it from Golden Valley. In Golden Valley, Alaska Native applicant Jennie Irwin's use and occupancy existed before the right-of-way. In the appeal now before us for review, NEA applied for a power line right-of-way and was granted permission to begin construction in 1960, prior to the actual grant of the right-of-way. Although the right-of-way was not issued until 1978, subsequent to the filing of Ivanoff's Native allotment application in 1971, the electric distribution line was constructed and in use in January 1961, prior to the time Ivanoff commenced occupancy in October 1965. In this case, unlike the situation described in Golden Valley, use of the land for a power distribution line preceded use and occupancy by Ivanoff.

The December 1989 decision focused on the notion that when BLM granted NEA permission to begin construction no commitment was thereby made to approve the right-of-way and that the distribution line construction was done at NEA's risk. The fact remains, however, that NEA was in continuous possession of a 40-foot wide strip of land across sec. 2 with BLM permission from January 1961 at the latest. NEA could not, therefore, be considered a trespasser who made improvements on the land without color or claim of right. While BLM could possibly have revoked approval of occupancy of the land by NEA, such action would have required good reason. In any event, there was no revocation of the right granted to NEA in this case.

Departmental regulation 43 CFR 2561.0-5(a), quoted above, requires that an applicant's use and occupancy be "at least potentially exclusive of others." Since the distribution line was in operation on the land in question when Ivanoff commenced his use and occupancy in 1965, his use

could not have been the exclusive use required by the Alaska Native Allotment Act. See Aguilar v. United States, 474 F. Supp. 840, 843 (1979). Although the BLM field report for Ivanoff's application, parcel A, dated October 20, 1975, does not mention the right-of-way application, a Proof of Construction filed by NEA on January 3, 1966, states that construction of the electric distribution line commenced June 3, 1960, and was completed January 11, 1961. A land status plat date-stamped by BLM on March 31, 1966, confirms that right-of-way application A-051081 is in sec. 2, T. 17 S., R. 47 W. Further, an October 20, 1975, field report for Ivanoff's allotment states that parcel A is located adjacent to the Naknek-King Salmon Road. A photograph accompanying the field report shows a utility pole near a road within the allotment boundaries. Assuming that this is the same highway which runs parallel to NEA's right-of-way, there is little doubt that Ivanoff was on notice that the power company was using the area. Additional evidence of the presence of the electric distribution line is found in a memorandum dated April 27, 1970, from the Anchorage District Manager to the Alaska State Director recommending acceptance of the proof of construction documents for right-of-way A-051081. The District Manager stated that BLM had conducted a field examination of the area covered by the right-of-way application and that it found "the power line to be constructed in accordance with the terms and provisions of the right-of-way agreement." Also the Environmental Assessment Report (EAR), dated June 9, 1978, for the right-of-way states that "[t]he visual impact of the line and poles is obvious" (EAR at 3). We find as a fact that the power line has been in place on land included in the allotment claim since 1961.

Reservation of a right-of-way is an exercise of discretion vested in the Secretary pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970). Therefore, BLM may reserve a right-of-way for an electrical distribution line when approving a Native allotment application, and in fact a decision issued on December 15, 1986, made the allotment subject to a highway. For reasons discussed above, BLM's decision declaring the NEA right-of-way null and void to the extent it conflicts with the Ivanoff allotment application is reversed and remanded to permit correction of the record to show that the power line right-of-way was a prior existing right to which the allotment was subject.

There is an additional aspect to this case, however, owing to the fact that the right-of-way was enlarged in extent on April 11, 1979, following approval of the Ivanoff allotment claim. The effect of this enlargement was not considered by the December 1989 decision, which simply voided the entire right-of-way. The record before us does not reveal whether this 1979 amendment, like the issuance of the 1978 grant, confirmed prior use of an enlarged right-of-way by the power company, or whether it extended onto the allotment land. On the record before us, therefore, we cannot determine whether the 1978 right-of-way (that confirmed a use that began in 1961) should also include the 1979 amendment that added a width of 30 feet to the right-of-way grant in sec. 2. The actual extent of the land possessed by NEA and Ivanoff must therefore be determined.

The case file is therefore remanded to BLM to permit issuance of a decision modifying approval of the Ivanoff application by making it subject to NEA's right-of-way. Although BLM approved Ivanoff's allotment application on March 12, 1979, that action did not end the Department's jurisdiction over the land. As we found in State of Alaska, 45 IBLA 318 (1980), jurisdiction passes only upon issuance of the instrument entitled "Native Allotment." Id. at 320-22. Thus, in Leo Titus, Sr., 89 IBLA 323, 92 I.D. 578 (1985), we held that the fact that the State Office had approved an allotment application would not prevent BLM from later determining that the allotment should be subject to an easement for a linear right-of-way, so long as the actual "Native Allotment" had not issued. Id. at 327-28, 92 I.D. at 581. The same reasoning applies here.

Because of the disposition made of this appeal, which concerns not the validity, but rather the extent of a Native allotment, we deny NEA's request for a hearing. See Leo Titus, Sr., 89 IBLA at 327, 92 I.D. at 580. We conclude that the permitted use and occupancy commenced by NEA in 1961 was prior to use and occupancy by Ivanoff that began in October 1965 and prevented him from acquiring a right to the land covered by the power distribution right-of-way. The case is remanded to permit modification of the Ivanoff allotment to show that it was issued subject to prior NEA use and possession which prevented Ivanoff from exercising use and occupancy at least potentially exclusive of others as to the right-of-way in place on the land in October 1965. On remand, BLM shall also determine whether the right-of-way to which the allotment is subject should also include the additional 30-foot width of right-of-way granted to NEA in 1979. That is, the actual nature and extent of the possession by NEA must be determined. In making this determination, BLM shall determine whether the 1979 amendment affects the allotment by determining the exact nature and extent of the possessory rights exercised by NEA and Ivanoff in October 1965 and thereafter in the vicinity of the power line in sec. 2, T. 17 N., R. 47 W.

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 reversed and the case remanded for future action consistent with this opinion.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

