



INTERIOR BOARD OF INDIAN APPEALS

State of Alaska v. Juneau Area Director, Bureau of Indian Affairs,
and Arctic John Etalook

9 IBIA 126 (11/09/1981)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

STATE OF ALASKA

v.

JUNEAU AREA ACTING DIRECTOR, BUREAU OF INDIAN AFFAIRS,

AND ARCTIC JOHN ETALOOK

IBIA 81-8-A

Decided November 9, 1981

Appeal from decision by the Juneau Area Acting Director, Bureau of Indian Affairs,
denying appellant easements across an Alaska Native allotment.

Affirmed.

1. Indian Lands: Allotments: Alienation

Where the owner of an Alaska Native allotment notified the Bureau of Indian Affairs that an agreement to alienate part of his allotment had been procured from him by fraud and that he revoked his consent to the use of his land for a road and pipeline by the State of Alaska, the Acting Area Director correctly declined to take action to grant an easement across the allotment to the State for a road and pipeline. Departmental regulations deny the agency authority to permit alienation of part

of an Alaska Native allotment subject to restrictions against alienation where the allottee refuses to consent to the alienation, and there is no other provision of law requiring or permitting the alienation.

APPEARANCES: E. John Athens, Jr., Esq., Alaska Attorney General's Office, for appellant State; Robert Thompson, Esq., Office of the Solicitor, Department of the Interior, for appellee Bureau of Indian Affairs; Clem H. Stephenson, Esq., for appellee Arctic John Etalook.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Procedural and Factual Background

Prior to March 27, 1980, the State of Alaska (appellant) sought an administrative concurrence by the Bureau of Indian Affairs (BIA) in a road and pipeline right-of-way easement agreement executed between appellee Alaska Native allottee Arctic John Etalook and Alyeska Pipeline Service Company (Alyeska), appellant's predecessor in interest to the road and pipeline. On May 27, 1980, the Juneau Area Acting Director rejected appellant's easement request, for the stated reason that BIA was without authority to grant a road and pipeline right-of-way easement across an Alaska Native allotment without the consent of the allottee. The Acting Area Director found that where the allottee had notified BIA his agreement to grant an easement was procured by fraud and the allottee refused to agree to a grant by BIA of a right-of-way predicated upon his prior agreement, section 2 of the Act of February 5, 1948,

62 Stat. 17, 18, 25 U.S.C. § 324 (1976) (all references are to 1976 edition), and Departmental regulation at 25 CFR 161.3(b), deny BIA authority to approve the easement. Appellant seeks review of that decision.

On July 20, 1971, appellee Etalook applied for a Native homestead allotment pursuant to the Native Allotment Act of May 17, 1906, 34 Stat. 197. In 1974, subsequent to approval of appellee Etalook's allotment application by the Bureau of Land Management (BLM) but before survey of the homestead and granting of the allotment, Alyeska commenced construction of a portion of the Trans Alaska Pipeline and haul road crossing appellee Etalook's allotment. The road and pipeline were built before appellee Etalook's interest in part of the land crossed by the construction project was noticed by the builder.

After the allotment interest of appellee Etalook was recognized by Alyeska, the BIA's Fairbanks Realty officer met with representatives of Alyeska and appellee Etalook. Several meetings resulted in a right-of-way proposal from Alyeska, said to have been interpreted to appellee Etalook in his native language, which he accepted on May 27, 1975. BIA's recorded position concerning the negotiation consisted of a "letter of non-objection" also dated May 27, 1975. This document recited that it did not constitute a formal grant of an easement, which could not occur until appellee Etalook received his allotment, and concluded--"We have no objection at this time to the agreements and permits you submitted. However, this non-objection does not imply approval now and is not to be construed as any intent for approval in the future."

On May 21, 1979, prior to agency action upon a request by the State for easement, appellee Etalook withdrew his consent to all previously executed easements across his property and informed BIA he refused to consent to any other road or pipeline right-of-way easements across his allotment, stating:

Because both the State of Alaska and Alyeska Pipeline Service Company have misrepresented certain facts to me and have fraudulently misinformed me about certain matters connected there with, I hereby withdraw all easements that I have heretofore executed and specifically direct you to withdraw and not to approve any such easements.

Following receipt of appellee Etalook's withdrawal of consent, BIA notified the State it was unable to grant an interest to appellant in those lands described in the May 27, 1975, agreement. Notification of the Acting Area Director's decision was provided to appellant on March 27, 1980.

Contentions of the Parties

Appellant contends, first, that the consent of appellee Etalook was in fact obtained and that the agency is now required under the circumstances of the case to execute the necessary documents to grant the desired easement to the State. Secondly, the State asserts that BIA approval is not needed because appellee Etalook transferred the desired easement prior to allotment, and a sufficient conveyance has already occurred. Appellant relies principally upon a decision by the

Interior Board of Land Appeals, State of Alaska, 45 IBLA 318 (1980), in support of the position taken.

Appellee Etalook contends, first, that the appeal by the State is not timely, arguing that a final adverse decision was conveyed to the State prior to March 27, 1980. This contention is not supported in the record and, as a factual matter, must be rejected. Appellee's second contention, which meets the appellant's arguments directly, focuses on the series of transactions between appellee Etalook and the appellant's agents, in an effort to find overreaching on the part of the State. To give full consideration to the contentions of appellee Etalook and the State an evidentiary hearing into the events surrounding the construction of the road and pipeline and subsequent negotiations would be required. Under the circumstances of this case, however, the factual issues urged on appeal by these parties are not reached.

The BIA contends that inquiry into the circumstances of the negotiations between the State, appellee Etalook, and Alyeska is not now the proper concern of the Department for the reason that Federal statutes and regulations preclude agency action in this case where an allottee refuses to consent to alienation of part of an Indian allotment which is subject to restrictions against alienation. The BIA takes the position that the State has a remedy in eminent domain proceedings where the merits of the factual positions stated by the State and the landowner may be fully aired. The above positions as briefed by the BIA are adopted by the Board for the following reasons.

Discussion and Decision

Pursuant to the Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. § 323 (1976), the Secretary is empowered to grant easements across Indian trust or restricted lands. This broad grant of authority is limited, however, by section 2 of the Act, 25 U.S.C. § 324, which requires the consent of the Indian "owners or owner." The relevant proviso codified at 25 U.S.C. § 324 reads:

Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

Thus, by dispensing with the need for consent in specified instances, section 2 implicitly forbids rights-of-way over individual Indian lands absent the Indian owner's consent in all nonspecified instances. Coast Indian Community v. United States, 550 F.2d 639, 650 n.25 (Ct. Cl. 1977).

Therefore, except for the enumerated exceptions, the authority conferred upon the Secretary to grant easements across individual Indian lands by 25 U.S.C. § 323 is dependent upon the consent of the owner. Appellee Etalook has expressed in writing his refusal to permit an easement across his allotment for the State's road and pipeline.

Additionally, Congress has provided (25 U.S.C. § 323 (1976)) that the Secretary may prescribe conditions necessary to regulate the granting of easements over Indian lands. To implement this statute the Department promulgated 25 CFR 161.3(b), which provides that: “[N]o right-of-way shall be granted over and across any individually owned lands * * * without the prior written consent of the owner or owners of such lands * * *.”

Accordingly, were the Acting Area Director to have granted the request by appellant, such a grant would have violated restrictions mandated by statute and regulation. See Coast Indian Community v. United States, above at 650. Since both the Act of February 5, 1948, and the implementing regulation require owner consent as a prerequisite to the grant of easements, the Acting Area Director correctly found that he had no authority to grant road and pipeline easements across appellee Etalook’s allotment.

Where Secretarial approval is the last act necessary to bring into effect an agreement between a restricted allottee and a purchaser of an interest in the allottee’s land, and the allottee refuses to proceed with the previously concluded bargain, the good faith of the purchaser is of no consequence. Bacher v. Patencio, 232 F. Supp. 939, 942 (S.D. Cal. 1964), aff’d, 368 F.2d 1010 (9th Cir. 1966). Therefore, even though appellant claims to have paid fair consideration for appellee Etalook’s easement, the transaction may not stand without Secretarial approval.

Trying to find a completed grant of the desired easements, appellant seeks to distinguish between allotments in which legal title is retained by the United States ("trust patent") and those instances where legal title is held by the beneficial owner in a restricted status ("restricted fee"). Relying upon State of Alaska, cited above, the argument of the State is that the execution of an easement is, in this case, a mere ministerial act for the Secretary since appellee Etalook is the legal title holder of the allotted lands. There is language in State of Alaska which appears at first to support appellant's argument. However, the three member panel of the Board which issued the decision each wrote a separate opinion to reach the result of that case, which was to find that an allotment to an Alaska Native under the 1906 Allotment Act which conflicted with State claims to the same land would not be canceled by the Department under the factual circumstances described. The language seized upon by appellant appears in only one of the three opinions. It is quoted out of context: even in the context of the case where it appears it is clearly dicta to the holding. If anything, the decision in State of Alaska supports the action taken by the BIA in the case at hand. The Board of Land Appeals, noting the provisions of 43 CFR 2561.3, 1/ recognized that the owner of any Alaska Native allotment may not convey the land without the Secretary's approval. 45 IBLA 318, 320, 322.

1/ The definitive regulation on the nature of property interest held by the owner of an allotment obtained under the Alaska Native Allotment Act, the provisions of 43 CFR 2561.3 state:

“(a) Land allotted under the Act is the property of the allottee and his heirs in perpetuity, and is inalienable and nontaxable. However, a native of Alaska who received an allotment under the Act, or his heirs, may with the approval of the Secretary of the Interior or his authorized representative, convey the complete title to the allotted

In practice, the Department has always regarded the two types of Indian title "trust patent" and "restricted fee" to be entitled to the same protections against alienation. The responsibility to prevent alienation of Indian land without consent of the Indian allottee and the United States cannot be avoided by attempts to create technical distinctions between the two types of Indian title. See Cohen, Handbook of Federal Indian Law at 108-10, 221-27. A distinction such as appellant seeks to make is inconsistent with the clear intent of Congress to restrict the power of an Indian to alienate allotted land, however the title may be characterized.

Appellant and appellee Etalook both attempt to define issues arising from the negotiations of the parties in 1975 as the basis for deciding this appeal; each argues that the other was guilty of some form of overreaching which would be dispositive of the controversy between them. Appellee Etalook, however, on May 21, 1979, divested the BIA of power to grant the easements demanded by appellant. As a consequence, the Board can go no further in review of this matter than to affirm the action of the agency which refused to provide administrative approval of the easement agreement dated May 27, 1975.

fn. 1 (continued)

land by deed. The allotment shall thereafter be free of any restrictions against alienation and taxation unless the purchaser is a native of Alaska who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such restrictions.

"(b) Application by an allottee or his heirs for approval to convey title to land allotted under the Allotment Act shall be filed with the appropriate officer of the Bureau of Indian Affairs."

The State has the power to seek a remedy by action taken under the provisions of 25 U.S.C. § 357 (1976) to condemn the property rights it seeks in appellee Etalook's allotment. Nicodemus v. Washington Water Power Co., 264 F.2d 614 (9th Cir. 1959). In this regard, the Board is advised that such an action has been filed by the State in federal district court for this purpose. (Civ. No. F81-40, U.S.D.C. D. Alaska, filed Sept. 29, 1981.)

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Acting Area Director dated March 27, 1980, is affirmed. In the absence of the consent of the allottee in this matter, no easement across his restricted lands may be approved by the Secretary.

This decision is final for the Department.

//original signed
Franklin D. Arness
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

//original signed
Jerry Muskrat
Administrative Judge