

INTERIOR BOARD OF LAND APPEALS

Edward N. O'Leary

132 IBLA 337 (May 9, 1995)

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EDWARD N. O'LEARY

IBLA 93-429

Decided May 9, 1995

Appeal from a decision of the Alaska State Office, Bureau of Land Management, vacating prior decisions holding Native allotment application to be legislatively approved in whole or in part. F-16644 (Parcel A).

Affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

A Native allotment application that is amended, pursuant to sec. 905(c) of ANILCA, to encompass different land (in part) is not legislatively approved as to the land described in the amended application and is properly adjudicated under Act of May 17, 1906, as amended, when a protest meeting the requirements of sec. 905(a)(5) of ANILCA is filed within 60 days following the mailing of notice of the amended description to the state and interested parties even though the protest is addressed solely to the additional land.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Under sec. 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), any individual objecting to the applicant's entitlement to a Native allotment must file a protest within the period established by ANILCA and must allege that the land described in the application is the situs of improvements claimed by the person filing the protest. The subsequent withdrawal of such a protest after the close of the protest period does not obviate the requirement to adjudicate the application.

APPEARANCES: William E. Caldwell, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for Edward N. O'Leary; Roger L. Hudson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Edward N. O'Leary has appealed from a May 12, 1993, decision of the Alaska State Office, Bureau of Land Management (BLM). That decision vacated prior BLM decisions (dated September 29, 1983, July 23, 1984, and November 15, 1984) holding parcel A identified in appellant's Native allotment application (F-16644) to be legislatively approved either in its entirety or in part by section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1988). 1/ Counsel for appellant has filed a motion to expedite consideration of this case. In view of the fact that further adjudication of this appeal will be required if the BLM decision is upheld, we have advanced this case on the docket for review.

O'Leary's Native allotment application for parcel A was filed with the Department before December 18, 1971, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). 2/ It encompassed approximately 80 acres of land in unsurveyed T. 9 N., R. 14 E., Fairbanks Meridian, Alaska. The land was specifically described, with reference to the protracted survey lines, as the W^{1/2} SW^{1/4} NW^{1/4} sec. 26 and the SE^{1/4} NE^{1/4} and N^{1/2} NE^{1/4} SE^{1/4} sec. 27, situated along and north of the Steese Highway across from the Central Airport near Central, Alaska. 3/ The land sought was also depicted on a copy of a portion of a United States Geological Survey (Survey) topographic map ("Circle B-2"). O'Leary claimed use and occupancy of the land as a "home site" beginning in May 1962.

On July 26, 1976, Paul Costello, a BLM realty specialist, examined parcel A on the ground, apparently following an interview with O'Leary. Appellant was invited to attend the examination, but did not do so.

1/ Parcel B of appellant's Native allotment application is not at issue in this appeal. Parcel B was the subject of a contest hearing initiated by BLM. The contest was dismissed after a hearing by decision of the Administrative Law Judge. That decision was affirmed by the Board on appeal. United States v. O'Leary, 125 IBLA 235 (1993).

2/ The Act of May 17, 1906, was repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1617(a) (Supp. IV 1992), effective Dec. 18, 1971, subject to applications pending on that date. The Act of May 17, 1906, authorized the Secretary of the Interior to allot "in his discretion and under such rules as he may prescribe" up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo of full or mixed blood, who resides in and is a Native of Alaska and is the head of a family or 21 years of age. 43 U.S.C. § 270-1 (1970).

3/ As depicted by BLM on its master title plat for the township, there was a small conflict with U.S. Survey No. 2848, Alaska. The southern boundary of parcel A intersected the northeastern corner of the survey (corner No. 3).

Based on that interview and field examination, Costello concluded, in a September 26, 1976, Land Report, that O'Leary had not satisfied the use and occupancy requirements of the Act of May 17, 1906, and its implementing regulations (43 CFR Subpart 2561). In particular, Costello concluded that O'Leary had not engaged in substantially continuous use and occupancy of the land, as required by section 3 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-3 (1970), and 43 CFR 2561.0-5(a), for any period of time since May 1962. See Land Report, dated Sept. 26, 1976, at 6. Costello noted that O'Leary, a professional truck driver, had only occasionally slept in a cabin (owned by another individual) while driving his truck along the Steese Highway between Fairbanks and Circle, Alaska, during the period from 1962 until about 1970 or 1971, when the cabin was sold by its owner and removed from the land by the purchaser. See id. at 2, 3. Costello also noted that O'Leary had then admittedly stopped staying on the land until 1975 (when he moved a trailer onto it) and that he thereafter removed the trailer and did not return to the land. See id. at 3. Finally, according to Costello, there was no evidence that O'Leary had ever used and occupied the land for any other purpose. See id. at 4.

At the time of the field examination, Costello concluded that O'Leary's allotment claim extended only to a 40-acre parcel of land, which encompassed part of the original 80-acre parcel described in the allotment application. The smaller parcel was described by metes and bounds starting at a corner of U.S. Survey No. 2848, Alaska. ^{4/} See id. at 6. The parcel was changed by Costello from an irregular to a square shape that paralleled the Steese Highway along a northeast-southwest axis.

On December 2, 1980, Congress enacted section 905 of ANILCA, 43 U.S.C. § 1634 (1988), which provided in subsection (a)(1) for the legislative approval (with certain exceptions) of Native allotment applications pending on or before December 18, 1971, which describe land that was unreserved on December 13, 1968. Such approval was generally effective on the 180th day following December 2, 1980. One such exception to the legislative approval was stated in subsection (a)(5), which provides that an allotment application is not legislatively approved, but must be adjudicated pursuant to the requirements of the Act of May 17, 1906, when a party files a protest within 180 days after December 2, 1980, stating that the applicant is not entitled to the land described in the allotment application and that the land is the situs of improvements claimed by the party. 43 U.S.C. § 1634(a)(5)(C) (1988).

^{4/} The boundaries of the parcel were described as beginning at corner No. 4 of U.S. Survey No. 2848, Alaska, and then running northeasterly along the north shoulder of the Steese Highway about 20 chains to corner No. 1, then northwesterly about 20 chains to corner No. 2, then southwesterly about 20 chains to corner No. 3, then southeasterly about 15 chains to corner No. 3 of U.S. Survey No. 2848, Alaska, and finally along the common boundary with the survey about 4.5 chains to the point of beginning. See Land Report, dated Sept. 26, 1976, at 6.

For the purposes of this case, it is also important to note that section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), permits a Native applicant to amend the land described in his application after December 2, 1980, so that it conforms to the land he originally intended to claim. See State of Alaska (Helen M. Austerman), 119 IBLA 260, 265-66 (1991). However, where the amendment occurs either during or after the original 180-day period, BLM is required to provide notice of the amendment to the State and interested parties and to afford them an additional 60 days from mailing of the notice to file a protest pursuant to section 905(a)(5) of ANILCA. See 43 U.S.C. § 1634(c) (1988); Hermann T. Kroener, 124 IBLA 57, 59-60 n.6 (1992). A protest filed within the 60-day period will be deemed filed within the original 180-day period, and will require adjudication of the allotment application pursuant to the Act of May 17, 1906. See 43 U.S.C. § 1634(c) (1988); Hermann T. Kroener, supra at 60 n.6.

By letter dated March 13, 1981, BLM provided O'Leary with a sketch of the approximate location of an 80-acre parcel A which purportedly reflected the lands sought by appellant as disclosed in the field examination. The BLM letter requested O'Leary to confirm whether this was the land he "meant to apply for." The attached map was another copy of the Survey topographic map ("Circle B-2"), depicting both the original parcel as described in appellant's Native allotment application and a new 80-acre parcel. The latter sketch of the parcel, like the land description in the September 1976 Land Report, differed from that in the original application in that it described a rectangular parcel which paralleled the Steese Highway along a southwest to northeast axis. It also differed from the description in the 1976 Land Report to the extent that the northwestern and southeastern boundaries of the parcel running parallel to the Steese Highway were shown as 40 (rather than 20) chains long causing the tract to contain approximately 80 (rather than 40) acres. On April 8, 1981, O'Leary returned a statement signed by him on April 5, 1981, indicating that BLM had correctly described the land "[he] ha[d] used and meant to apply for."

In its September 29, 1983, decision, BLM held that O'Leary's Native allotment application had been legislatively approved as to the 80 acres of land in parcel A pursuant to section 905(a)(1) of ANILCA. The decision contained another metes and bounds description of the allotment parcel. ^{5/} In accordance with section 905(c) of ANILCA, BLM provided O'Leary 60 days from receipt of the decision to amend the land description if it did not encompass the land he had originally intended to claim. In the absence of

^{5/} The BLM description of the boundaries of the parcel placed the parcel to the northwest of the Steese Highway and northeast of USS 2448, as in the September 1976 Land Report. The metes and bounds description in the decision included approximately 80 acres in a slightly different rectangular configuration with the boundaries parallel to the axis of the road 20 chains in length and the tract extending further back from the highway.

submission of an amendment, BLM stated that it would survey the parcel as described in the decision.

On October 27, 1983, O'Leary objected to BLM's description of the parcel and submitted a map depicting the land he "applied for." By decision dated July 23, 1984, BLM found that appellant's new description added certain areas not included in the description in the September 1983 decision totalling approximately 30 acres and deleted other areas amounting to the same acreage. Thus the amended description was found to encompass about 50 acres of the tract described in the September 1983 BLM decision. The additional land consisted of two blocks of land bordering the parcel to the northeast (about 14 acres) and southwest (about 16 acres). The southwestern block bordered U.S. Survey No. 2848, Alaska. The July 1984 decision amended the September 1983 decision to hold that the 50-acre tract common to both descriptions was legislatively approved. Further, the decision provided 60-days notice as required by section 905(c) of ANILCA to the State and other interested parties of the additional lands included in the amended description. Finally, the decision held the balance of the lands for approval pending receipt of any timely protest.

A protest was timely filed, pursuant to section 905(a)(5)(C) of ANILCA, on September 13, 1984, by H. O. (Red) Williams, the owner of the land in U.S. Survey No. 2848, Alaska. It challenged O'Leary's entitlement to the 16-acre block of land "contiguous to [U.S. Survey No.] 2848," as described in O'Leary's amended application, noting that it was the situs of various improvements claimed by Williams.

In its November 15, 1984, decision, BLM concluded that Williams' protest applied only to the additional 16-acre block of land claimed by O'Leary in his amended application. Based on this, BLM again reaffirmed the legislative approval of O'Leary's application as to the 50 acres of land described by BLM in its September 1983 decision and held that the application was also legislatively approved as to the 14-acre block of land described in his amended application which was not protested by Williams. Thus, BLM deemed O'Leary's application to be legislatively approved as to 64 acres of land. However, it concluded that the application was not legislatively approved, but must be adjudicated pursuant to the Act of May 17, 1906, as to the remaining 16 acres subject to Williams' protest. BLM further noted that the available evidence established that O'Leary had not engaged in qualifying use and occupancy of the 16-acre block under the Act of May 17, 1906, but provided him 60 days from receipt of the decision to supply evidence supporting his qualifications. ^{6/} No appeal was taken from the November 1984 BLM decision.

^{6/} The land described in O'Leary's October 1983 amendment was surveyed by BLM in 1990 as part of U.S. Survey No. 9940, Alaska. The land was divided into two lots (Nos. 3 and 4). Lot 4, comprising 62.55 acres, consisted of the original 50-acre block and the added 14-acre block. Lot 3, comprising

Finally, in its May 12, 1993, decision, BLM concluded, in accordance with BLM policy at the time (see Exh. A attached to BLM Answer at 3), that O'Leary's October 1983 amendment of his application had the effect of subjecting the entire application to the 60-day protest period provided by section 905(c) of ANILCA, and that the timely filing of Williams' protest subsequently precluded the legislative approval of that application. Accordingly, BLM vacated its September 1983, July 1984, and November 1984 decisions holding that the application had been legislatively approved by section 905(a)(1) of ANILCA either in whole or in part. The BLM decision relied on the Board's decision in Richard L. Nevitt, 78 IBLA 300 (1984), aff'd, Nevitt v. United States, No. A 80-226 (D. Alaska June 14, 1985), aff'd, 828 F.2d 1405 (9th Cir. 1987). See Decision at 2. O'Leary appealed from the May 1993 BLM decision.

Appellant argues in his statement of reasons (SOR) for appeal that BLM lacked the "power" to vacate its earlier decisions recognizing legislative approval of parcel A. Appellant argues that once the preference right to an allotment is vested, the right relates back to the initiation of use and occupancy. Further, appellant takes issue with the Nevitt precedent, asserting that it should not be applied to Native allotment cases. Appellant contends that the existence of a protest as to part of the lands embraced in his Native allotment application does not preclude approval of the land not affected by the amendment of the description (i.e., the land in parcel A prior to amendment). Finally, appellant notes that the protest in this case has been withdrawn subsequent to the filing of this appeal to the Board. Since the protest which initially precluded legislative approval has been withdrawn, appellant asserts that the Native allotment should now be considered to be legislatively approved and that Board precedent to the contrary should be overruled.

Counsel for BLM has filed an answer contending that the earlier BLM decisions recognizing legislative approval of the amended application (in part) were properly vacated by BLM. It is asserted that the decisions did not pass title to the land, that only the statute could effectuate the automatic passage of title (without adjudication of the claim), and that BLM retains jurisdiction to correct erroneous decisions until title to the land has passed. BLM notes that this is not a case involving the relation back of a vested preference right to the initiation of use and occupancy, but rather a question of statutory construction. Further, BLM asserts that the Nevitt case is controlling regarding the issue of adjudication of the entire Native allotment application as amended. Finally, BLM contends that controlling precedent should be followed and the subsequent withdrawal of a timely filed protest does not give rise to legislative approval. See Stephen Northway, 96 IBLA 301 (1987).

fn. 6 (continued)

17.42 acres, consisted of the added 16-acre block. The survey was accepted by BLM on July 25, 1991, and officially filed on Aug. 2, 1991. This land (as a result of a survey of the surrounding township) still straddles secs. 26 and 27, T. 9 N., R. 14 E., Fairbanks Meridian, Alaska.

As a threshold matter, we find that BLM had both authority and jurisdiction to issue the decision under appeal which vacated the prior decisions. As a general rule, the doctrine of administrative finality—the administrative counterpart of the principle of *res judicata*—precludes reconsideration of a decision of an agency official when a party, or his predecessor-in-interest, had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed. Helit v. Gold Fields Mining Corp., 113 IBLA 299, 308-09, 97 I.D. 109, 114 (1990); Turner Brothers, Inc. v. OSMRE, 102 IBLA 111, 120-21 (1988). The rule is not absolute, because decisions by administrative officials, as well as those of this Board, are made exercising authority delegated by the Secretary of the Interior. The Secretary, and those exercising his authority, may review a matter previously decided and correct or reverse an erroneous decision. See Gabbs Exploration Co. v. Udall, 315 F.2d 37, 40 (D.C. Cir. 1963). Appellant's argument regarding the relation back of the preference right to the commencement of use and occupancy is simply not germane in the context of this appeal. The sufficiency of appellant's use and occupancy has not yet been adjudicated. The sole question on this appeal is the propriety of the BLM decision vacating the prior decisions finding the allotment to have been legislatively approved in whole or in part.

In Nevitt, we construed statutory provisions relating to Alaskan homesteads in section 1328 of ANILCA, 16 U.S.C. § 3215 (1988), which are very similar to the provisions at issue in section 905 of ANILCA. Section 1328(a)(1) provides (with certain exceptions) for the legislative approval of homestead applications on the 180th day following December 2, 1980. See 16 U.S.C. § 3215(a)(1) (1988). However, pursuant to section 1328(a)(3) of ANILCA, such an application will not be deemed legislatively approved, but must be adjudicated pursuant to the homestead laws where a protest is filed within 180 days after December 2, 1980, by a party "stating that the applicant is not entitled to the land described in the application and that the land is the situs of improvements claimed by" the party. 16 U.S.C. § 3215(a)(3) (1988). Further, section 1328(b) of ANILCA, permits the homestead applicant to amend the land described in his application so that it conforms to the land he originally intended to claim. 16 U.S.C. § 3215(b) (1988). Similarly, where the amendment occurs either during or after the original 180-day period, BLM is required to provide notice of the amendment to the state and interested parties and to afford them an additional 60 days from mailing of the notice to file a protest pursuant to section 1328(a)(3) of ANILCA. A protest filed within the 60-day period will be deemed filed within the original 180-day period, and will require adjudication of the homestead application pursuant to the homestead laws. See 16 U.S.C. § 3215(b) (1988).

In Nevitt, the homestead applicant also sought to amend his application. See Richard L. Nevitt, 78 IBLA at 301. The effect of the amendment was to include additional land not described in his original application. See id. at 301 n.2. Protests to the amended application were filed by interested parties within the 60-day period. The applicant argued that

his amended application should be deemed legislatively approved as to the land encompassed in his original application, leaving only the land added by his amendment subject to adjudication in view of the filing of the protests. See id. at 302.

[1] However, the Board concluded, based upon our reading of section 1328(b) of ANILCA and the legislative history of the similar language in section 905(c) of ANILCA, that the effect of the protests was to render the entire amended application (and not just the additional lands included therein) subject to adjudication rather than legislative approval. See Richard L. Nevitt, 78 IBLA at 303. We noted that section 1328(b) of ANILCA provided that, when an application was amended, the statute would operate to approve the application or require its adjudication "with reference to the amended land description only." Richard L. Nevitt, 78 IBLA at 303 (quoting from 16 U.S.C. § 3215(b) (1988) with emphasis added). The Board found that the legislative history of section 905(c) of ANILCA similarly provided that the "allotment application, as amended, is subject to statutory approval or adjudication under the terms of Section 905 on the basis of the corrected land description." Richard L. Nevitt, 78 IBLA at 303 (quoting from S. Rep. No. 413, 96th Cong., 2d Sess. 286, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5230, with emphasis added). We found that the "amended or corrected land description refers to the total parcel that [the applicant] intended to claim and not simply to those additional lands described by his [amended] filing." Richard L. Nevitt, 78 IBLA at 303 (emphasis in original). The district court agreed with the Board:

[W]hen [the applicant] filed his amended land description, he triggered an additional protest period, and [section] 1328 [of ANILCA] could operate only as to his new, amended description. His original land description ceased to have any significance under [section] 1328 [of ANILCA]. [The] protest letters then operated to block legislative approval of [the applicant's] amended application. The agency acted correctly when, noting that protests had been filed, it held [the applicant's] entire application for adjudication.

Nevitt v. United States, No. A 80-226 (D. Alaska June 14, 1985), at 15. The Board's ruling was also expressly affirmed by the circuit court. See Nevitt v. United States, 828 F.2d at 1408-09. The court specifically held that the phrase "amended land description" in section 1328(b) of ANILCA refers to the land originally intended to be claimed, as set forth in full in the amended application. See id. Appellant's effort to distinguish the Nevitt case on the basis of the fact that allotment applicants are Native Americans is not persuasive in view of the similar language of the statutory provisions and the reference to section 905 in the legislative history cited above.

We find the Nevitt case to be controlling in the context of the present appeal involving an amended Native allotment application. It is clear

from the record that, after some confusion regarding the proper location of his original allotment claim (reflected in the differences between the land described in his original application and the land description accepted by him on April 5, 1981), O'Leary sought to amend the land description on October 27, 1983. The amended description clearly included land in addition to that described in his original application and that accepted by him on April 5, 1981. It also differed from BLM's description of the land in its September 1983 decision. This is clearly illustrated in a map appended to O'Leary's October 1983 amendment. That map is a copy of a portion of BLM's "MTP Suppl[ement]" for sec. 27, T. 9 N., R. 14 E., Fairbanks Meridian, which contains handdrawn additions to BLM's depiction of parcel A. The two additional areas of land are identified as an "Adjustment Area" (referring to the 14-acre block to the northeast) and an "Actual Usage Area" (referring to the 16-acre tract to the southwest).

The October 1983 amendment triggered the additional protest period provided for by section 905(c) of ANILCA, much as the amendment of the homestead application triggered the similar protest period in Nevitt. Indeed, the protest period is triggered whenever there is an "intended correction of the allotment's location." 43 U.S.C. § 1634(c) (1988). Further, section 905(c) of ANILCA, like section 1328(b), provides that, where the application is amended, the statute "shall operate to approve the application or to require its adjudication * * * with reference to the amended land description only." 43 U.S.C. § 1634(c) (1988) (emphasis added). Here, this description encompassed the entire 80-acre parcel of land described in the amended application, i.e., all of the land that the applicant now asserts that he originally intended to claim. Therefore, we find that the statute operates to approve the amended application or to require its adjudication as to the entire parcel of land described in the amendment.

We hold that, upon the filing of a protest during the 60-day protest period, BLM was required to adjudicate O'Leary's amended application as to the entire parcel of land described in the amendment. Under this reading of the statute, it does not matter that the protest by Williams did not apply, by its terms, to the entire parcel. The fact of the filing of the protest required adjudication of the amended application. Section 905(a)(5) of ANILCA provides that the filing of a protest operates to preclude the legislative approval of an application (whether original or amended) and require adjudication of the application under the Act of May 17, 1906, as amended. 43 U.S.C. § 1634(a)(5) (1988). 7/

7/ O'Leary also contends that BLM was estopped, in May 1993, from overturning its November 1984 ruling that his amended application was legislatively approved as to 64 acres of land where he acted in detrimental reliance on that decision in the period of time prior to the May 1993 BLM decision by making substantial investments in the land. See Reply to BLM

Finally, noting that Williams has now withdrawn his September 1984 protest (see Letter to BLM from Williams, dated Dec. 15, 1993 (Exh. B attached to BLM "Motion on Shortened Notice for Leave to Take Deposition to Preserve Testimony")), O'Leary contends that this withdrawal should have the "same result" as if no protest had been filed in response to the July 1984 BLM decision, *i.e.*, his October 1983 amended application should be deemed legislatively approved by BLM (SOR at 7). Thus, O'Leary argues that the Board should overrule the Northway precedent. See SOR at 7-15. We decline to overrule Northway, which has long been followed by the Board. See State of Alaska (Heirs of Lucy Charlie), 126 IBLA 204, 208 (1993); Marshall McManus, 126 IBLA 168, 171-72 (1993).

[2] In Northway the Board held that the timely filing of a legally sufficient protest of a Native allotment under section 905(a)(5) of ANILCA precludes a finding that the allotment application was statutorily approved pursuant to subsection 905(a)(1) of ANILCA notwithstanding the fact the protest was subsequently withdrawn. Stephen Northway, *supra* at 306. Once a protest is filed within the statutory filing period, adjudication of the allotment is required under section 905(a)(5) of the statute and legislative approval under section 905(a)(1) is, by the terms of the statute itself, inoperative. Subsequent withdrawal of the protest after the close of the protest period will not under the terms of the statute result in "revival" of the legislative approval. See Marshall McManus, *supra* at 171-72.

O'Leary takes exception to the Board's holding in Northway on the basis that it was grounded on the Board's unjustified fear that, following the withdrawal of a section 905(a)(5)(B) State protest, the protested allotment application could be amended (as to the land described) and then legislatively approved in that form, without the State being able to protest the amended application in order to protect its legitimate interests (since such a protest would be after the 180-day period provided by ANILCA). See SOR at 11-12. It is true that, in such a situation, the State would be permitted by section 905(c) of ANILCA another opportunity to file a protest, and thus to preclude legislative approval. See Marshall McManus, *supra* at 173. However, our concern in Northway was directed to an application that had already been amended (as to the land described) prior to the passage of ANILCA when such amendment was not known by the State until after the withdrawal of a section 905(a)(5)(B) State

fn. 7 (continued)

Answer at 10-11. The effect of the imposition of estoppel will clearly be to invest O'Leary with a right to which he is plainly not entitled by law, *i.e.*, legislative approval of his allotment. Therefore, we find that BLM was not estopped to overturn its ruling that O'Leary's amended application was legislatively approved as to the 64 acres of land. See 43 CFR 1810.3(b); James W. Bowling, 129 IBLA 52, 56 (1994). Nor can we find an unconstitutional taking of private property. See Reply to BLM Answer at 11. Indeed, O'Leary's allotment application has not been finally adjudicated by the Department. He may yet be awarded the land claimed.

protest. ^{8/} See Stephen Northway, *supra* at 306. We concluded that the State would not be permitted, by section 905(c) of ANILCA, another opportunity to protest such an amended application. See also Marshall McManus, *supra* at 172-73 (section 905(c) of ANILCA does not apply where land description is not amended subsequent to passage of ANILCA). Thus, if we had held in Northway that the withdrawal reinstated the legislative approval provided by section 905(a)(1) of ANILCA, the State would have had no opportunity to protest the amended application (and thus preclude legislative approval), even where the application then conflicted with legitimate State interests. We declined to so hold. Rather, the original withdrawn protest would itself be deemed to have precluded legislative approval, so long as it was finally determined to be legally sufficient.

Therefore, we hereby affirm BLM's May 12, 1993, decision vacating the prior decisions holding parcel A of O'Leary's Native allotment application to be legislatively approved in whole or in part, under section 905(a)(1) of ANILCA. Upon the return of the case, BLM should proceed to adjudicate the application, as amended by O'Leary on October 27, 1983, pursuant to the Act of May 17, 1906, and its implementing regulations. We express no opinion on the outcome of this adjudication. In the event that BLM decides to approve the Native allotment application, an allotment should issue. However, if BLM decides to reject the application, BLM is required to initiate a Government contest pursuant to Pence v. Andrus, 586 F.2d 733, 739-44 (9th Cir. 1978).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

^{8/} In this situation, the State would have withdrawn its protest, mis-takenly believing that it had no countervailing interest that required that the protested allotment application be adjudicated. However, the fact that there arguably is such an interest requires that the adjudication proceed. This fact is not recognized by O'Leary. See SOR at 8. Further, the situation is clearly distinguishable from that where no protest is ever filed or the protest filed is so lacking in any merit that the applicant should not be put to his proof. See SOR at 7, 13.

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I am in complete agreement with the legal conclusions espoused in the lead opinion, I believe that further discussion is warranted with respect to appellant's contentions relating to the decision which the United States District Court for Alaska rendered in Frances Degnan v. Hodel, A87-252 Civ. (D. Alaska, Feb. 16, 1989), reaffirmed (May 6, 1989).

In Degnan, Judge Holland reversed a decision of this Board, styled Clarence Lockwood, 95 IBLA 261 (1987). The Lockwood decision had affirmed a BLM determination that certain allotment applications, which had received initial BLM approval but for which no "Native allotment" had issued, could be impressed, pursuant to the discretionary authority inherent in the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed effective Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988)), with an easement, as provided for in the National Trails Systems Act (NTSA), 92 Stat. 3467, 16 U.S.C. § 1242 (1988) (Order of Feb. 16, 1989, at 2-3), for part of the Iditarod Trail, a National Historic Trail.

In his original unpublished decision, Judge Holland noted that "an interim approval document known as a 'certificate of allotment' had been issued to" the allotment applicants 10 years prior to the attempted modification of their allotments and 3 years before Congress had enacted the NTSA. Based on his analysis of the facts in this case, the Court held that the applicants had acquired equitable title to their allotments before the Secretary sought to reserve a right-of-way across those lands. Id. at 7. The Court then addressed the argument that the Secretary, nevertheless, retained discretionary authority under the Native Allotment Act to reserve the subject right-of-way:

The Secretary has argued that issuance of the interim certificates of allotment does not trigger the elimination of all secretarial discretion regarding pending allotments. However, the Secretary had no further discretion to exercise with respect to plaintiffs' allotment lands once interim approval was given. The structure and purpose of [the Native Allotment Act] and the applicable regulations, as well as pertinent case law, clearly evidence a congressional intent to "create or recognize rights in Alaska Natives to the land that they occupy for the statutory period and not, as the Secretary contends, merely a hope that the government will give them the land" [citing Pence v. Kleppe, 529 F.2d 135, 141-42 (9th Cir. 1976)]. To later modify the approved applications is contrary to that intent. The Secretary's action under the NTSA was based on an unreasonable and unlawful interpretation of the [Native Allotment Act] and is therefore set aside.

Id. at 7-8.

Subsequent to the issuance of the February 16 order in Degnan, the Government moved for reconsideration of that order based on the fact that, while Judge Holland had recited in his decision that the allotment applicants had obtained "certificates of allotment" from BLM, in fact they had not done so. Nor had the applicants been issued a "Native allotment," such as even the Government agreed would constitute passage of legal title. See State of Alaska, 45 IBLA 318, 320-21 (1980). Therefore, the Government argued that the factual predicates upon which the Degnan decision had been premised were nonexistent.

In his order of May 6, 1989, the entry of summary judgment was reaffirmed. While the Court admitted that it had, apparently incorrectly, assumed that certificates of allotment had, in fact, issued, the Court noted that it had never assumed that the plaintiffs had received a "Native allotment":

On the contrary, the court's order, like Judge von der Heydt's decision in [United States v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alaska 1985)], is predicated on plaintiffs having a vested preference right once they had satisfied the use, occupancy, and other requirements of 43 C.F.R. 2561.0 - 2561.3.

Here, as in 13.90 Acres of Land, with the use determinations having been made in favor of the plaintiffs and the applications having been in question are deemed segregated and the plaintiffs had equitable title before enactment of the 1978 National Trail Systems Act amendments which defendants employed to attempt modification of plaintiffs applications.

(Order of May 6, 1989, at 3-4).

Appellant asserts that the decisions in Degnan stand for the proposition that, once BLM has approved a Native allotment and the time for review of that decision has expired, BLM lacks the jurisdiction to reconsider the underlying correctness of its approval of the allotment application since the initial approval of the allotment effectively passed title to the lands to the applicant. This interpretation, appellant maintains, is binding on the Board, BLM and the Regional Solicitor. See Reply Brief at 11. It seems to me, however, that appellant's interpretation of the scope of the Degnan decisions simply does not withstand critical analysis. ^{1/}

^{1/} I note, in passing, that appellant's implicit assertion that the Department is required to follow every unappealed decision rendered by a United States District Court is simply wrong. Thus, this Board has expressly refused to follow isolated decisions of Federal courts "where the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion." Conoco Inc., 114 IBLA 28, 32 (1990), quoting Oregon Portland

In candor, I must admit that, on the surface, the Degnan decisions, particularly the May 6 order, might be susceptible to the interpretative gloss with which appellant seeks to coat them. Thus, Judge Holland's May 6 order could broadly be read as holding that any initial determination that an allotment applicant had met the requirements of the law effectively constituted the grant of a Native allotment such as would remove from the Department the power to reconsider the factual predicates subsistent in its initial determination. ^{2/} But, such a reading, I would suggest, is inherently flawed for a number of reasons.

First of all, it ignores the emphasis which the Court had placed on the assertion of Secretarial "discretion." In this regard, it is important to remember that the Native Allotment Act provided that "[t]he Secretary of the Interior is authorized and empowered, in his discretion and under such rules as he may prescribe" to allot up to 160 acres of land to Native Alaskans. See 43 U.S.C. § 270-1 (1970) (emphasis supplied). Based on this language, the Department has consistently asserted the right to reject, on a discretionary basis, a Native allotment even where the requirements of use and occupancy have been met, if the purposes of the Native Allotment Act would not be advanced by the grant of the allotment. See, e.g., Edward A. Nickoli, 90 IBLA 273, 276 (1986); Frank Rulland, 41 IBLA 207, 211-12, 86 I.D. 342, 344-45 (1979). This, indeed, was the essential basis of the Board's decision in Clarence Lockwood, *supra*. Thus, the Board did not purport to reject or limit the various allotments involved therein because of perceived deficiencies in the applicants' showing of entitlement under the Native Allotment Act. Rather, the Board premised its decision on BLM's discretionary authority under the Native Allotment Act and cited as specific authority for the reservation of the right-of-way a statute which was not even in existence at the time of BLM's original adjudications. ^{3/}

fn. 1 (continued)

Cement Co. (On Judicial Remand), 84 IBLA 186, 190 (1984).

This principle seems particularly apt when the decision involved is unpublished. I note, for example, that Rule 36-3 of the Rules of the Ninth Circuit Court of Appeals provides that "[a]ny disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this court or any district court in the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel."

^{2/} Paradoxically, under this analysis the Department could reconsider any determination that an allotment application should be rejected since such a result would not implicate jurisdictional impediments. It is only favorable decisions which would be beyond the purview of reconsideration.

^{3/} Thus, the Board in Clarence Lockwood, *supra* at 264, noted:

"Moreover, under the Native Allotment Act, 43 U.S.C. § 270-1 (1970), the Secretary is authorized, in his discretion and under rules as he may prescribe, to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any qualified Alaskan Native. Reservation of a right-of-way for the Iditarod Trail in the subject allotments is within the scope of discretion conferred by the Native Allotment Act. Edward A. Nickoli, 90 IBLA at 276." (Emphasis in original).

Far from constituting a broad declaration that the act of initially determining an allotment's acceptability forestalls any subsequent reexamination of the applicant's compliance with the requirements of the Native Allotment Act, the Degnan decision was narrowly tailored to address only the question of the exercise of the Department's discretionary authority to reject or condition an allotment application for reasons apart from statutory or regulatory compliance. In effect, Degnan holds that if the Department wishes to exercise its discretionary authority to reject or limit an allotment application meeting the statutory and regulatory requirements, it is obliged to do so when it initially considers the application or it will be deemed to have waived its discretionary powers. In this regard, the decision in Degnan is not disharmonious with pronouncements of this Board in other areas of adjudication. ^{4/} Nothing in Degnan, however, deals with the question of whether, assuming that BLM had erroneously issued an initial decision declaring that an allotment application had been legislatively approved, BLM is thereby deprived of jurisdiction to revisit the matter and correct the record. I think the answer to this latter question must clearly be in the negative.

Much of appellant's focus is directed to Judge Holland's declaration that "once [the plaintiffs] had satisfied the use, occupancy, and other requirements" of the regulations to the satisfaction of BLM, "the plaintiffs had equitable title" to the lands sought (Order of May 5, 1989, at 4). But the mere fact that "equitable title" to a parcel of public land may be deemed to have vested in another party has never been held to constitute an ouster of Departmental jurisdiction to adjudicate matters related thereto.

There are numerous areas in public land and mineral law where rights enforceable against the Government may be deemed to arise prior to the issuance of a patent or other title document, but it is only upon issuance of the patent or other title document, *i.e.*, upon passage of legal title, that the Department's jurisdiction lapses. Compare Germania Iron Co. v. United States, 165 U.S. 379 (1897), with Cameron v. United States, 252 U.S. 450 (1920); see also Schade v. Andrus, 638 F.2d 122, 124-25 (9th Cir. 1981); Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1367 (9th Cir. 1976). Indeed, this is true even in those cases, such as

^{4/} For example, the Board long-recognized the discretionary authority of BLM to reject any and all bids received for competitive oil and gas leases as inadequate. See, e.g., Harris-Headrick, 95 IBLA 124 (1987); Viking Resources Corp., 80 IBLA 245 (1984). But, the Board consistently ruled, if BLM desired to exercise this discretion it was required to do so immediately. See, Exxon Co. U.S.A., 15 IBLA 345 (1974). Having once communicated its intent to accept a high bid, the Board held that BLM was barred from subsequently rejecting the high bid based on an alleged inadequacy of the bonus bid. Exxon Corp., 97 IBLA 330 (1987).

swamplands grants under the Act of September 28, 1850, 43 U.S.C. § 982 (1988), where the congressional grant was judged to be one in praesenti in nature. See United States v. Minnesota, 270 U.S. 181 (1926); John Stuart Hunt, 31 IBLA 304, 84 I.D. 421 (1977). Thus, the mere determination of compliance with the requirements of the Native Allotment Act or the provisions of legislative approval found in section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a) (1988), absent passage of legal title, is not preclusive of the exercise of the Department's plenary authority to inquire into the validity of claims to assure that "valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, supra at 459-60.

Appellant's argument confuses the substantive question of whether an individual has, by his actions, acquired rights in public lands (i.e., equitable title) with the procedural question of the authority of the Department to determine the existence of those rights. To put it in the context of Native allotment adjudication, Congress, in enacting section 905(a) of ANILCA, has granted legislative approval of pending Native allotments except in certain situations specifically provided for in section 905(a). This approval was generally by the terms of the statute, automatically effective upon the passage of 180 days and required no affirmative action on BLM's part to effectuate the approval. Any BLM decision informing an allotment applicant that his or her allotment has been legislatively approved is simply declaratory of existing fact. But, should BLM issue a determination that equitable title has passed under section 905(a) when, in point of fact, a valid protest was timely filed, equitable title does not vest in the applicant either under section 905(a) or by the force of BLM's declaration. 5/ Since, under the terms of the act, legislative approval only occurs under specified circumstances, BLM is powerless to expand these parameters either by design or inadvertence. Thus, when BLM discovers that it has erroneously treated an allotment as legislatively approved when, in reality, it was not, BLM not only has the authority to correct the record, it is required to do so, so long as legal title remains in the United States. Noting in the Degnan decisions, or any other judicial pronouncement, is to the contrary. 6/

5/ Of course, this is not to say that the allotment applicant might not already be vested with equitable title, but this would arise because of compliance with the requirements of the Native Allotment Act and not the application of section 905(a) of ANILCA.

6/ Appellant's suggestion that the decision in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), somehow supports his contention that legal title to allotment claims passes to the applicant upon the earning of equitable title is, I would suggest, based on a profound misreading of that decision and its relationship to relevant Supreme Court precedent. See Eddie S. Beroldo, 123 IBLA 156, 160-68 (1992) (Concurring opinion).

For the foregoing reasons and because it is my view that the lead opinion correctly and cogently rejects other arguments raised in this appeal, I concur in the disposition of the instant appeal.

James L. Burski
Administrative Judge