

STATE OF ALASKA  
DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES

IBLA 98-301

Decided November 21, 2000

Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring right-of-way null and void in part. A-067759.

Affirmed in part, reversed in part.

1. Administrative Procedure: Generally--Alaska: Native Allotments--Appeals: Generally--Res Judicata--Rules of Practice: Appeals: Generally

Where the State of Alaska fails to appeal a decision finding a native allotment to be legislatively approved the State may not subsequently challenge any of the predicate facts determined by BLM in its initial decision.

2. Alaska: Native Allotments--Rights-of-Way: Generally--Rights-of-Way: Cancellation

A highway right-of-way grant for land which was withdrawn and the withdrawal then converted to an easement reserved for highway purposes is a valid existing right to which a native allotment is subject, where the use and occupancy began after the land was withdrawn.

APPEARANCES: E. John Athens, Jr., Esq., Assistant Attorney General, Fairbanks, Alaska, for the State of Alaska, Department of Transportation and Public Facilities.

OPINION BY ADMINISTRATIVE JUDGE TERRY

The State of Alaska, Department of Transportation and Public Facilities (State), has appealed an April 28, 1998, decision of the Alaska State Office, Bureau of Land Management (BLM), declaring right-of-way (ROW) grant A-067759 null and void to the extent that it embraced lands within native allotment AA-7336.

On June 3, 1966, the Alaska Department of Highways filed an application for a ROW for the realignment of the Tok Cutoff Highway between mile 9.5 and mile 19.5 (A-067759), pursuant to the Federal Highway Act,

23 U.S.C. § 317 (1994). BLM issued the ROW grant on July 14, 1966, subject to "all valid rights existing on the date of the grant." (ROW Grant at 2.) The grant specifically noted valid existing rights including but not limited to: "Trade and Manufacturing Sites Anchorage 063211 and 062329, Indian Allotment Anchorage 062755 and Headquarters Site Anchorage 054398." (ROW Grant at 2.)

Florence Sabon signed native allotment application AA-7336 on July 18, 1971, for approximately 160 acres of unsurveyed land in sec. 18, T. 7 N., R. 3 E., Copper River Meridian. Subsequently the land was surveyed and described in U.S. Survey No. 10277, Alaska as located within secs. 7 and 18, T. 7 N., R. 2 E., Copper River Meridian, containing 159.94 acres. Sabon claimed seasonal use of hunting, berry picking, firewood gathering, and trapping starting in 1954 and continuing to the date of the application. On March 24, 1972, the Bureau of Indian Affairs filed Sabon's application, pursuant to the Alaska Native Allotment Act of May 17, 1906 (Native Allotment Act), as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). 1/ In a July 8, 1983, decision BLM found that the application had been legislatively approved effective June 1, 1981, pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1994), pending confirmation of location. The decision also stated that the land was valuable for oil and gas and that the allotment would be subject to an easement for the Tok Highway as established by Public Land Order (PLO) No. 1613 (23 Fed. Reg. 2376), pursuant to the Act of August 1, 1956, 79 Stat. 898 and transferred to the State of Alaska pursuant to the Alaska Omnibus Act, Pub. L. No. 86-70, 73 Stat. 141.

In its Statement of Reasons (SOR), the State asserts that because Sabon's allotment application was not filed with BLM until March 24, 1972, it was not pending before the Department on December 18, 1971, and could not be legislatively approved. Therefore, it contends the Department must allow an evidentiary hearing to determine whether the allotment application was timely filed. (SOR at 6.)

The State also seeks a hearing to establish the extent of Sabon's claim of use and occupancy. It argues that her claim of use and occupancy commencing in 1954 has never been adjudicated because her allotment claim was legislatively approved. The State asserts it is entitled to a hearing on the question of whether her claimed prior occupancy was sufficiently open and notorious for application of the relation back doctrine. 2/

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1/ The Native Allotment Act was repealed effective Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1994), subject to pending applications.

2/ Under the relation back doctrine allotment applicants established inchoate preference rights under the Native Allotment Act by qualifying use and occupancy and upon the subsequent filing of the allotment application a vested preference right arose that related back to the initiation of use and occupancy. United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981).

The State cites the Board's decision in State of Alaska (Irene Johnson), 133 IBLA 281, 289 (1995), wherein the Board stated that:

If the Native is found to have insufficient rights predating the right-of-way's creation, the result is not to defeat the legislative approval of the subsequent allotment application, but simply to make it subject to the right-of-way, since the right-of-way is a valid existing right under section 905(a)(1) of ANILCA.

The State asserts that "means that where there is a right-of-way grant which predates the allotment application, but use and occupancy is claimed prior to the grant, then there must be an inquiry into whether the use and occupancy was sufficiently open and notorious" because only if Sabon's use and occupancy were open and notorious at the time of the ROW grant could the grant be invalidated. (SOR at 10, 11.) It further supports this argument with reference to the Board's decision in State of Alaska (Goodlataw), 140 IBLA 205, 215 (1997), which held that a "previously granted right-of-way grant which was valid when it issued could not be retroactively invalidated." (SOR at 10.) The State also argues the ROW was valid when issued by BLM, because Sabon's use and occupancy of the land prior to application posed no impediment on the Department to appropriating the land under 23 U.S.C. § 317 (1994). Thus, the State contends that only if Sabon's use was open and notorious at the time of the ROW grant could her allotment application retroactively invalidate the ROW and that that use is a factual question that requires an evidentiary hearing. (SOR at 11.)

The State notes that under the Alaska Native Allotment Act, 43 U.S.C. § 270-1 (1970), the Secretary's authority is limited to allotting "vacant, unappropriated, and unreserved non-mineral land." (Emphasis in SOR at 2.) However, the State contends that land granted to it under 23 U.S.C. § 317 (1994), is "appropriated and transferred to the State highway department." (Emphasis in SOR at 3.) Moreover, it points out that it received its section 317 grant on July 14, 1966, whereas Sabon did not file her Native allotment application until March 24, 1972. It argues that even if Sabon began her occupancy in 1954, as claimed in her application, that did "not prevent BLM from appropriating the land to Alaska prior to her application and [did] not vest the Secretary with authority to approve an allotment on appropriated land." (SOR at 3.)

Additionally, the State argues that it was BLM's intent that the ROW grant "would take precedence over any claims based on prior occupancy." (SOR at 3.) This argument is based on the definition of public lands contained in the grant which included "those reserved or withdrawn for specific purposes, entered, selected, occupied and/or settled, and leased." (SOR at 3, grant at 2.) The State contends that the terms of a BLM grant must be given effect and that the grant term expressly provides that the grant is effective notwithstanding occupancy, settlement, or entry of the public land by others. (SOR at 3.) It asserts that BLM had the authority to make the appropriation of the ROW subject to any condition it

chose and in fact did make the grant subject to some third-party claims and to some allotment claims, but not to Sabon's. The State maintains therefore, that when Sabon filed her allotment application in 1972, the land had already been appropriated to Alaska pursuant to 23 U.S.C. § 317 and was no longer "unappropriated" and available for allotment under 43 U.S.C. § 270-1 (1970). (SOR at 5.)

Finally, the State argues that BLM failed to consider the effect of PLO's on the allotment claim. It contends that almost all of ROW A-067759 where it conflicts with the Sabon allotment claim was covered by a PLO at the time Sabon commenced occupancy in 1954, thus rendering the land unavailable for an allotment. The State maintains that PLO No. 601 placed the Gulkana-Slana Tok Road, i.e., the Tok Cutoff, in the "Through" road category with a withdrawal of 150 feet on each side of the centerline of the road and that this 300-foot withdrawal status was continued by PLO No. 757, dated October 16, 1951 (16 Fed. Reg. 10749). This was followed on April 7, 1958, by PLO No. 1613 (23 Fed. Reg. 2376 (Apr. 11, 1958)) which revoked PLO No. 601 and converted the withdrawal into a 300-foot wide highway easement. The State asserts that the land embraced by the PLO's was deeded to Alaska by a 1959 quitclaim deed pursuant to section 21 of the Alaska Omnibus Act, Pub. L. No. 86-70, 73 Stat. 141, and that the land within the PLO's and the quitclaim deed covers all but 1/2 acre of the Sabon allotment claim. Based on this history, the State argues that Sabon was precluded from establishing occupancy rights prior to the time Alaska received its ROW grant.

[1] The State asserts that Sabon's allotment application was not pending before the Department on December 18, 1971, and thus it could not be legislatively approved. It also argues that it is entitled to a hearing to determine if Sabon's use and occupancy was sufficiently open and notorious for her use and occupancy for application of the relation back doctrine. We first note that in a July 8, 1983, decision BLM found that Sabon's Native allotment was legislatively approved. A copy of that decision was sent to the State of Alaska by certified mail. The case record contains a return receipt card showing that the decision was received on July 12, 1983. There is no record that the State of Alaska appealed that decision.

As we have observed in numerous decisions, the principle of administrative finality is generally considered to be the administrative counterpart of *res judicata*. See, e.g., United States v. Stone, 136 IBLA 22, 26 (1996). As such, it is a jurisprudential concept which normally precludes reconsideration in a later case of matters finally resolved for the Department in an earlier appeal. See, e.g., Laguna Gatuna, Inc., 131 IBLA 169, 172 (1994). However, given the fact that the 1983 decision made the allotment subject to the Tok Highway easement established by PLO No. 1613, the concept of *res judicata* clearly does not come into play inasmuch as there has been no previous adjudication of the validity of the ROW. See generally United States v. Knoblock, 131 IBLA 48, 78-79 (1994). What may be involved, however, is application of the related concept of collateral estoppel.

Application of the concept of collateral estoppel essentially provides that, when a party had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was ultimately affirmed, matters decided therein may not be relitigated in subsequent proceedings involving the same parties and related or associated matters, absent a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent a demonstrable injustice. See Mary Sanford, 129 IBLA 293, 298 (1994), and cases cited. The State has failed to provide any compelling reason why the principle of collateral estoppel should not be applied herein with respect to any challenge to matters relating to Sabon's compliance with the requirements of the 1906 Act. It had the opportunity to challenge before the Board all facets of the 1983 decision, but it elected not to take advantage of that option by not appealing.

However, while the State may be precluded from challenging Sabon's use and occupancy, it is not precluded from challenging BLM's 1998 decision that its ROW was null and void in part. In its 1983 decision finding that Sabon's allotment had been legislatively approved, BLM made the allotment subject to an easement for highway purposes. It was not until the decision of April 28, 1998, that BLM concluded the ROW was null and void in part due to the Sabon's allotment. Thus, the fact that the State may be precluded from challenging the matters decided in the 1983 decision is not ultimately dispositive of the validity of the ROW. Section 905(a)(1) of ANILCA, as amended, provides that the Native allotment applications are legislatively approved "[s]ubject to valid existing rights." 43 U.S.C. § 1634(a)(1) (1994). A ROW may be a valid existing right and the State claims that its ROW grant is such a right. State of Alaska (Johnson), 133 IBLA at 287.

[2] PLO No. 601 (14 Fed. Reg. 5048 (Aug. 16, 1949)), issued August 10, 1949, withdrew, subject to valid existing rights, all public lands, at fixed distances on each side of the centerline of certain "through," "feeder," and "local" roads, from all forms of appropriation under the public land laws, and reserved such lands for highway purposes. See 14 Fed. Reg. 5048 (Aug. 16, 1949). The Gulkana-Slana Tok Road (Tok Cut-off) was identified as a through road. Consequently, all public lands within 150 feet on each side of the centerline of that road were withdrawn. See id. PLO No. 601 was amended on October 16, 1951, by PLO No. 757 (16 Fed. Reg. 10749 (Oct. 20, 1951)), which revoked the withdrawal of public lands on each side of the centerline of local roads, but preserved the withdrawal as to certain through and feeder roads. See State v. Alaska Land Title Association, 667 P.2d 714, 719 (Alaska 1983). Also on that date the Secretary issued Secretarial Order No. 2665, to "fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior" and to "prescribe a uniform procedure for the establishment of rights-of-way or easements \* \* \* for such highways." 16 Fed. Reg. 10752 (Oct. 20, 1951).

Thus, at the time Sabon claimed she commenced her use and occupancy the land was withdrawn from all forms of appropriation. Native settlement on land which was closed to entry afforded no cognizable rights. See

Akootchook v. United States Department of the Interior, 747 F.2d 1316, 1320 (9th Cir. 1984); State of Alaska (Goodlataw), 140 IBLA at 214; Magnel E. Drabek, 41 IBLA 219, 222 (1979); Milton R. Pagano, 41 IBLA 214, 217 (1979).

PLO No. 601 was revoked on April 7, 1958, pursuant to PLO No. 1613 (23 Fed. Reg. 2376 (Apr. 11, 1958)), but an easement for highway purposes, encompassing public lands lying within 150 feet on each side of the centerline of the remaining through and feeder roads, was established for the lands that had been withdrawn. PLO No. 1613 specified that lands within the easements "shall not be occupied or used for other than the highways \* \* \* except with the permission of the Secretary of the Interior." 23 Fed. Reg. 2377 (Apr. 11, 1958). There is nothing in the case record to indicate permission was given. However, since the allotment application was accepted and the claim deemed legislatively approved, we find that to be permission. The PLO also stated that lands released from withdrawal, which "adjoin lands in valid unperfected entries, location, or settlement claims, shall be subject to inclusion in such entries, locations and claims." Since a portion of Sabon's claim fell outside the withdrawn land, the rest of her claim would be subject to inclusion pursuant to PLO No. 1613.

However, while PLO No. 1613 stated that any tract released from the withdrawal made by PLO No. 601 was open to settlement claim application, selection or location under any applicable public land law, it also specified that it was subject to the highway easement. Thus, while the effect of PLO No. 1613 was to permit Sabon to commence use and occupancy in 1958, it also made that use and occupancy subject to the highway easement which extended 150 feet on each side of the center line. That easement was never revoked. The State asserts that ROW grant A-067759 covers almost precisely the same land covered by the PLO's and that at most Sabon's allotment claim includes a strip of land perhaps "1200 feet by 20 feet" that is not covered by the PLO's and the ROW grant A-067759. (SOR at 12.) BLM has not objected to that assertion.

The effect of the Secretarial Order in 1951 was to formally recognize the public highway and to define the limits of that highway. As the District Court said in Myers v. United States, 210 F. Supp. 695, 700 (D. Alaska 1962), aff'd, 323 F.2d 580 (9th Cir. 1963): "Where a public road has been created over a part of the public domain, one who thereafter acquires title to, or rights in, that part of the public domain takes and holds subject to the right-of-way for such road." The State contends that the ROW for the realignment falls within land covered by the original PLO's. The maps in the case record depicting ROW A-067759 support the contention that for the most part it is within the original easement. BLM has not disputed that contention. Thus, while ROW A-067759 was issued in 1966 it was within a highway easement that existed prior to the date Sabon commenced use and occupancy and any portion of ROW A-067759 within the original easement is a valid existing right.

Therefore, the Sabon allotment must be subject to any portion of ROW A-067759 within the easement established by PLO No. 1613. Any portion of the Sabon allotment not covered by ROW A-067759 is not subject to the ROW,

as her commencement of use and occupancy predated that portion of the ROW. Therefore, BLM's decision declaring ROW A-067759 null and void is reversed as to any portion of the ROW grant within the easement established by PLO No. 1613.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the BLM decision appealed from declaring ROW A-067759 null and void in part is reversed as to that portion of ROW A-067759 traversing the allotment within the limits of PLO No. 1613, but affirmed as to that portion of ROW A-067759 traversing the allotment located outside the lands described in PLO No. 1613.

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James P. Terry  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge

