

Editor's Note: Reconsideration granted by order dated August 31, 2000, clarification provided. See Order at 276A, below.

STATE OF ALASKA

IBLA 96-313

Decided June 11, 1998

Appeal from a decision of the Alaska State Office, Bureau of Land Management, confirming approval of Native allotment application F-19180, and rejecting in part Village Selection Application F-14877A.

Appeal dismissed.

1. Administrative Authority: Generally—Alaska: Native Allotments

A BLM decision confirming the 1975 legislative approval of a Native allotment application, as conformed to a 1990 survey which shifted the location of a portion of the allotment into a section which had previously been conveyed out of Federal ownership, is not an adversarial adjudication of the allotment applicant's entitlement and is not dispositive of the rights of the applicant or adverse parties, since the Department lacks jurisdiction to make such a ruling in the absence of legal title. Such an appeal is properly dismissed as premature.

APPEARANCES: Bruce M. Bothelo, Attorney General, John E. Athens, Jr., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

The State of Alaska (State) has appealed from a March 13, 1996, Decision of the Alaska State Office, Bureau of Land Management (BLM), confirming approval of Native allotment application F-19180, Parcel B, rejecting in part village selection application F-14877-A, and dismissing the State's protest of BLM's approval of Parcel B.

Background

On July 3, 1972, the Bureau of Indian Affairs filed Native allotment F-19180 on behalf of Sarah Wood Weisner. The application was filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through

270-3 (1970). The part of Weisner's allotment at issue in this appeal is Parcel B, described in her application as the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 28, T. 18 N., R. 9 E., Kateel River Meridian. ^{1/} The BLM's January 31, 1975, field report (accepted on April 15, 1975) states as follows with respect to the location of Parcel B: "This tract is not located as described in the application. Actual tract location is as shown on the attached map. The tract is located approximately two miles from the village of Kobuk toward the Dahl Creek airstrip and west of the road."

According to the map accompanying the field report, Parcel B no longer occupied the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 28, but was shifted south along the eastern section line, so that the northern boundary of the parcel no longer abutted the northern boundary of sec. 28. The northern boundary of Parcel B is shown, abutting in part, the southern boundary of the Native allotment of Mabel Brown. On that map, the Brown allotment straddles the north-south boundary between secs. 21 and 22 and approximately its lower fourth extends into secs. 27 and 28. The BLM letters in the file (August 21 and 25, 1975) indicate that BLM moved Weisner's Parcel B slightly south, with Weisner's assent, in order to avoid a conflict with Mabel Brown's allotment.

The survey instructions in the field report directed the surveyor to begin in the northeast corner of the allotment, proceed in a westerly direction, "paralleling in part" Mabel Brown's allotment, "for approximately 1/4 mile, then south for 1/4 mile, then east for 1/4 mile, then north for approximately 1/4 mile to the P.O.B." The surveyor was further instructed to "[a]djust the southeast and southwest corners, so as to make 40 acres, which is the intent of the applicant."

The BLM's September 1975 master title plat (MTP) of unsurveyed T. 18 N., R. 9 E., shows the Weisner and Brown parcels as sharing, in part, their eastern and western boundaries, respectively, and not their northern and southern boundaries as shown on the field report map.

^{1/} The Act of May 17, 1906, authorized the Secretary of the Interior to allot "in his discretion and under such rules as he may prescribe" up to 160 acres of vacant, unappropriated, and unreserved nonmineral land upon satisfactory proof of "substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. §§ 270-1 and 270-2 (1970). The Act of May 17, 1906, as amended by the Act of Aug. 2, 1956, 48 U.S.C. § 357 (1958), was repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1617(a) (1994), effective Dec. 18, 1971, subject to applications pending on that date. Section 905(a)(1) of Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1994), provides that all Native allotment applications pending before the Department on or before December 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section.

In one of its pleadings responding to the appeal, BLM explains as follows the migration of Weisner's Parcel B:

During the field examination conducted on August 6, 1974, Ms. Weisner told the examiner that the description and drawing which he had was not the property for which she intended to apply and that she intended her allotment to border Ms. Brown's allotment on the north. At that time Ms. Brown's allotment was shown on the examiner's map as being in protracted sections 21, 22, 18 and 29. Ms. Weisner's allotment was shown in protracted section 28. * * *

* * * * *

Ms. Weisner agreed to a description of Parcel B and survey instructions which described the parcel as beginning the description at a marker placed in the northeast corner of the allotment and bordering Ms. Brown's allotment to the north.

* * * * *

On January 28, 1981, a survey of T 18 N, R 9 E was accepted. The BLM then plotted the information from the protraction[-] based MTP's on the surveyed township. By this time, Ms. Brown's allotment had been surveyed as USS 5895 and was now located by survey north of where its protracted location had approximated. Mrs. Weisner's allotment had not yet been surveyed and was still shown in section 28 adjoining the protracted location of Ms. Brown's parcel C, rather than the surveyed location.

(The BLM Aug. 1, 1996, Opposition to Motion for Summary Reversal and Motion to Dismiss at 2-3 (emphasis supplied).)

By interim conveyance (IC) No. 995 and 996 of January 24, 1985, the surface and subsurface estates of lands including secs. 21 and 28 were conveyed to NANA Regional Corporation, Inc. (NANA). Specifically excluded from those conveyances was Parcel B of Weisner's allotment. NANA conveyed its interests to the City of Kobuk on June 30, 1986. Responding to the appeal, BLM asserts that "[d]ue to a mapping error, in 1985 the BLM conveyed 2.5 acres of the allotment to NANA which then conveyed the property to the City of Kobuk." (Aug. 1, 1996, Motion to Dismiss at 5.)

On March 24, 1988, BLM notified Weisner that "Parcel B * * * is presently scheduled for survey in 1989." The BLM's notice described the land as "Parcel B: T. 18 N., R. 9 E., Within Sec. 28, containing approximately 40 acres."

U.S. Survey No. 9855 was completed on September 15, 1990, and approved on June 21, 1991. Weisner's Parcel B (approximately 40 acres) was now

described as Lot 7 of that survey and, for the first time, as being situated not only in sec. 28, but also, to the extent of a small triangular portion comprising 2-1/2 acres, in sec. 21, T. 18 N., R. 9 E. 2/

In its August 1, 1996, Motion to Dismiss at 4, BLM states that its 1990 survey (US 9855)

was based on the description to which Ms. Weisner had agreed [at the time of the field examination] as set forth in [BLM's] Final Date to Amend notice of March 24, 1988. On the ground[,] the surveyor discovered that the allotment did in fact border Ms. Brown's parcel C to the north. This caused the mapped location of the property to change from the approximation based upon protraction in section 28 to its location on the ground in sections 21 and 28. [Note: the location of the property on the ground had not changed, but the accuracy of locating the property on a map had improved.]

On May 28, 1992 the BLM conformed the description of the land to the survey. Parcel B is now described as Lot 7, USS 9855. This surveyed land is located in surveyed sections 21 and 28.

On August 31, 1992, NANA submitted to BLM a "Title Affirmation on Survey of Inholdings." In it, NANA acknowledged that Weisner's Parcel B was excluded from IC Nos. 995 and 996 and that Lot 7, Survey No. 9855 would not be included in NANA's patent to the interim-conveyed lands.

On December 14, 1995, BLM issued a Notice entitled "Native Allotment Application, Parcel B, Relocation Proposed." The Notice notified the State, Weisner, and NANA of their right to protest "an intended correction of a Native allotment application location," as follows:

Parcel B:

From: Sec. 28, T. 18 N., R. 9 E., Kateel River Meridian, Alaska.

To: Secs. 21 and 28, T. 18 N., R. 9 E., Kateel River Meridian, Alaska, now surveyed and described as Lot 7, U.S. Survey No. 9855, Alaska.

The BLM's notice did not explain the reasons for this proposed correction.

On January 16, 1996, the State filed a protest of the amended description of Parcel B, noting that it included part of the Kobuk/Dahl Creek

2/ See BLM's post-survey MTP. The area of overlap in sec. 21 is quantified as 2-1/2 acres for the first time in BLM's Aug. 1, 1996, response motion.

Road, an improvement owned by the State and necessary for access between the village of Kobuk and the Dahl Creek Airport, as well as adjoining lands. The State pointed out that it claimed a 60-foot right-of-way for that road and asserted that the road was a valid existing right to which Weisner's allotment must be made subject.

The BLM Decision

The BLM's Decision states that Weisner's allotment application was approved between December 18, 1971, and December 18, 1975, in accordance with section 14(h)(6) of the ANCSA, 43 U.S.C. § 1613 (1994). It further states that IC Nos. 995 and 996 "transferred title subject to valid existing rights, to NANA Regional Corporation, Inc., * * * for a portion of the lands now described as lot 7, U.S. Survey No. 9855, Alaska." Noting that NANA had executed the "Title Affirmation on Survey of Inholdings" in which it disclaimed any interest in Lot 7, U.S. Survey 9855, BLM found that the remaining land, i.e., Lot 7, U.S. Survey No. 9855, "was returned to BLM," and it "therefore rejected [village selection application F-14877-A] * * * as to that portion in conflict with Parcel B of Native allotment application F-19184." (Dec. at 3.)

As to the State's protest, BLM's Decision asserts that its December 14, 1995, notice "was issued in error, since the land description was never amended from the location depicted in the field report." (Dec. at 2.) The BLM therefore vacated the December 14, 1994, Notice.

The BLM's Decision acknowledges that the State claimed a 60-foot right-of-way for the Kobuk/Dahl Creek Road. It states that the portion of the Kobuk-Dahl Creek Road that crossed Mabel Brown's allotment "was in existence since 1955 * * * and the applicant [Brown] did not maintain substantially continuous use and occupancy of the lands for that portion encompassed in the Kobuk-Dahl Creek Road." The BLM found, however, that the portion of the Kobuk-Dahl Creek Road which crossed Weisner's allotment came into "existence after October 2, 1975" the date of administrative approval of Weisner's allotment. (Dec. at 2-3.) For this reason, BLM dismissed the State's protest.

Arguments of the Parties

The State contends that BLM's Decision must be reversed because BLM lacked jurisdiction, specifically over that portion of Weisner's allotment which extends into sec. 21, T. 18 N., R. 9 E., Kateel River Meridian. The State argues that because this land was already conveyed to the City of Kobuk, BLM was "without jurisdiction to approve, adjudicate, or confirm approval of Ms. Weisner's allotment claim in Section 21." (Apr. 29, 1966, Motion for Summary Reversal at 1.)

The State proffers additional arguments pertaining to the Aguilar procedures (*see Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979)), the proper statutory prerequisites governing amendment of Native allotment

applications and attendant notice to the State, standing to appeal, and other issues. In summary, the State asserts that BLM's Decision contains various errors and is unsupported by the record.

The BLM contends that the State's appeal, based on an interest in the 2-1/2 acres, must be dismissed because BLM must recover title to that land before an adjudication of title is effective. The BLM requests that the State's appeal be dismissed "so that BLM can proceed with conveyance of the portion of the allotment in Federal ownership and title recovery on the 2-1/2 acres no longer owned by the Federal government." (BLM Aug. 1, 1996, Motion to Dismiss at 6.) Citing State of Alaska, 134 IBLA 272 (1995), BLM argues that the appeal should be dismissed because the March 13, 1996, Decision does not affect title to land, that the land at issue is not in Federal ownership, and that BLM should be allowed to proceed with title recovery activities. (BLM Sept. 30, 1996, Response to Opposition to Motion to Dismiss at 1-2.) The BLM states that if the City of Kobuk, owner of the 2-1/2 acres at issue "declines to voluntarily reconvey the acreage, the Department will then consider whether it is appropriate to recommend" a suit to recover title. (BLM Aug. 1, 1996, Motion to Dismiss at 9.)

Discussion

The record reflects, and the parties agree that the 2-1/2 acres at issue are not subject to Departmental jurisdiction. That circumstance governs the approach the Board must take in adjudicating this case. However, as a preliminary matter, some discussion of the Decision appealed from is warranted.

The BLM stated in its March 13, 1996, Decision that its December 14, 1995, Notice, advising of a correction in the location of Parcel B, was issued in error, since the land description for Parcel B was never amended from the location depicted in the field report. (Dec. at 2.) This statement, though technically correct, is misleading because the Parcel B location and description was altered by conformance to the 1990 survey so that, effectively, an amendment was the result. Had BLM had jurisdiction over the 2-1/2 acres within sec. 21, a notice allowing the State to file a protest would have been crucial to proceeding. See State of Alaska, 119 IBLA 260, 265-66 (1991). As we observed in that case, where an allotment application is amended, section 905(c) of ANILCA requires the Secretary, before adjudicating or recognizing the legislative approval of the application, to notify the State of the "intended correction of the allotment's location," whereupon the State will have the opportunity to file a protest "as provided in subsection (a)(5) of this section." 43 U.S.C. § 1634(c) (1994). Errors subject to correction include "[t]echnical errors in land description, made either by the applicant or by the Department in computing a metes-and-bounds or survey description from diagrams." S. Rep. No. 413, 96th Cong., 2d Sess. 286, reprinted in 1980 U.S.C.C.A.N. 5070, 5230.

Having ruled, in the Decision before us, that notice to the State was not required, BLM, nonetheless, purported to adjudicate the merits of the State's right-of-way claim insofar as that claim conflicts with the sec. 21 portion of Weisner's Parcel B. As authority to dispose of the 2-1/2 acres, the Decision relied on the NANA "Title Affirmation on Survey of Inholdings" as a result of which "the remaining lands [sic] was returned to BLM." (Dec. at 3.) There is no dispute that the City of Kobuk, and not NANA, holds title to the 2-1/2 acres. Therefore, NANA could not have "returned" those lands to BLM's jurisdiction. In spite of this circumstance, and in disregard of the fact that Parcel B was shifted into sec. 21 only as a result of the 1990 survey, BLM cited the 1975 administrative approval of Parcel B as preemptive of the State's claim, and for that reason dismissed its protest.

Since, however, the case is controlled by lack of Departmental jurisdiction, the above rationale in BLM's Decision has no impact on our disposition of the appeal.

[1] Because BLM lacks jurisdiction to adjudicate rights as to the 2-1/2 acres at issue in this appeal, its Decision is not adversarial to the State. State of Alaska, 134 IBLA 272 (1995). In that case we held that a BLM decision reinstating a Native allotment application covering lands previously conveyed out of Federal ownership was not an adversarial adjudication of the allotment applicant's entitlement and not dispositive of the rights of such applicant or adverse parties.

The BLM's Decision could not, and did not, adjudicate title or rights to lands not under jurisdiction of the Department. We held in Bay View Inc., 126 IBLA 281, 286-87 (1993), that where the land has been conveyed from Federal ownership, Departmental consideration of an amended Native allotment application could only be justified by the Secretary's fiduciary responsibility to Native Americans. We noted that "this fiduciary responsibility properly extends to ascertaining the proper description of the lands for which an Alaskan Native intended to apply." Id. at 287 (footnote omitted). The case before us might well call for the implementation of this responsibility, given the migration of Weisner's Parcel B from somewhere south of the NE¹/₄NE¹/₄ of sec. 28, north to, and finally into sec. 21 to the extent of 2-1/2 acres, as a result of conformance to BLM's 1990 survey. If a reconveyance is obtained by the Department of the 2-1/2 acres embraced by Weisner's Parcel B, adjudication by BLM of Weisner's interest would be appealable to the Board. Accordingly, the State's appeal of BLM's confirmation of the amended allotment description is properly dismissed as premature. State of Alaska, 134 IBLA 272, 275-76 and cases there cited; Bay View, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the State's

appeal is dismissed and the case files are remanded for further action as deemed appropriate consistent with the foregoing.

James P. Terry
Administrative Judge

I concur.

T. Britt Price
Administrative Judge

August 31, 2000

IBLA 96-313R : F-19180, Parcel B
:
STATE OF ALASKA : Native Allotment
:
: Request for Reconsideration Granted
:
: Clarification Provided
ORDER

In The State of Alaska, 144 IBLA 269 (1998), the State appealed from a March 13, 1996, Decision of the Alaska State Office, Bureau of Land Management (BLM), confirming approval of Native allotment application F-19180, Parcel B, rejecting in part village selection application F-14877-A, and dismissing the State's protest of BLM's approval of Parcel B.

In the Board's decision published on June 11, 1998, the Board held that the 1996 BLM decision confirming the 1975 legislative approval of a Native allotment application, as conformed to a 1990 survey which shifted the location of a portion of the allotment into a section which had previously been conveyed out of Federal ownership, is not an adversarial adjudication of the allotment applicant's entitlement and is not dispositive of the rights of the applicant or adverse parties, since the Department lacks jurisdiction to make such a ruling in the absence of legal title to the land. We further held that the State's appeal was properly dismissed as premature, without further explaining which aspects of its appeal were premature.

In a Motion for Clarification (which we deem a Request for Reconsideration (Request)) filed with the Board, the State of Alaska timely moved the Board to reconsider its determination within the subject decision that held the State's appeal was premature. See State of Alaska, supra at 275. The State explains:

The Board's holding that Alaska's appeal is premature implies that Alaska should have waited until further action by the BLM. However, after the March 13, 1996 BLM decision there would have been no further action by the BLM. If Alaska had not appealed the March 13, 1996 BLM decision, Alaska would never have been able to present the jurisdictional issue to the Board. An appeal of a final BLM decision which questions the jurisdiction of the BLM is not a premature appeal insofar as the jurisdictional issue is raised.

(Request at 1.)

After careful review of the casefile and decision in State of Alaska, supra, we accept the fact that an incorrect inference could be drawn from

our language regarding this one point. We thus grant the State's Request for Reconsideration and clarify our decision. We intended that our decision be understood to state that, to the extent that the State also raised issues which relate to the merits of the BLM adjudication, the appeal is premature and will not be considered until BLM reacquires title to the land. We agree that an appeal on the question of BLM's jurisdiction, where the Board specifically rules on that issue, is not premature.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the State's Request is granted and our decision at 144 IBLA 269 (1998) is clarified as set forth herein.

James P. Terry
Administrative Judge

I concur:

T. Britt Price
Administrative Judge

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