

JAMES DULEY

IBLA 2002-193

Decided December 13, 2004

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting amended application for Alaska Native allotment under the Alaska Native Veterans Act. AA-82898.

Affirmed as modified.

1. Alaska: Alaska Native Veteran Allotment: Generally

The Alaska Native Veterans Allotment Act, as amended, 43 U.S.C. § 1629g (2000), allows certain Alaska Natives who were on active military duty during a specific period of time to apply for an allotment of not more than two parcels of Federal lands totaling 160 acres or less under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), as that Act was in effect before December 18, 1971. However, the lands applied for must be currently owned by the Federal government. If they are not at the time the application is filed, the application is properly rejected under 43 CFR 2568.90(a)(1).

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corp. for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

James Duley has appealed from the January 23, 2002, decision of the Alaska State Office, Bureau of Land Management (BLM). That decision rejected Duley's amended application for an allotment (AA-82898) under the Alaska Native Veterans

Allotment Act (ANVAA), as amended, 43 U.S.C. § 1629g (2000). ^{1/} Duley applied for approximately 160 acres described as NW¼ Sec. 15, T. 29 N., R. 4 W., Seward Meridian, Alaska. ^{2/}

BLM's decision noted that the lands Duley applied for were withdrawn "on September 7, [1950], by Public Land Order [(PLO)] 669 for use of the Alaska Railroad under the authority of Executive Order No. 9337 of April 24, 1943." ^{3/} (Decision at 2.) Further, BLM held that, on January 5, 1985, the Alaska Railroad Corporation of the State of Alaska (ARC) "received an exclusive license" for the lands Duley applied for (among others) pursuant to section 604(b)(1)(C) of the Alaska Railroad Transfer Act of 1982 (ARTA), 45 U.S.C. § 1201 et seq. (2000). Id. That "license granted exclusive use of rail properties pending a final administrative adjudication of valid existing rights pursuant to applicable law and ARTA." Id. BLM's decision further explained that ARC "received the full and complete right, title and interest of the United States in and to the real property" that Duley had applied for (among other property) on September 16, 1985. Id.; see Decision dated Sept. 16, 1985, at 2. Without further explanation, BLM ruled, "[i]n view of the above, your application AA-82898, as amended on December 17, 2001, is rejected." (Decision at 2.)

Duley asserts on appeal that the lands he claims are available because they were not withdrawn by PLO 669 and therefore remained Federal lands available for a veterans allotment when he applied in 2001. (Statement of Reasons filed Mar. 29, 2002 (SOR), at 2.) He further contends (1) that the lands in question became public

^{1/} ANVAA originated as section 432 of the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1999, Pub. L. No. 105-276, 112 Stat. 2461, 2516-18 (Oct. 21, 1998). That section amended the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 et seq. (2000), by adding a new section 41, which became known as ANVAA and was codified at 43 U.S.C. § 1629g (2000).

^{2/} The application at issue was an amended application, a previous application for different lands having been rejected by decision dated July 17, 2001. (BLM Decision dated Jan. 23, 2002 (Decision) at 1.) However, by decision dated Aug. 15, 2001, BLM vacated its July 17, 2001, decision, to clear the way for the filing of the amended application.

^{3/} On appeal, BLM points out that its Jan. 23, 2002, decision mistakenly stated that PLO 669 withdrew the lands on September 7, 1960 (Decision at 2), when in fact the withdrawal occurred on September 7, 1950. (BLM Answer filed May 28, 2002 (Answer) at 2 n.1.) BLM's decision is accordingly modified to reflect the correct date of the PLO.

domain in 1971 when ANCSA generally extinguished his possessory rights to them and (2) that, in the absence of any subsequent action by the Government to withdraw or reserve the lands, they were vacant, unappropriated, and unreserved and therefore available to him for an allotment pursuant to ANVAA. *Id.* at 3. Duley also claims that “the Duley family’s past possession” of the lands had some influence on the status of the lands both when PLO 669 issued in 1950 and after the asserted extinguishment of those possessory rights in 1971 by ANCSA. (Reply to BLM’s Answer filed June 21, 2002 (Reply), at 2.)

BLM maintains that, owing to its having been transferred to ARC in 1985, the lands were not Federal lands when Duley filed his amended application and rejection was required by 43 U.S.C. § 1629g(a)(1) (2000) and 43 CFR 2568.90(a)(1). BLM also maintains on appeal that the application had to be rejected under 43 CFR 2568.90(a)(3) because the lands were continuously withdrawn since September 7, 1950, a date before Duley’s sixth birthday.^{4/}

[1] ANVAA allows certain Alaska Natives who were on active duty in Vietnam during a specified period of time to apply for an allotment under the Native Allotment Act of 1906. 43 U.S.C. §§ 270-1 through 270-3 (1970).^{5/} Thus, ANVAA provides that an eligible applicant can receive up to 160 acres of “federal land.” Departmental regulations implementing ANVAA provide standards for determining which lands are eligible for selection under that statute:

^{4/} Duley states on appeal that he was born on November 11, 1946 (SOR at 2); the lands were withdrawn on September 7, 1950.

BLM’s decision recites the fact that Duley’s original application for different lands (filed on Apr. 6, 2001) was rejected on two grounds. First, the lands had been reserved in 1909 for the Chugach National Forest and therefore were not vacant, unappropriated, and unreserved at the time he began to use and occupy them, as required by 43 CFR 2568.90(a)(2). Second, BLM noted that 43 CFR 2568.90(a)(3) requires that the lands applied for not have been continuously withdrawn since before the applicant’s sixth birthday and that the “1909 withdrawal of the land occurred before” Duley’s sixth birthday. (Decision at 1.) However, BLM stated no such conclusion as to the lands at issue in his amended application and the present appeal, notwithstanding that the facts support that conclusion.

^{5/} That Act was repealed by section 18(a) of ANCSA, 43 U.S.C. § 1617(a) (2000), with a savings provision for applications pending before the Department on Dec. 18, 1971.

You may receive title only to:

(a) Land that:

- (1) Is currently owned by the Federal government,
- (2) Was vacant, unappropriated, and unreserved when you first began to use and occupy it, [and]
- (3) Has not been continuously withdrawn since before your sixth birthday.

43 CFR 2568.90. ^{6/} In addition, 43 CFR 2568.50(b) states that in order to qualify for an allotment, the applicant must “[e]stablish that * * * the land is still owned by the Federal government * * * .”

BLM held in effect that the lands applied for were not “currently owned by the Federal government” at the time of Duley’s application, within the meaning of 43 CFR 2568.90(a)(1), as the full and complete right, title, and interest of the United States were transferred to ARC on September 16, 1985. (Decision at 2.) As explained in its answer, BLM’s decision correctly described the effect of an earlier September 16, 1985, BLM decision implementing the transfer of the lands to ARC under ARTA. Thus, in January 1985, ARC had received an exclusive license for the lands previously withdrawn by PLO 669; that license was issued because, at the time, competing land selections by the State of Alaska and a Native corporation had to be adjudicated. BLM rejected those selections on September 16, 1985, and its final rejection of the then-existing competing claims to the lands allowed BLM to issue a contemporaneous decision transferring title to ARC. That is, upon rejection of all competing land selections, ARC became entitled under ARTA to a patent or interim conveyance (IC). ^{7/} 45 U.S.C. § 1203(b)(2) (1982). Either a patent or IC transferred all right, title and interest of the United States to the ARC. 45 U.S.C. § 1203(b)(3) (1982). As stated in BLM’s September 16, 1985, decision: “In view of the above, when this decision becomes final [ARC] shall receive the full and complete right, title and interest of the United States in and to the real property described below pursuant to Secs. 604(b)(2) and (3) of ARTA, 45 U.S.C. 1203(b)(2) and (3).”

There is no dispute that the lands Duley applied for are included in those transferred to ARC in 1985. Accordingly, those lands were not, at the time of Duley’s application (or any time after 1985) “[l]and[s] that [were] currently owned by the Federal government,” as required by 43 CFR 2568.90(a)(1) and were not, therefore,

^{6/} There are two additional requirements not placed at issue in this appeal.

^{7/} BLM explains that, if the lands were already surveyed, a patent was issued; if not, an IC. It appears from the master title plat for T. 29 N., R. 4 W., Seward Meridian, that the township was surveyed. As a result, we would expect that a patent would have been issued, but none is in the record.

subject to applications under ANVAA. Appellant has not shown otherwise. BLM's decision must be affirmed on that basis alone. ^{8/}

We note that 43 CFR 2568.90(a)(1) is a regulatory statement of the long-standing rule that, where lands have been conveyed out of Federal ownership, the Department loses jurisdiction to adjudicate conflicting interests in the lands so conveyed. Seldovia Native Association, 161 IBLA 279, 286 (2004); Stratman v. Leisnoi, Inc., 157 IBLA 302, 311 (2002); Bay View, Inc., 126 IBLA 281, 286 (1993), citing Germania Iron Co. v. United States, 165 U.S. 379, 383 (1897). We are aware of "Stipulated Procedures for Implementation of Order," approved by the Court in settlement of Aguilar v. United States, No. A76-271 (D. Alaska Feb. 9, 1983). Those procedures allow BLM to investigate Native allotment applications filed prior to December 18, 1971, for lands which are no longer Federally owned to determine if qualifying use and occupancy predated patent or other conveyance of the lands from the United States, and, if so, to pursue recovery of the lands, pursuant to the exercise of its fiduciary responsibility, so that any rights under the 1906 Act may be satisfied. Andrew Evan, 164 IBLA 56, 59 (2004); see, e.g., Harrison v. Hickel, 6 F.3d 1347, 1353 (9th Cir. 1993) (citing Terry L. Wilson, 85 IBLA 206, 218, 92 I.D. 109, 116 (1985)); 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). However, those procedures are not available to ANVAA applicants, and, in fact, the ANVAA regulations clearly preclude such an arrangement for ANVAA applicants. Those regulations state at 43 CFR 2568.95 that ANVAA "does not give BLM the authority to reacquire former Federal land in order to convey it to a Native veteran." In fact, ANVAA expressly states at 43 U.S.C. § 1629g(a)(3)(E) (2000), that the Secretary may not convey allotments containing "acquired lands." As BLM explained in the preamble to the final rulemaking, it would not reacquire patented lands because, even if they were reacquired, the allotment of acquired lands would be "prohibited" by ANVAA (65 FR at 40957). Andrew Evan, 164 IBLA at 59.

Appellant applied for lands that, under Departmental regulations, are not available for selection under ANVAA. It is well settled that the Secretary of the Interior is bound by her own regulations. Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 629 (1950). Likewise, this Board has no authority to declare a duly promulgated regulation invalid, and such regulations have the force and effect of law and are binding on it. Alamo Ranch Co., Inc., 135 IBLA 61, 69 (1996); Conoco, Inc. (On Reconsideration), 113 IBLA 243, 249 (1990).

^{8/} To the extent that BLM's decision fails to expressly set out this ground, it is hereby modified.

To the extent not specifically addressed herein, appellant's arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

David L. Hughes
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge