

INTERIOR BOARD OF LAND APPEALS

Old Harbor Native Corp.

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OLD HARBOR NATIVE CORP.

IBLA 96-143

Decided May 29, 1998

Appeal of a decision by the Alaska State Office, Bureau of Land Management, to sign a settlement and release agreement for Native allotment application AA-7328 and to forward the agreement to the Bureau of Indian Affairs.

Vacated and remanded.

1. Alaska: Native Allotments--Alaska Native Claims Settlement Act: Generally

When BLM has notice of a controversy regarding whether an offer of settlement was viable when it was purportedly accepted, BLM should withhold approval of the settlement agreement pending resolution of the dispute.

2. Alaska: Native Allotments--Alaska Native Claims Settlement Act: Generally

When the evidence in the record is insufficient to prove that a Native allotment applicant is entitled to an allotment, the Board will vacate BLM's decision to approve a settlement agreement reconveying the land to the Federal Government for the purpose of conveying the land to the allotment applicant, and remand the case for a hearing on the Native's entitlement to the allotment.

APPEARANCES: Alan L. Schmitt, Esq., Kodiak, Alaska, for Old Harbor Native Corporation; Joseph D. Damell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Old Harbor Native Corporation (Old Harbor) has appealed a December 14, 1995, decision by the Alaska State Office, Bureau of Land Management (BLM or Bureau), to execute a settlement and release agreement pertaining to Frank R. Peterson's Native allotment application (AA-7328) and to forward it to the Bureau of Indian Affairs (BIA).

On March 23, 1972, BIA filed Peterson's June 11, 1971, Native allotment application with BLM pursuant to the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (Native Allotment Act). ^{1/} Peterson claimed use and occupancy of a 160- acre tract described as the E $\frac{1}{2}$ NW $\frac{1}{4}$ and the E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 30, T. 33 N., R. 23 W., Seward Meridian, Alaska, commencing in 1956. ^{2/} In his application Peterson stated that he had used the land seasonally for subsistence purposes including hunting and gathering berries.

On May 9, 1974, BLM received a relinquishment from Peterson, dated March 17, 1974, and closed his application. On March 8, 1979, BLM issued Interim Conveyance No. 165 to Old Harbor, pursuant to sections 14(a) and 22(j) of ANCSA, 43 U.S.C. §§ 1613(a) and 1621(j) (1994). The conveyed lands included all of sec. 30, T. 33 S., R. 23 W., Seward Meridian.

On July 13, 1981, BLM reinstated Peterson's Native allotment application. The reinstatement was based on the observation that the signature on Peterson's relinquishment appeared different from the signature on his Native allotment application. ^{3/} On October 23, 1989, BLM filed the official plat of the survey of Peterson's allotment, U.S. Survey No. 9245, Lots 1 and 3, depicting 160 acres of land within secs. 30 and 31, T. 33 S., R. 23 W., Seward Meridian.

In a January 18, 1991, decision, BLM notified interested parties of the reinstatement of Peterson's Native allotment application and conformed the allotment to the official plat of survey. The Bureau also stated that because title to the lands within sec. 30, T. 33 S., R. 23 W., Seward Meridian, had been conveyed out of Federal ownership to Old Harbor in 1979, that portion of the Native allotment application would be adjudicated pursuant to the Stipulated Procedures for Implementation of Order in Aguilar v. United States (Aguilar), 474 F. Supp. 840 (D. Alaska 1979).

In an attempt to amicably resolve the conflict between the interim conveyance and outstanding Native allotment applications, Old Harbor initiated discussions with BLM and BIA resulting in mutually acceptable settlement and release agreement language. The mutually acceptable language provided, in pertinent part, that Old Harbor would quitclaim the land described in the Native allotment application to the United States for reconveyance to the applicant in exchange for a right of first refusal should the applicants or their heirs or assigns decide to sell the land.

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

^{2/} On May 9, 1958, the land was withdrawn by Public Land Order (PLO) No. 1634 for inclusion in the Kodiak National Wildlife Refuge.

^{3/} In a Mar. 27, 1995, letter to BLM, and an Aug. 8, 1995, letter to the Alaska State Director, Peterson acknowledged that he did, in fact, sign the 1974 relinquishment.

Old Harbor executed 46 settlement and release agreements and delivered them to BLM for forwarding to BIA and the Native allotment applicants claiming land conveyed to Old Harbor. The settlement and release agreement forwarded to Peterson, stated that Old Harbor would quitclaim the 155 acres of land in sec. 30, T. 33 S., R. 23 W., Seward Meridian, included in Peterson's allotment to the United States for reconveyance to Peterson in exchange for the right of first refusal. Of the 46 allotment applicants, 45 signed the settlement and release agreements. Peterson did not respond to the offer.

On April 2, 1993, Old Harbor executed another copy of the settlement and release agreement which BIA forwarded to Peterson by letter dated April 27, 1993. In a letter dated June 30, 1994, Peterson notified BLM, BIA, and Old Harbor that he did not agree with the proposed settlement and release agreement. Specifically, he objected to the covenants imposed on the allottee and stated that he was entitled to conveyance of the land under the provisions of the Native Allotment Act. Peterson also requested information regarding title recovery procedures and about the applicability of Aguilar.

The Bureau responded by letter dated July 19, 1994, advising Peterson that, technically, he was not a member of the class certified in Aguilar because the lands described in his allotment application had not been conveyed to the State of Alaska. The letter also advised Peterson that BLM decided, as a matter of policy, that it would use the same process adopted in the Aguilar settlement in his title recovery case. The Bureau explained that the Aguilar procedure afforded interested parties the opportunity to submit additional evidence supporting or disputing the validity of a Native allotment claim and, if the information was insufficient to prove entitlement, a hearing would be held to allow him to present more evidence and witnesses. The Bureau noted that, although it had not determined that Peterson's claim was valid, it was attempting to settle his claim without undertaking the time consuming and expensive Aguilar process because Old Harbor was willing to reconvey the land. The Bureau added that the conveyance document Peterson would receive as a result of the settlement and release agreement would be identical to the one he would receive if the application were approved under the Native Allotment Act, and the only difference was that, should he decide to sell the land, the settlement and release agreement would grant Old Harbor the first opportunity to buy the land.

By letter dated September 29, 1994, Old Harbor informed Peterson that it had obtained information calling his entitlement to an allotment into question. Old Harbor included copies of two affidavits supporting the conclusion that his claim was invalid. See Statement of Reasons (SOR), Ex. 25. ^{4/} Old Harbor advised Peterson that its continued willingness to

^{4/} Old Harbor did not send a copy of this letter to BLM.

enter into the settlement and release agreement was coming to an end, and asked Peterson to let it know within 30 days whether he would execute the settlement and release agreement.

On November 14, 1994, BLM notified the interested parties that a portion of Peterson's allotment application would be processed pursuant to the Aguilar stipulations. ^{5/} Interested parties were granted 90 days to submit evidence and comments supporting or opposing Peterson's Native allotment claim.

On December 1, 1994, Peterson wrote to Old Harbor, informing Old Harbor that on November 14, 1994, BLM had started what he believed to be an irreversible process through Aguilar, which rendered any response to Old Harbor's September 29, 1994, letter, unnecessary and redundant. See SOR, Ex. 29. Old Harbor responded on December 14, 1994, stating that it intended to file an objection to the allotment with BLM prior to the 90-day deadline and encouraging Peterson to sign the settlement and release agreement before it submitted its objection. ^{6/} See SOR, Ex. 30. Peterson did not respond, and on February 13, 1995, Old Harbor filed two affidavits with BLM disputing Peterson's entitlement to an allotment.

In a letter dated March 27, 1995, Peterson requested BLM approval of his Native allotment application pursuant to the legislative approval provisions of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a) (1994), and the Aguilar stipulations, and asked BLM to convey full and free title to the allotment to him pursuant to the Native Allotment Act. He further asserted that he should not be required to sign the settlement and release agreement because he had not participated in its development and writing and he did not want the covenants to become a part of his title. He also requested 90 days to obtain additional evidence if his application was to be processed under Aguilar.

In a response dated April 6, 1995, BLM informed Peterson of its policy of applying the stipulated procedures adopted in Aguilar to all allotment cases involving land conveyed out of Federal ownership. The Bureau also explained that the legislative approval provisions of ANILCA did not apply to his allotment because the land had been withdrawn by PLO No. 1643 on May 9, 1958, and was not unreserved on December 13, 1968. Accordingly, BLM stated that his allotment must be adjudicated under the Native Allotment Act pursuant to the Aguilar stipulations and that BLM would have no responsibility to recover the land unless and until the evidence was sufficient

^{5/} The Bureau stated that the 155 acres in sec. 30, T. 33 S., R. 23 W., Seward Meridian, conveyed to Old Harbor would be processed under Aguilar, and the remaining 5 acres, located in sec. 31, would be adjudicated under the Native Allotment Act. The 5 acres in sec. 31 are not at issue in this appeal.

^{6/} No copy of Peterson's Dec. 1, 1994, letter or Old Harbor's Dec. 14, 1994, response was sent to BLM.

to prove entitlement. The Bureau acknowledged Peterson's concern about the settlement and release agreement, and granted him an additional 90 days to respond to the November 14, 1994, request for information.

On June 30, 1995, Peterson filed four affidavits, his own and those of Nick Inga, Victor A. Peterson, and Paul Kahutak. In his affidavit, Peterson stated that, consistent with the traditional practice of considering all community land to be communal property, "when it came time to select the different 160 acre parcels, the lots claimed by the Native people in Old Harbor, including the land claimed in AA-7328, was done by lottery or drawing straws out of a hat, for the different lot selections." (Frank Peterson Affidavit (Aff.) at unnumbered p. 4.) Nick Inga indicated in his affidavit that everyone in the village used all the lands around Old Harbor for hunting, fishing, and berry picking. See Nick Inga Aff., paragraph 8. Peterson's brother, Victor A. Peterson, stated in his affidavit that Peterson did not use the land on a regular basis, use all of the land, or use it every year and explained that no one in Old Harbor had claimed any particular parcel of the communally-used land until the specific allotment selections were determined by drawing straws. (Victor A. Peterson Aff. at unnumbered pages 3-4.) Paul Kahutak recounted in his affidavit that all the Native allotments were picked by lottery, and that he was unsure whether Peterson had actually used the land described in his application. (Paul Kahutak Aff. at 2.)

After reviewing the affidavits submitted by Peterson and Old Harbor, BLM drafted a proposed contest complaint alleging that Peterson was not entitled to the allotment because he had not made substantially continuous use and occupancy of the claimed land, at least potentially exclusive of others, for a period of 5 years as required by the Native Allotment Act. On July 18, 1995, BLM forwarded the proposed contest complaint to the Regional Solicitor for review.

By letter dated August 8, 1995, Peterson asked the Alaska State Director, BLM, to examine his Native allotment claim. Peterson informed the State Director that applicants for allotments in and around Old Harbor had selected their allotment lands by drawing lots out of a hat, a system necessitated by the villagers' traditional communal use and occupancy of all the lands for subsistence hunting, fishing, and berry picking, with no villager asserting ownership of a specific parcel. He reiterated his belief that he should receive title to the land under the Native Allotment Act and not be pressured to accept the settlement and release agreement imposing extraneous covenants to the title to his claim.

The Acting Associate State Director replied on August 29, 1995, stating that, based on the information in the record, Peterson's application did not satisfy the requirements of the Native Allotment Act. Specifically, the Acting Associate State Director indicated that the evidence provided did not show that Peterson had made substantially continuous use

and occupancy of the land for a period of 5 years or that his use and occupancy were at least potentially exclusive of others. The Acting Associate State Director advocated working out a solution to the conflict among the parties.

On November 13, 1995, Peterson signed the settlement and release agreement executed by Old Harbor on April 2, 1993, and transmitted the agreement to BLM. On November 20, 1995, Old Harbor learned that Peterson had accepted the settlement agreement. It sent a letter, dated December 1, 1995, advising BLM that Old Harbor was no longer willing to proceed with the settlement and that it had been lead to believe that the validity of Peterson's allotment application would be adjudicated. Old Harbor stated that its February 10, 1995, letter enclosing affidavits disputing Peterson's claim signified its withdrawal of the settlement and release agreement.

On December 14, 1995, BLM notified Old Harbor that, based on advice from legal counsel, it had decided to sign the settlement and release agreement and send it to BIA, with Old Harbor's letter, and let BIA determine whether the terms of the settlement and release agreement should be enforced. The Bureau informed Old Harbor that if BIA wanted to pursue the terms of the agreement, BLM would ask Old Harbor to submit a draft quitclaim deed and would seek enforcement action by the Regional Solicitor's office if Old Harbor remained unwilling to voluntarily reconvey the land. ^{7/}

On appeal, Old Harbor argues that basic contract law principles control the issues raised in this case. It interprets its execution of the settlement and release agreement to Peterson as an offer to settle which lodged the power to accept with Peterson, but that this power terminated due to rejection, lapse of time, and/or revocation. Old Harbor maintains that Peterson's power to accept Old Harbor's last offer was limited by Old Harbor's December 14, 1994, letter, and terminated on February 14, 1995, both by lapse of time and by revocation by Old Harbor. It further contends that Peterson's subsequent actions, including his March 27, 1995, letter, demanding BLM approval of his application and his subsequent filing of additional evidence supporting his claim, indicate his recognition of the termination of his power to accept Old Harbor's settlement offer. Old Harbor asserts that the power to accept the settlement offer terminated long before Peterson executed the settlement and release agreement on November 13, 1995, and that BLM's decision to sign the agreement must therefore be reversed.

The Bureau maintains that its decision to sign the agreement and forward it to BIA was reasonable under the facts available to it when it received the signed settlement and release agreement from Peterson. It notes that several documents identified by Old Harbor, including the

^{7/} The settlement and release agreement was signed by BIA on Feb. 1, 1996.

December 14, 1994, letter, did not influence its decision because they had not been sent to BLM and did not become part of the record until Old Harbor filed its SOR. It also argues that Old Harbor's letter did not contain an explicit deadline, as Old Harbor suggests. The Bureau contends that it did not err when it did not interpret Old Harbor's February 10, 1995, letter forwarding the affidavits opposing the allotment application as a revocation of the offer to settle, and that it was proper for BLM to construe Peterson's inquiries as being other than a rejection of the offer to settle. According to BLM, its initiation of the Aguilar title recovery procedures did not signify that the offer to settle was no longer extant, but merely recognized that BLM had no authority to impose settlement on the parties, pointing out that it continued to encourage Peterson to settle. Admitting that it knew Old Harbor was no longer willing to settle when it decided to sign and forward the settlement and release agreement to BIA (see BLM Opposition to Request for Hearing at 2-3), BLM maintains that it reasonably considered the settlement offer viable when Peterson accepted it. It urges that its decision should therefore be affirmed.

[1] A primary issue in this appeal is whether BLM acted properly when it found that Peterson had the power to accept Old Harbor's offer to settle when he signed the settlement and release agreement on November 13, 1995. Analogous situations have arisen in lease assignment cases in which parties have disagreed regarding the validity of agreements assigning Federal leases and BLM is being asked to approve the assignment. In those cases we held that the proper procedure is for BLM to refrain from taking action on the assignment until the controversy has been resolved. See, e.g., Pat Reed, 119 IBLA 338, 342-43 (1991), and cases cited; Charles H. Dorman, 79 IBLA 209 (1984). The Bureau admits that it had notice that Old Harbor challenged Peterson's authority to accept the offer and create a binding agreement prior to the time it signed the settlement and release agreement and sent it to BIA. It did not investigate the matter or direct the parties to resolve the dispute before it approved, and thereby imposed the settlement on the parties, even though it had previously acknowledged that it had no authority to impose the settlement. At the very least, BLM should have eschewed acting on the settlement and release agreement until Peterson and Old Harbor had independently resolved the issue of whether that agreement was binding on the parties after Peterson executed it.

[2] A more fundamental impediment to accepting the settlement agreement exists, however, even assuming Peterson and Old Harbor were to agree that the settlement and release agreement is binding. The Board's administrative review responsibility on behalf of the Secretary under 43 C.F.R. § 4.1 requires us to ensure that the law is carried out and that no public domain land is conveyed to a party not entitled to receive that land. Knight v. U.S. Land Association, 142 U.S. 161, 178, 181 (1891); Ira Wassillie, 103 IBLA 112, 116 (1988); United States Fish & Wildlife Service, 72 IBLA 211, 220-21 (1983). In the absence of legislative approval of a Native allotment under ANILCA, the Board's authority includes the duty to prevent the mistaken issuance of a patent of land to a Native who has

not satisfied the requirements of the Native Allotment Act. Ira Wassillie (On Reconsideration), 111 IBLA 53, 57 (1989). This obligation persists whenever it appears that the law may not have been followed and land may be erroneously transferred, even when the parties involved agree to the transfer. Ira Wassillie, supra.

Based upon the information currently in the record, we conclude that Peterson has not yet submitted satisfactory proof of substantially continuous use and occupancy of the tract he seeks, potentially exclusive of others for a period of 5 years, as required by the Native Allotment Act, 43 U.S.C. § 270-3 (1970), and its implementing regulations, 43 C.F.R. §§ 2561.0-5(a) and 2561.2(a). Therefore, the current record does not support his entitlement to the land.

Accordingly, we hereby vacate BLM's decision and remand the case to BLM to proceed with processing Peterson's Native allotment application under the Aguilar stipulations. An Aguilar hearing will afford Peterson an opportunity to present additional evidence and testimony supporting his claim. We emphasize that we have based our decision on the record as presently constituted, and do not intend to imply that Peterson will be unable to present evidence that he is entitled to the allotment.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's decision is vacated and the case is remanded for further proceedings.

R.W. Mullen
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge