

Editor's note: Appeal -- dismissed, (at Golden Valley's request - it acquired easement) Civ.No. F87-064 (D. Alaska Jan. 1990)

GOLDEN VALLEY ELECTRIC ASSOCIATION
(ON RECONSIDERATION)

IBLA 84-520

Decided June 29, 1987

Petition for reconsideration of Golden Valley Electric Association, 85 IBLA 363 (1985), which reversed a decision of the Fairbanks District Office, Bureau of Land Management, declaring a portion of transmission right-of-way F-035083 null and void.

Reconsideration granted, prior Board decision vacated; Fairbanks District Office decision affirmed.

1. Alaska: Native Allotments -- Rights-of-Way: Nature of Interest Granted

A right-of-way for electric transmission line issued, subject to valid existing rights, pursuant to the Act of March 4, 1911, over lands in the open and notorious possession of an Alaska Native cannot diminish the statutory preference right to a Native allotment. Although the preference right is inchoate prior to completion of the required period of qualifying use and occupancy and the filing of a timely application, when the preference right is vested it takes precedence over intervening applications filed subsequent to the commencement of use and occupancy by the Native and the right-of-way will be ineffective to authorize use of lands in the allotment after vesting of the preference right.

Golden Valley Electric Association, 85 IBLA 363 (1985), vacated, and State of Alaska v. Albert, 90 IBLA 14 (1985), modified to the extent inconsistent.

APPEARANCES: F. Christopher Bockmon, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management;

Constance A. Cates, Esq., Fairbanks, Alaska, for Golden Valley Electric Association; Lance B. Nelson, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Counsel for the Bureau of Land Management (BLM) has petitioned the Board of Land Appeals for reconsideration of the decision in this case, cited as Golden Valley Electric Association, 85 IBLA 363 (1985). In that

decision, the Board reversed a BLM decision declaring a portion of a right-of-way for power transmission line null and void. The BLM decision had invalidated that portion of the right-of-way which crossed land used and occupied by Jennie K. Irwin as a Native allotment on the ground the right-of-way was issued subject to valid existing rights and Irwin's use and occupancy pursuant to the Native Allotment Act, coupled with her subsequent timely filed application, precluded a right-of-way grant.

In support of the petition, BLM asserts that commencement of use and occupancy of the land by Irwin created a preference right in the land which could not be defeated by the subsequent right-of-way grant. This is so, BLM contends, because Irwin filed a timely Native allotment application notwithstanding the fact the Native allotment application, had not been filed with BLM at the time the right-of-way was issued. BLM contends the Board decision is inconsistent with Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), and with a proper reading of the Board's decision in United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981). Petitioner also cites the decision in State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alaska 1985), issued since the Board's decision, for the proposition that Native use and occupancy creates an inchoate preference right which, once vested, relates back to the initiation of occupancy and takes preference over applications filed prior to the Native allotment application. In further support of reconsideration, BLM asserts it must deal with this issue in taking action to issue Irwin's Native allotment.

Counsel for appellant in this case, Golden Valley Electric Association, has opposed the request for reconsideration. Golden Valley argues BLM is not a proper party to the case with standing to request reconsideration, citing the regulation governing standing to appeal at 43 CFR 4.410(a). Further, Golden Valley opposes reconsideration on the ground Irwin had neither completed the required 5-years use and occupancy nor filed a Native allotment application at the time the right-of-way was issued. Thus, her rights at the time were still inchoate, as opposed to vested. Counsel distinguishes State of Alaska v. 13.90 Acres of Land, supra, on the ground the Native allotment right vested in that case when both filing of the application and completion of the required use and occupancy occurred prior to issuance of the conflicting right-of-way.

The State of Alaska has petitioned the Board for leave to file a brief as amicus curiae in this case on reconsideration on the ground the issues presented here are involved in many cases in which the State is a party. Petitioner asserts that although the rights of Native allotment applicants are subject to the protection of due process of law, Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and thus protected against arbitrary abridgement, the Secretary is not deprived of discretion properly exercised in the adjudication of Native allotments, citing State of Alaska, 85 IBLA 196, 205 (1985). In opposing the BLM petition for reconsideration, the State cites the Board opinion in Edward A. Nickoli, 90 IBLA 273 (1986), and cases cited therein for the proposition that Native allotments may be made subject to public access routes as an exercise of the Secretary's discretion under the Native Allotment Act.

We find it appropriate to grant the petition for reconsideration in light of the precedents cited by petitioner. We also find it appropriate to accept the State's brief in this case as amicus curiae. As a preliminary matter, we find BLM has standing to petition for reconsideration under 43 CFR 4.21(c). Service on the Solicitor of the notice of appeal and statement of reasons is required of the appellant. 43 CFR 4.413. Any party served with the notice of appeal may file an answer, however, failure to answer will not result in a default. 43 CFR 4.414. Although petitions for reconsideration by BLM are not ordinarily viewed with favor where counsel for BLM failed to file a brief prior to the decision of the Board, reconsideration may be granted by the Board in its discretion where good cause is shown. 43 CFR 4.21(c). For reasons made plain in the following discussion, we find good cause has been shown and grant the petition for reconsideration.

[1] Upon careful review of the decision in Aguilar v. United States, *supra*, we must agree with the Solicitor that the court held that the Alaska Native Allotment Act of 1906, as amended, 43 U.S.C. § 270-1 through 270-3 (1970) (repealed December 18, 1971, subject to pending applications, 43 U.S.C. § 1617(a) (1982)), pursuant to which Irwin filed her Native allotment application, accorded the applicant a statutory preference right to an allotment of land commencing with the first use and occupancy of the land in a qualifying manner. Further, the preference right was not barred by the fact a Native allotment application was not filed for the land until after other disposition was made of the land. 474 F. Supp. at 845. It is true as we held in our prior decision that it is not until the completion of the required 5 years of use and occupancy coupled with the timely filing of a Native allotment application that the inchoate preference right becomes a vested preference right. United States v. Flynn, *supra*. However, we must also find that once the preference right becomes vested, the preference or preemption "relates back to the initiation of occupancy and takes preference over competing applications filed prior to the native allotment application." State of Alaska v. 13.90 Acres of Land, *supra* at 1319; Aguilar v. United States, *supra* at 845; United States v. Flynn, *supra* at 234, 88 I.D. at 387.

This result is also supported by Departmental precedent relating to Indian allotments outside Alaska. The case of Schumacher v. State of Washington, 33 L.D. 454 (1905), involved an appeal by an Indian allotment applicant from rejection of his application on the ground the land was previously granted by statute to the State (which in turn had sold the land to a third party) prior to the filing of appellant's allotment application. The allotment applicant claimed bona fide settlement of the land, including the making of improvements, predating the grant to the State. Secretary Hitchcock found the Departmental history of protecting the possession of Indians on lands occupied and improved by them amounted to an appropriation or dedication of such lands which, when considered with the provisions of the Allotment Act under which the Indian allotment application was filed, caused lands occupied and applied for to be excepted from the grant to the State. *Id.* at 456. This was found to be true despite the fact the Indian allotment application was not filed until after the grant to the State and the subsequent sale to a third party:

It is true that the Indian did not give notice of his intention to apply for an allotment of this land until after the State had made disposal thereof, but the purchaser at such sale was bound to take notice of the actual possession of the land by the Indian if, as alleged, he was openly and notoriously in possession thereof at and prior to the alleged sale, and that the act did not limit the time within which application for an allotment should be made.

Id. at 456, quoted in Cramer v. United States, 261 U.S. 219, 228 (1923).

We recognize, as pointed out by counsel for Golden Valley, that the Native allotment application reviewed in State of Alaska v. 13.90 Acres of Land, supra, was filed prior to the grant of the conflicting right-of-way, unlike the present case where the Native allotment application was not filed until after issuance of the right-of-way. However, we find no basis in the decision for restricting the court's holding to those cases where the Native allotment application was filed prior to approval of the conflicting application. Indeed, the court in State of Alaska, supra, while distinguishing our prior decision in Golden Valley Electric Association, supra, on this basis, expressly declined to address whether the case was correctly decided. 625 F. Supp. at 1319 n.4. Further, we find no basis for so restricting the court's holding in Aguilar v. United States, supra. The class of plaintiffs certified by the court was not restricted in this manner. Id. at 842. We also note the allotment application in Schumacher, supra, was not filed until after the statutory grant to the State and the subsequent sale of the tract to a third party.

We point out that to the extent prior use and occupancy by Natives afford any specific protections in the absence of an application to acquire title, it is "essential that acts of appropriation occur which would disclose to an observer on the ground that the land was under active development or use." United States v. Flynn, supra at 236-37, 88 I.D. at 389. It is clear from the record in this case, however, that Irwin was in open and notorious use and occupancy of the land prior to the right-of-way grant. See Golden Valley Electric Association, supra at 364 n.1.

The case of Edward A. Nickoli, supra, cited by the State in opposition to the petition for reconsideration, as well as the other precedents analyzed therein, are for the most part distinguishable from the case at hand. In Nickoli, reservation of a right of public access along a portion of the Iditarod National Historic Trail which crossed appellant's Native allotment was affirmed by the Board notwithstanding a BLM finding of qualifying use and occupancy by the applicant. According to the decision, use of the trail pre-dated the applicant's use and occupancy pursuant to the Native Allotment Act. Although the reservation was upheld as an exercise of the Secretary's discretion pursuant to the Native Allotment Act, the decision makes it clear that the reservation was specifically authorized by Act of Congress, section 7(h) of the National Trails System Act, 16 U.S.C. § 1246(h) (1982). 90 IBLA at 276. There is little doubt as to the authority of Congress to qualify the right to an allotment of the public lands pursuant to the Native Allotment

Act prior to the vesting of the applicant's rights upon the filing of an application and the completion of the required use and occupancy. See State of Alaska v. 13.90 Acres of Land, *supra* at 1320. Reservation of a right-of-way for the Iditarod Trail in Native allotments was upheld on a similar basis in Clarence Lockwood, 95 IBLA 261 (1987).

The case of Leo Titus, Sr., 89 IBLA 323 (1985), involved an appeal by a Native allotment applicant from a BLM decision reserving a public trail right-of-way across appellant's Native allotment. The Board set aside the BLM decision and remanded the case to ascertain whether the appellant had, in fact, intended to include the trail in his Native allotment application and, if so, whether appellant had established substantial actual possession of the land at least potentially exclusive of others for that part of the Native allotment crossed by the trail. *Id.* at 332-34. In reviewing the question of whether a right-of-way may be reserved, the Board found that "where a valid existing right-of-way is found which does not impede a Native allotment applicant's claim to the subservient land the allotment may be made subject to the right-of-way." *Id.* at 335. The record in Titus disclosed a trail which pre-dated appellant's use and occupancy pursuant to his Native allotment claim. The Board recognized that use of this trail across the public lands as a highway might legally suffice to establish a right-of-way for this purpose under section 8 of the Act of July 26, 1866, repealed, Federal Land Policy and Management Act of 1976, section 706(a), 90 Stat. 2793 (formerly codified at 43 U.S.C. § 932 (1970)). 89 IBLA at 335-37.

These cases are distinguishable from the present case in that use of the land for right-of-way purposes preceded initiation of use and occupancy by the Native allotment applicant. Under the circumstances, we cannot find that they militate against reconsideration of our prior decision in this case. One of the cases cited in Nickoli, however, does offer language contrary to our analysis on reconsideration in this case. In State of Alaska v. Albert, 90 IBLA 14 (1985), we stated, citing Golden Valley, that although the Native applicant's use and occupancy preceded conflicting right-of-way grants to the State, the inchoate preference right (which did not become vested until the filing of the Native allotment application subsequent to the grant of the rights-of-way to the State) could not defeat the previously issued rights-of-way. *Id.* at 21-22. Clearly, that statement must now be qualified for the reasons stated herein. Albert's inchoate preference right could defeat the previously issued rights-of-way if her use and occupancy was open and notorious at the time the right-of-way grants issued such that it would have disclosed to an observer on the ground that the land was under active development or use. See United States v. Flynn, *supra* at 236-37, 88 I.D. at 389. ^{1/} For that reason, our statement in Albert is modified to the extent it is inconsistent with our present analysis.

^{1/} We observe that the BLM decision in Golden Valley and the position asserted on reconsideration apparently represent a shift in BLM's policy regarding the issuance of allotment certificates subject to rights-of-way. See State of Alaska v. Albert, *supra* at 19 n.7.

Golden Valley's right-of-way was issued subject to "all valid rights existing on the date of the grant" (Exh. B to Response to Request for Reconsideration at 2). These rights included Irwin's inchoate preference right to a Native allotment established by her open and notorious use and occupancy at the time of the grant. Although this right did not become vested until later when Irwin completed the required use and occupancy and filed a timely application for Native allotment, the preference right relates back to the initiation of use and occupancy and preempts conflicting applications filed after that time, although prior to filing of the Native allotment application. Thus, on reconsideration we must affirm the decision of BLM declaring the right-of-way grant null and void to the extent it purported to grant a right-of-way over land in which Irwin held an inchoate preference right which later became a vested right. Although Golden Valley apparently obtained the consent of Irwin to its use of a portion of her land for right-of-way purposes, the right-of-way granted by BLM to Golden Valley in 1966 pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1970) (repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2793, effective October 21, 1976), cannot authorize the use subsequent to the vesting of Irwin's right to a Native allotment for the lands.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted; the prior Board decision in this case, Golden Valley Electric Association, 85 IBLA 363 (1985), is vacated; and the decision of BLM is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge.

