



United States Department of the Interior

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F-12950, Par. A

December 14, 2010

James E. Cantor,
Statewide Section Chief
Office of the Attorney General
Transportation Section
1031 W. 4th Ave, Suite 200
Anchorage, AK 99501

Dear Mr. Cantor:

I am writing about Parcel A of the Native allotment of Stephen Northway (deceased). The parcel is near Northway Junction and was conveyed to the heirs of Stephen Northway on December 27, 2005. Parcel A is also bisected by the Alaska Highway. I would like to explore the possibility of settling claims concerning the highway easement without going through the time consuming and expensive *Aguilar* process.

On May 19, 1970, Stephen Northway filed an application (Attachment 1) for one allotment parcel of 80 acres for what is now called Parcel A. Use for hunting and trapping was claimed to have commenced in 1930 and to have continued from that date. The parcel was field examined in 1974. The field examiner reported finding several cabins, trails and evidence of wood cutting. He also reported local residents verified Northway's use of the entire tract as claimed and that the land had been used by Northway for many years. Further, local witnesses testified that Parcel A was not a community use area. Based on such a favorable field report (Attachment 2), BLM issued an approval letter dated October 31, 1974 (Attachment 3). The approval letter told the applicant that the land needed to be surveyed before it could be conveyed.

The necessary survey work was started in 1978 and the survey, U.S. Survey No. 5349, was accepted and officially filed on October 20, 1980. However, when the survey was sent to Stephen Northway for review, his representative asserted that it was incorrect. Eventually the survey was appealed to the Interior Board of Land Appeals (IBLA) on the grounds that the survey included mud flats along the Tanana River on the south end of the parcel that Northway did not claim or want and that the survey failed to include one of his improvements, a tent frame, on the north side of his parcel. While the case was on appeal, additional allotment applications for Stephen Northway, dated December 2, 1970, were found and were submitted to the IBLA. These new applications were for four parcels and included Parcel A in the same location as the May 19, 1970 application except that the December 1970 application was for 40 acres, 20 on

each side of the Alaska Highway, and did not include the mud flats along the Tanana (Attachment 4). Based on these developments the IBLA referred the matter to hearing. The issues to be resolved at the hearing were whether the December 2, 1970 applications were timely filed and, if so, were the December applications meant to supersede or supplement the May application. *Stephen Northway*, 96 IBLA 301, 309-310 (1987) (Attachment 5).

After a hearing in Tok, Alaska on June 9, 1988, the Administrative Law Judge assigned to the matter ruled that the December 1970 applications were timely filed and that the December and May 1970 applications must be read to supplement one another. *Stephen Northway v. BLM, State of Alaska, Intervenor*, IBLA 85-815 (Decision, November 20, 1988) (Attachment 6). The decision of the Administrative Law Judge became final when no one appealed it to the IBLA.

On remand, BLM worked with the Northway heirs and combined the May 1970 and December 1970 applications for Parcel A to keep it an 80 acre parcel with qualifying use starting in 1930. Further field examinations of Northway's Parcel A were conducted on June 24 and August 24, 1990 (Attachment 7). As with the earlier field exam in 1974, evidence of use and occupancy by Stephen Northway was confirmed. However, the main purpose of the 1990 field exams was to determine the extent and location of Northway's northern most improvements that the heirs wanted included and to determine the description and acreage of the mud flats on the south side of Parcel A that the heirs claimed should be excluded. The claimed tent frame was located off the northeast end of Parcel A although it was found to be just inside the boundary of an adjoining piece of private property. Trapping trails leading off Northway's Parcel A were also confirmed and evidence of woodcutting by Northway was again found.

On the bases of the 1990 field work, survey instructions were written to exclude approximately 5.75 acres from the south end of Parcel A and to add approximately 5.75 acres on the north side. This was accomplished by a dependent resurvey and subdivision of U.S. Survey 5349, officially filed on August 19, 1996 (Attachment 8). The mudflats to be excluded were denominated as lot 1, the unchanged portion of Parcel A became lot 2 and the additional tract added on the north corner of Parcel A was called lot 3. Subsequently, on November 3, 2005, BLM issued a decision finding that Parcel A of the Northway allotment application was legislatively approved (Attachment 9).

On December 27, 2005, a Supplemental Certificate of Allotment for Parcels A and D was issued to the heirs of Stephen Northway (Attachment 10). Parcel A was correctly described as lots 2 and 3 of U.S. Survey 5349. However, the certificate failed to include a reservation for the Alaska Highway even though the legislative approval decision stated the certificate would contain such a provision. Nevertheless, a portion of the Alaska Highway actually crosses Parcel A and a highway easement was conveyed to the State of Alaska in 1959 prior to issuance of the Certificate of Allotment for Parcel A. BLM efforts to correct the Certificate of Allotment for Parcel A to expressly include a highway reservation were unsuccessful. A memo to BLM case file F-12950, dated March 24, 2009 (Attachment 11), explained why no correction could be made. The memo to the file also expressed the view that a Highway Commission map published in 1923 showed Parcel A was crossed by a road or trail in the approximate location of the Alaska Highway prior to Northway's claim of qualifying use beginning in 1930 and concluded that Parcel A should be subject to a highway easement. However, more careful review of the

referenced map revealed it had been updated in 1945. When I obtained a copy of the original 1923 map, I found that no road or trail was depicted on the land claimed as Parcel A.

In this case, the evidence of record more than adequately supports the claim that Stephen Northway started qualifying use and occupancy of Parcel A in 1930, well before the building of the Alaska Highway in or about 1942 or 1943. See, the field exam reports, Attachments 2 and 7. As you know, under the "relation back doctrine," when an allotment applicant's rights to his claimed allotment vest, those rights relate back to the date the applicant commenced qualifying use and occupancy of the claimed allotment land. *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); *Golden Valley Electric Association (On Reconsideration)*, 98 IBLA 203 (1987), followed by numerous IBLA cases. Where qualifying use started prior to third party, state or private interests, the Department of the Interior has a duty to investigate and to recover title interests that should not have been conveyed. *Aguilar v. United States*, 474 F.Supp. 840, 847 (D. Alaska, 1979) ("If the defendant [U.S.] has mistakenly or wrongfully conveyed land to the State of Alaska to which plaintiffs' have a superior claim, it is the responsibility of the defendant [U.S.] to recover that land."). Under the *Aguilar Stipulated Procedures* there are additional rounds of notices and opportunities to provide more evidence for or against the claimed allotment and a hearing if BLM finds the evidence of record is insufficient to grant the allotment application. If BLM determines that the evidence of record or the evidence produced at a hearing is sufficient to approve the allotment, the matter is referred back to this Office for preparation of a request to the Department of Justice to institute a title recovery suit. At any time during this process the parties can settle their claims.

In speaking with an official of the Tanana Chiefs Conference (the BIA realty services provider for the area) and the heirs' representative, I learned the heirs are interested in selling the State the property interest it needs for the Alaska Highway. As I understand it, the State of Alaska paid the heirs for property needed to realign part of the highway and the heirs are interested in a similar arrangement and payment for Parcel A lands within the Alaska Highway easement. I do not have details or a specific proposal. At this point, I just want to know if the State is interested in short-circuiting the *Aguilar* process to save time and money by entering into negotiations to pay for the interests the State needs in the portion of the Alaska Highway that runs through Parcel A of the Stephen Northway allotment.

I look forward to your response.

Sincerely,


Dennis J. Hopewell
Senior Attorney

cc (w/o Attachments):

Kathy Wilson, Superintendent, BIA, Fairbanks Agency
Candy Grimes, Preparation & Resolution Branch, BLM, ASO (962)
Paul Mayo, Natural Resource & Realty Director, TCC, Fairbanks
Avis Sam, Heirs' Representative, Northway
Cecilia LaCara, Attorney, ALSC, Anchorage