United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

LEO TITUS, SR.

IBLA 84-747 Decided November 13, 1985

Appeal from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management, reserving a public trail right-of-way across lands in Native allotment application F-027119.

Set aside and remanded.

1. Administrative Procedure: Generally—Alaska: Native Allotments--Rules of Practice: Generally

The hearing requirement mandated by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), does not apply where the Bureau of Land Management has not concluded that a Native allotment application contains insufficient proof of qualifying use and occupancy of the claimed lands and has not determined to reject the application.

2. Alaska: Native Allotments—Conveyances: Generally

The Department has continuing jurisdiction to consider all issues in claims to land while legal title remains in the United States. A Native allotment applicant obtains no legal title in land claimed by him prior to receipt of a "Native allotment."

3. Alaska: Native Allotments—Applications and Entries: Generally

Under 43 CFR 2561.1(c), a Native allotment applicant must describe "as accurately as possible" available lands he claims to have used or occupied in compliance with the Native Allotment Act, 43 U.S.C. §§ 270-1

through 270-3 (1970), if the lands were unsurveyed under the rectangular survey system. Where the description provided "is ambiguous" so that the claimant's entitlement to a part of a trail is not clearly adjudicated under the Act notwithstanding that an allotment of a tract of the land was approved, the decision to grant the allotment will be set aside and the case remanded to determine whether the application included the trail in question and to review the claimant's entitlement to that trail as part of his allotment.

4. Alaska: Native Allotments--Conveyances: Reservations--Rights-of-Way: Generally--Rights-of-Way: Revised Statutes Sec. 2477

Although available information suggests the possibility an existing trail across a Native allotment claim might qualify as a preexisting R.S. 2477 right-of-way, the Department is not required to adjudicate such rights-of-way. Since the adjudication of R.S. 2477 rights-of-way is primarily a matter for the state courts, and since no Departmental need would be served by an adjudication of the R.S. 2477 roadway in this case, no mention of the right-of-way should appear in the conveyance.

APPEARANCES: David C. Fleurant, Esq., Anchorage, Alaska, for appellant; Barbara L. Malchick, Esq., Assistant Attorney General, Anchorage, Alaska, State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Leo Titus, Sr., appeals from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), dated June 13, 1984, in which parcel B of his Native allotment application, F-027119, was declared subject to a right-of-way reservation for a public trail. 1/

1/ Titus has moved to consolidate this appeal with two other pending cases; his motion is denied.

Titus filed an amendment to his original Native allotment application on July 15, 1965, to include the following area (designated parcel B):

> Beginning at a point on the west side of the Dunbar to Livengood Trail at approximately 64°53'38" North Lat., 149°42'25" West Long.; thence westerly approximately 20 chains on a line at right angles to the trail; southerly approximately 20 chains; easterly approximately 20 chains on a line at right angles to the trail to a point on the trail; northerly approximately 20 chains along the trail to the point of beginning.

His use of land in the vicinity of the described parcel commencing in November 1938, is not challenged. BLM examined parcel B in 1967 and 1974 and concluded Titus had satisfactorily complied with the requirements for a Native allotment. By decision dated May 20, 1983, BLM announced the parcel would be "held for approval." 2/ On September 2, 1983, BLM approved allotment of parcel B according to the following description: "Parcel B, U.S. Survey No. 4445B, Alaska, located on the Dunbar-Livengood Trail approximately 14 miles east of Minto, Alaska, in T. 1 N., R. 6 W., Fairbanks Meridian, containing 39.99 acres." A final certificate was prepared October 20, 1983, which set forth standard reservations of rights-of-way for ditches and canals and for construction of railroads, telegraph, and telephone lines. However,

2/ Native allotment applications pending before the Department on Dec. 18, 1971, which described unreserved lands on Dec. 13, 1968, were statutorily approved by Congress in section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1982), unless otherwise provided by other paragraphs or subsections of that section. Section 905(a)(4) of ANILCA provides that allotment applications describing lands validly selected by the State of Alaska on or before Dec. 13, 1968, must be adjudicated. A general purpose grant selection application, F-026807, for the entire township in which parcel B is located, T. 1 N., R. 6 W., Fairbanks Meridian, was filed by the State of Alaska on Sept. 29, 1960, pursuant to the provisions of section 6(b) of the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C Chap. 2 (1982). See May 20, 1983, decision.

it did not contain a reservation for public trails or roads. Subsequently, in its June 13, 1984, decision, BLM determined parcel B should be made subject to a linear right-of-way for public use of the Dunbar-Livengood Trail. BLM found that use of the trail predated Titus' use of the parcel.

Titus alleges in his statement of reasons that "BLM's decision to reserve a public trail across parcel B of his Native allotment claim was in error" (Statement of Reasons at 1). He asserts BLM violated his rights to due process procedures because he was not notified of the adverse action and given an opportunity to respond before the decision was issued. He also challenges BLM's authority to establish a public access right-of-way across his approved Native allotment without his concurrence. Finally, he claims that if the trail was publicly used, the area it traverses cannot be approved for allotment since potentially exclusive use cannot be shown under such circumstances. BLM, he argues, must either allot the trail corridor without a reservation for public use or reject the area from his application. He asserts the trail area is not publicly used and should be allotted to him. The State of Alaska has submitted an answer in response to Titus' claims which, inter alia, argues that the Dunbar-Livengood Trail is an existing sled road established by public use in 1921.

[1] Appellant charges that he was denied certain due process rights afforded Native allotment applicants under the decision in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), where the court held Native allotment applicants whose claims are to be rejected are entitled to prior notice of the proposed rejection and the opportunity to be heard. Following the Pence decision, this Board established that a contest must be initiated where

factual issues exist as to the applicant's compliance with the use and occupancy requirements of the statute and implementing regulations, and BLM determines the application should be rejected. Mary DeVaney, 51 IBLA 165 (1980); John Moore, 40 IBLA 321, 86 I.D. 279 (1979). BLM's decision at issue here cannot be accurately characterized as a rejection of appellant's claim but instead comprises a determination to subject a small portion of the approved allotment to a purported preexisting use. Under the circumstances, prior notice and contest proceedings pursuant to the Pence decision are not required, for appellant is not left without due process safeguards. BLM provided sufficient rationale for its determination and informed appellant of the opportunity to appeal to this Board. Consideration of appellant's argument on appeal fulfills the Department's due process responsibilities under the circumstances. See John D. Archer, 75 IBLA 128, 132 (1983). Moreover, since this decision remands this matter to BLM for further action, appellant will be afforded an additional opportunity to be heard and to participate in the administrative decisionmaking by the agency, as described later in this decision.

[2] Appellant suggests that BLM's previous determinations to allot the surveyed parcel without reserving a trail easement vested a right to have the land allotted without such encumbrance. So long, however, as the legal title remains in the United States, there is continuing jurisdiction in the Department to consider all issues in land claims, including correction or reversal of erroneous decisions. Cameron v. United States, 252 U.S. 450 (1920); Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364 (9th Cir. 1976); cf. Germania Iron Co. v. United States, 165 U.S. 379 (1897); Peter Andrews, Sr. (On Reconsideration), 83 IBLA 344 (1984) (the Department lacks

jurisdiction to adjudicate rights to land only after legal title is transferred). Prior to receiving a certificate of allotment, a Native allotment applicant has no legal title to the lands which he or she claims. Akootchook v. United States, 747 F.2d 1316 (9th Cir. 1984). The BLM case file abstract indicates a "Final Certificate" was prepared October 20, 1983; a draft document found in the case file is titled "Certificate of Allotment." These documents, however, are "worksheets" prepared preliminary to issuance of the official "Native Allotment." No title document has been approved and delivered to the allottee; as of yet, therefore, there has been no Native allotment. It is the "Native Allotment" which will operate to pass title. See State of Alaska, 45 IBLA 318, 321 (1980). Cf. State of Alaska, 35 IBLA 140 (1979). Accordingly, the Department has jurisdiction to reconsider any issue regarding appellant's application for parcel B.

[3] Review of the appeal documents and the BLM case file reveals distinct differences between the land accounts provided by BLM field examiners and BLM surveyors. In his application for parcel B, Titus began his description for his purported claim by referring to a point "on the west side of the Dunbar to Livengood Trail," with the first call being "westerly" at right angles to the trail. According to his application, he intended to claim lands in the vicinity of the trail where he had hunted and trapped for many years and where his cabin is located. There is nothing in the application which establishes that the trail was to be included within the claim.

When the first field examination was conducted by BLM in 1967, the area claimed by Titus was "identified [in the report] with reference to the appropriate quad map." See Report on Native Allotment Application F-27119 at 1

(Aug. 29, 1967). The maps accompanying this report depict a definite boundary between the trail and the claimed lands.

In July 1967, a field survey, designated U.S. Survey No. 4445B, was done by BLM surveyors to establish the boundaries to Titus' Native allotment. At the same time survey was made of Native allotment application F-034718 for Matilda Titus, appellant's wife. The parcel claimed by Matilda Titus is located directly to the east of appellant's claimed allotment, "Beginning at a point on the east side of the Dunbar to Livengood Trail at approximately 64°53'38" North Lat., 149°42'25" West Long." (Emphasis added.) See Native Allotment Application F-034718. As depicted on the survey plats for these two parcels, they are situated so that they jointly form a rectangle with the centerline of the Dunbar-Livengood Trail illustrated as the boundary between them. According to the survey plats, one-half of the trail is allocated to each parcel. The surveying instructions constitute the first recorded instance where the land encumbered by the west half of the Dunbar-Livengood Trail is clearly included within appellant's claimed Native allotment parcel.

When parcel B was examined by BLM in June 1974, Titus accompanied BLM's field examiner. The examiner reported the parcel boundaries were not posted and later prepared a sketch map for the field report which shows the boundaries established by the examination. This sketch map portrays the west edge of the Dunbar-Livengood Trail as the purported east boundary of appellant's claimed parcel. Recognizing the trail's existence, the examiner declared in his report that there were no existing roads or trails on the parcel. Native Allotment Field Report, F-027119, D. 4. (Oct. 31, 1974). To better understand the implications of the examiner's statements, reference is made

to a field report prepared from the July 1974 field examination of Matilda Titus' adjacent Native allotment claim. The field examiner was accompanied during that investigation by appellant, on behalf of his wife. Relying on what occurred during the on-site inspection, the examiner wrote in the report with reference to any existing roads or trails: "The Dunbar Trail boundary is on the immediate west boundary of the parcel and not part of the parcel." Native Allotment Field Report, F-034718, D. 4. (Nov. 22, 1974). It is apparent the BLM field examiner did not consider the trail to be part of the allotment claim and, consequently, did not review this narrow strip of land to determine whether it qualified for inclusion in appellant's allotment. Moreover, there is no reconciliation in the record of the differences between the accounts found in the field reports and the survey.

The Secretary is authorized under the Native Allotment Act, 34 Stat. 197, as amended (previously codified at 43 U.S.C. §§ 270-1 through 270-3 (1970)), 3/ to allot to each individual allottee up to 160 acres of qualifying lands. See 43 CFR 2561.0-3. To qualify for such allotment, a claimant must provide satisfactory proof of "substantially continuous use and occupancy of the land." 43 U.S.C § 270-3 (1970); 43 CFR 2561.2. Departmental rules require a Native allotment applicant to describe vacant, unappropriated, and unreserved nonmineral lands claimed to have been used or occupied under the provisions of the Act. If the lands are unsurveyed, the applicant's description is to be made "as accurately as possible." 43 CFR 2561.1(c). An accurate and complete description is essential for proper BLM land management

3/ The act was repealed by section 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1982), subject to a savings clause preserving valid, pending applications.

because the lands specified in a Native allotment application are segregated upon the filing of the application. 43 CFR 2561.1(e). Moreover, a claim for unsurveyed lands must be made identifiable by an accurate description since an official survey of the claim must be completed before an allotment will be made. 43 CFR 2561.2(a). In this instance, the description was made part of the instructions used to guide BLM surveyors in their assigned task of defining the boundaries of the claimed parcel. They interpreted the description to include the area within the west half of the Dunbar-Livengood Trail, although the description of parcel B furnished by Titus specified that the allotment should begin "at a point on the west side of the Dunbar to Livengood Trail."

The description found in a Native allotment application also serves to identify the extent of the area claimed by the applicant. By using the prepared forms, appellant made his assertion that he used and occupied those lands described in his application. See Native Allotment Application F-027119 (forms 4-021 (Nov. 1963), 4-1426 (Sept. 1963)). Without such an assertion, allotment of lands not described usually will not be considered since the initial step in an applicant's required proof of continuous use and occupancy is missing, viz., there is no claim he has used or occupied the lands. 4/ The regulations at 43 CFR 2561.0-8(b) do allow BLM to allot, in some instances, more than the actual area used or occupied, presumably so that BLM not be inconvenienced with managing irregular and isolated pockets or corridors of public lands. However, this provision is restricted by its

4/ In addition, the Bureau of Indian Affairs is required under 43 CFR 2561.1(d) to certify that the applicant has occupied "the lands as stated in the application."

terms to apply only to lands where the rectangular survey pattern is employed. Thus, the regulation provides:

> In areas where the rectangular survey pattern is appropriate, an allotment may be in terms of 40-acre legal subdivisions and survey lots on the basis that substantially continuous use and occupancy of a significant portion of such smallest legal subdivision shall normally entitle the applicant to the full subdivision, absent conflicting claims. [Emphasis supplied.]

43 CFR 2561.0-8(b). We cannot construe this authority to extend to the present situation, however, because the survey of parcel B does not employ the grid pattern used by the rectangular survey method.

Because the field examiner interpreted the description in appellant's application not to include the trail, BLM's case file does not include proof of "substantially continuous use and occupancy" of this narrow strip of land. In point of fact, BLM's field reports address only use and occupancy of an area which did not include the trail. Aside from these reports, there are no references in the case file to show the nature of appellant's claim to the trail corridor. Because BLM's decision to allot the land in question is therefore not supported by its record, we must set aside the decision to allot the narrow strip of land within the west half of the Dunbar-Livengood Trail and remand the case for resolution of the following issues.

First, did appellant claim this narrow strip as part of his allotment? Although the description found in the application and related documents indicates he probably did not intend to claim the land at issue, we find the

circumstances surrounding the framing of the description ambiguous. Provision of 43 U.S.C. § 1634(c) (1982) permits a Native allotment applicant to amend his land description "if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed." Under this provision, it is the actual intent of the applicant, as proven, which controls designation of the area claimed where a discrepancy is found. See Pedro Bay Corp., 78 IBLA 196, 200-201 (1984); Edith Jacquot, 27 IBLA 231 (1976). Accordingly, appellant should be provided an opportunity to establish whether he intended to include the unappropriated lands underlying the west half of the Dunbar-Livengood Trail. Even if appellant declines to avail himself of the opportunity, BLM should review the circumstances and render a determination based on the available record.

Next, has appellant shown he is entitled to the land at issue? Departmental regulation 43 CFR 2561.0-5(a) requires "substantial actual possession of the land, at least potentially exclusive of others, and not intermittent use." Appellant asserts the existence of the trail does not establish constant and consistent use by others. Indeed, the record does not disclose convincing evidence that the trail has been maintained and used in such fashion as to display use contrary to an attempt by appellant to establish potentially exclusive use and occupancy of the land. However, BLM's failure to verify qualifying use by Titus with respect to this narrow strip of land makes an inquiry into the actual situation appropriate in this case. Accordingly, appellant should be allowed an opportunity to show his independent use or occupancy of the land in compliance with the Native Allotment

Act, if it is determined that he claimed it under his allotment application. 5/

[4] An additional issue raised by this appeal concerns BLM's authority to subject a Native allotment to a reservation for a trail right-of-way. Appellant alleges reservation of such linear easement would imply the non-exclusive use or occupancy of the land and, therefore, indicate the land within the trail corridor is not available for allotment under the Act. The State of Alaska argues that BLM has the authority to reserve rights-of-way over Native allotments. The State relies upon a Regional Solicitor's (Alaska Region) memorandum dated December 22, 1983, which concludes that where the right-of-way was established prior to entry under the Native Allotment Act, the approved allotment should be issued subject to the right-of-way. The Regional Solicitor reasoned that, in accordance with prior Departmental decisions, the establishment of a linear right-of-way does not necessarily segregate the entire fee interest in the land from subsequent disposition. Indeed, section 508 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1768 (1982), allows the Secretary to grant or convey any land out of Federal ownership which is encumbered by an existing right-of-way provided the land is conveyed subject to the right-of-way. The Board recently recognized BLM's authority to reserve an easement established prior to the time a Native allotment applicant claiming the subservient land qualified to

5/ Concern is expressed in the record that BLM should not retain the land within the trail area because of perceived inconveniences associated with BLM's responsibility to manage such isolated strips of public land. However, this land was selected by the State of Alaska, see note 1, and a grant of this narrow strip under the State's application appears in harmony with a public trail right-of-way. Thus, if appellant is not qualified to obtain an allotment of the land at issue, BLM should review the possibility of granting this land to the State.

receive it as part of the allotment. See Golden Valley Electric Association, 85 IBLA 363 (1985). Cf. State of Alaska, 85 IBLA 170, 171 (1985). Thus, 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.

The record shows the Dunbar-Livengood (Brooks) Trail existed as early as 1921 to provide access from Dunbar Station on the Alaska Railroad to the mining camp at Livengood. See Annual Report of the Alaska Road Commission (1923), at 72-73. The State of Alaska asserts it is a well established trail which has provided public access and recreational opportunities. According to the record, when BLM recommended approval of appellant's allotment as defined by U.S. Survey 4445B, the State protested BLM's failure to recognize the trail and provide protective measures. The record does not indicate this protest was withdrawn by the State or resolved by BLM.

Available information suggests the legal status of the Dunbar-Livengood Trail has not been analyzed by BLM or appellant. Official notice is taken that the case file for Matilda Titus' Native allotment application F-034718 (see previous discussion) includes a letter to BLM from the State of Alaska dated July 21, 1983, reasserting its claim to an R.S. 2477 right-of-way for the Dunbar-Livengood Trail.

Section 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1970), 6/ R.S. 2477, provides that: "The right of way for construction of highways

6/ This provision was repealed by section 706(a) of FLPMA, 90 Stat. 2793, effective Oct. 21, 1976. Valid existing rights established under such terminated authority were recognized pursuant to section 701(a) of FLPMA, 90 Stat. 2786.

over public lands, not reserved for public uses, is hereby granted." The grant under this provision inures when a public highway over unreserved public lands is established pursuant to the laws of the jurisdiction where the land is located. 43 CFR 2822.2-1 (1975). See State v. Crawford, 7 Ariz. App. 551, 441 P.2d 586, 590 (1961); Ball v. Stephens, 68 Cal. App. 2d 843, 158 P.2d 207, 209 (1945); Solicitor's Opinion, M-36274, 62 I.D. 158, 161 (1955). This statute was operable in Alaska when appellant initiated his activities in the area of the trail. See Hamerly v. Denton, 359 P.2d 121 (Alaska 1961); United States v. Rogge, 10 Alaska 130, 147 (1941). Public trails appear to have historically been an integral element of the Alaskan highway system. See Act of January 27, 1905, as amended, 48 U.S.C.A. §§ 322-325 (West 1952); Act of June 30, 1932, as amended, 48 U.S.C.A. §§ 321a-321d (West 1952); United States v. Rogge, supra. Cf. Alaska Stat. §§ 19.45.001(8), 19.30.241(6) (1962). The establishment of an R.S. 2477 right-of-way in Alaska occurred by either a positive act of the appropriate public authority or by public use showing the congressional grant had been accepted. Hamerly v. Denton, supra; Clark v. Taylor, 9 Alaska 298 (1938). See also Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973). It does appear the State of Alaska, Department of Highways, refers to the trail corridor as part of its public system. State of Alaska, Department of Highways, Existing Trail System (1973), Quadrangle # 100, Trail # 192 (trail); Annual Report Alaska Road Commission (1923), supra (sled road). This fact is not, however, conclusive of the matter.

The R.S. 2477 right-of-way confers upon the public the right to use the lands for highway purposes only. 43 CFR 2822.2-2 (1975). While the

retained fee interest is subject to the right-of-way, it is also available for disposal pursuant to law. Alfred E. Koenig, A-30139 (Nov. 25, 1964). More importantly, disposal of the underlying fee is subject to the R.S. 2477 easement regardless of whether or not a reservation is expressed in the conveyance document. Alfred E. Koenig, id.

The Koenig decision describes the customary Departmental approach to adjudication of tracts where an R.S. 2477 right-of-way is claimed to have been established; the Koenig decision deals with the argument that an R.S. 2477 right-of-way was established across lands encompassed by an application to purchase small tracts. The Department refused to adjudicate the claimed R.S. 2477 right-of-way, explaining at pages 2-3 the reasons for the refusal to define whether any rights were obtained under R.S. 2477:

> The Bureau's decision does leave the question of the status of the Sunbeam Gulch road uncertain both for appellant and for the small tract lessees who may be affected by any determination regarding the status of the road insofar as it conflicts with lands leased by them or which may be patented to them. However, in considering whether reservations of public roads granted pursuant to Rev. Stat. § 2477 need be made in grants of public lands, this Department has long taken the position that it is unnecessary to include any reservation or exception for the right-of-way in a patent. Herb Penrose, A-29507 (July 26, 1963), and cases cited therein. The reason for this is that grants of public lands upon which there is such a public highway are subject to the easement despite the absence of a reservation in the patent or grant. Id. The question as to whether a road is a public highway is determined by the law of the State in which the public land is located; therefore this Department has considered State courts to be the proper forum for determining whether there is a public highway under that section of the Revised Statutes and the respective rights of interested parties. Id. Thus, although the Bureau's conclusion may seem unsatisfactory to all of the parties concerned here, it was the proper conclusion in the circumstances as the questions involved are matters for the courts rather than this Department.

An exception to this rule was developed by the decisions in Nick DiRe, 55 IBLA 151 (1981), and Homer D. Meeds, 26 IBLA 281, 83 I.D. 315 (1976). The purpose of this exception, as explained in DiRe and Meeds, was to permit BLM to make determinations respecting R.S. 2477 rights-of-way in cases where a determination would be helpful in the administration of the public lands. In Meeds, the Board concluded BLM adjudication of the possible existence of such a right-of-way was necessary where a road closure proposed by BLM was protested because the road was claimed to be a public road established under R.S. 2477. The Board agreed this case was a special circumstance of "administrative concern" which could justify the effort and difficulty necessarily involved in making a determination normally reserved to the state courts because "it is appropriate that the Bureau review the propriety of its actions for its own purpose * * *." Id. at 26 IBLA 298-99, 83 I.D. at 323. (Emphasis supplied.) The Board was careful, however, to point out this exception was to be limited in application, and would not extend to cases involving private claims. This exception for purposes of administrative necessity was again applied in Nick DiRe to the situation where an application was made for a private road right-of-way across an existing trail said to be an R.S. 2477 road. Relying upon the "administrative concern" exception created by Meeds, the DiRe Board concluded adjudication of the R.S. 2477 issue in that case was proper, stating:

> Therefore, while the question of the existence of a "public highway" is ultimately a matter for state courts, BLM is not precluded from deciding the issue where it is considering an application for a private access road right-of-way, under section 501 of FLPMA, supra. The potential conflict is properly a matter of administrative concern.

Nick DiRe, supra at 154.

A second limited exception to this rule was formulated by the Alaska Native Claims Appeal Board (ANCAB) 7/ in State of Alaska, 5 ANCAB 307, 88 I.D. 629 (1981) as modified (On Reconsideration), 7 ANCAB 188, 89 I.D. 346 (1982), and applied by this Board in Alaska Department of Transportation, 88 IBLA 106 (1985). This exception provides for the identification of claimed R.S. 2477 rights-of-way where they underlie easements reserved under section 17(b) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1616(b) (1976). This exception to the rule prohibiting identification of a claimed R.S. 2477 right-of-way on patents issued under the public land and mineral laws clearly does not apply here, however, since there is no claim that a 17(b) easement has been reserved with respect to the Dunbar-Livengood Trail. 8/ Absent an affirmative grant by BLM for the Dunbar-Livengood Trail, it must be assumed the State is resting its claim under provisions of R.S. 2477. This being the case, even if, on remand, it is determined appellant did make application for allotment of part of the land underlying the road, any patent which would issue could not indicate that an asserted R.S. 2477 right-of-way traversed the land. The existence or nonexistence of that right-of-way would properly be determined under state law.

Since the reason for avoiding adjudication of R.S. 2477 rights-of-way in conveyancing is to avoid difficult decisionmaking where there is no real point in making the effort, in this case, quite clearly, whether there is

7/ ANCAB was abolished in 1982 by Secretarial Order, and the authority of the Board was transferred to the Interior Board of Land Appeals. See 47 FR 26392 (June 18, 1982).

8/ Whether or not the exception created by ANCAB for section 17(b) reservations has any meaningful basis might properly be reexamined when directly presented by an appeal.

an R.S. 2477 trail or not, should not be adjudicated by BLM. The factual question which remains to be decided is the location of the eastern boundary of appellant's allotment. No adjudication concerning whether the Dunbar-Livengood Trail is an R.S. 2477 right-of-way is needed in order to make this determination, which is entirely factual and is controlled entirely by the intent and conduct of the claimant. See 43 U.S.C. § 1634(c) (1982).

On remand, appellant must be afforded the opportunity to participate in the decisionmaking as indicated by this opinion; he shall be permitted to file a response to the questions propounded by this opinion. Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is set aside and the case remanded for action consistent herewith.

Franklin D. Arness
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge