

Hon. Harry A. Noah, Commissioner
Department of Natural Resources
Juneau

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661-95-0252

269-5240

State authority to convey
cabin and land in
Kachemak Bay State Park
to Tillion family

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By memorandum you requested advice regarding whether the Department of Natural Resources (Department) may convey a cabin and land located within Kachemak Bay State Park to Clem Tillion and his family. Mr. Tillion and his family have used the cabin since approximately 1961 and have asserted for some time that they have a legal claim to the cabin and approximately five acres of land, or alternatively, that they are entitled to a preference right under state law to purchase the land and cabin from the state. Your request specifically asks (1) whether Mr. Tillion has a meritorious claim to the land and cabin; (2) whether the Department has authority to convey the land and cabin to Mr. Tillion; and (3) if a conveyance of the land and cabin is impossible, what options are available to the Department.

Summary Answer

Mr. Tillion does not have a meritorious claim of title to the land and cabin. The Department has already determined that Mr. Tillion does not qualify for a preference right to purchase the land and cabin under AS 38.05.035. We see nothing in the Department's decision suggesting that it erred. Moreover, AS 38.05.035 is inapplicable to the land at issue because it has been reserved by the legislature from the public domain as a state park. Accordingly, the Department does not have authority to convey the cabin and land to Mr. Tillion.

If the Tillions refuse to vacate the property after appropriate notice, the Department may bring a forcible entry and detainer or ejectment action in state court to regain possession of the land and cabin. Finally, unauthorized use of the cabin and land may subject persons to criminal prosecution by the state under AS 41.21.950. Accordingly, the Department may request that the district attorney bring criminal charges against the Tillions.

Discussion

1. Factual background

On July 28, 1959, Burton H. Bachman filed an application with the Bureau of Land Management (BLM) under provisions of the Small Tracts Act¹ to purchase or lease a five-acre recreational parcel located on the northeast shore of Leisure Lake (currently known as China Poot Lake), near Homer, Alaska. Sometime in 1959 and prior to a final decision by BLM regarding the application, Bachman constructed a cabin on the parcel.

BLM initially rejected the application on November 20, 1959, because Bachman failed to adequately describe the small-tract parcel. Bachman filed a corrected application with BLM on December 8, 1959. On December 27, 1959, the state selected land under the Statehood Act² in the Kachemak Bay area that included the land covered by Bachman's application.³ BLM again rejected Bachman's application on December 28, 1959, this time on the ground that Bachman had not justified how he qualified for a second small tract under existing regulations.⁴ Bachman filed an explanation for his application for the China Poot Lake land on

¹ See 43 U.S.C. § 682(a), 68 Stat. 239, repealed with savings and sunset clauses for Alaska public lands, Act of October 21, 1976, Pub. L. 94-579, Title VII, § 702, 90 Stat. 2787.

² See Alaska Statehood Act, Pub. L. 85-505, § 6(a)-(b), 72 Stat. 339, 340.

³ The state's selection received tentative approval by the Secretary of the Interior on December 23, 1963. Subject to valid existing rights, the United States confirmed all rights, title, and interest in the land to the state under section 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1990). See Alaska v. Thorson, 83 IBLA 237 (Oct. 22, 1984).

⁴ Under the act and former 43 C.F.R. § 257.4(c), an individual was not eligible for more than one parcel without demonstrating special circumstances. Bachman had previously applied for and received a small-tract lease for a parcel near Kenai, Alaska, in October 1954.

December 31, 1959. BLM suspended Bachman's application on February 2, 1960, stating that it viewed the state's selection as having priority over Bachman's application.

BLM finally rejected Bachman's application on June 14, 1961. BLM determined that the public interest was served by preferring the state's selection of the land over Bachman's application. BLM treated small-tract applications as petitions for the reclassification of land which upon filing did not, according to BLM, vest an applicant with any rights or interest in the land. Bachman did not appeal the decision to the Secretary of the Interior. No lease or sale of the land to Bachman ever occurred.

Bachman conveyed his purported interest in the cabin and the five-acre parcel to Mr. Tillion and a former partner by bill of sale and/or quitclaim deed sometime in approximately 1961.⁵ Mr. Tillion claims that he subsequently purchased his partner's rights in the parcel and cabin. Mr. Tillion and his family have used and made improvements to the cabin and parcel since 1961.

According to Diana Tillion, Mr. Tillion's wife, Mr. Tillion became aware that "title wasn't clear" to the property in 1962 after being elected to the Alaska Legislature. However, Mr. Tillion did not challenge in court the Secretary's tentative approval of the state's selection of land, even though he was aware of the Tillions' apparent lack of a clear claim of title. Nor did Mr. Tillion seek an appeal of BLM's decision denying Bachman's small-tract application.

In 1970, the legislature created Kachemak Bay State Park. See ch. 121, SLA 1970, codified as amended at AS 41.21.130 -- 41.21.131. Citing article VIII, section 7, of the Alaska Constitution and designating the land as a special purpose site, the legislature restricted uses of all state-owned land within the park. AS 41.21.120. Land designated as state park includes the parcel claimed by Mr. Tillion. See AS 41.21.121. Mr. Tillion was a member of the legislature at the time, and was a sponsor and prime proponent of the legislation.

In 1986, twenty-five years after BLM finally denied

⁵ Mr. Tillion asserts that a bill of sale and/or quitclaim deed for the cabin and parcel were lost in a house fire that destroyed the Tillion home in 1980.

Bachman's small-tract application and sixteen years after the creation of Kachemak Bay State Park, Mr. Tillion submitted an application to the Department for a preference right to purchase the land and cabin under AS 38.05.035(2), (3), and (5). The Division of Land and Water Management ("Division") denied the application in 1988 on the ground that Mr. Tillion's circumstances did not satisfy criteria set out in the statute. The decision was upheld on administrative appeal by Department Commissioner Judith M. Brady on July 15, 1988. Commissioner Lennie Gorsuch denied a request for reconsideration of the matter on November 13, 1989.⁶ The Tillions did not seek judicial review of the Department's decision. However, the Tillions have continued to correspond with the Department, and the Department of Law, urging the state to convey the land and the cabin to them.

2. The Tillions do not have a meritorious claim to the cabin or land

a. The Tillions did not acquire title from Bachman

Under the Small Tracts Act, the Secretary of the Interior was authorized "in his discretion" to sell or lease up to five acres of vacant, unreserved, or unappropriated public lands. See former 43 U.S.C. § 682a, 68 Stat. 235. An applicant for a parcel under the act acquired no contract rights or equitable title until and unless the application was approved by the Secretary. See Willcoxson v. United States, 313 F.2d 884, 888 (D.C. Cir. 1963)

Although Bachman applied for a small tract under the act, BLM decided not to grant Bachman's application, and did not lease or sell the land to him. Therefore, Bachman never acquired title to the land from the United States. Since Mr. Tillion acquired nothing more than the interest held by Bachman at the time of the alleged conveyance,⁷ he did not acquire title to the

⁶ A review of the Department's decision denying Mr. Tillion's preference right application is set out in the discussion below.

⁷ At most, Mr. Tillion may have acquired Bachman's interest in pursuing his application and appealing BLM's decision denying the application. However, to the extent Mr. Tillion believed BLM wrongfully failed to grant Bachman's application, the time for appeal elapsed more than 33 years ago. See former 43 C.F.R. § 221 (1960).

land. See, e.g., Willis v. City of Valdez, 546 P.2d 570, 575-76 (Alaska 1976); 23 Am. Jur. 2d Deeds § 338 at 299 (1983) (under a quitclaim deed a grantee can acquire no better interest than that possessed by the grantor). This conclusion applies equally to the cabin. See generally 36A C.J.S. Fixtures § 25 (1979) (buildings and other fixtures constructed by trespassers without the consent of the owner become the real property of the owner); Oden v. City of Seattle, 432 P.2d 642 (Wash. 1967).⁸ Accordingly, the Tillions do not have a meritorious claim of title to either the land or the cabin.

b. The Department acted within its authority in denying Mr. Tillion's application for a preference right under AS 38.05.035

As previously noted, Mr. Tillion applied to the Department in 1986 for a preference right under AS 38.05.035(2), (3) and (5) to purchase the five-acre parcel and cabin. In general terms, AS 38.05.035(b)(2) and (3) authorize the director of the Division to grant an applicant a preference right to purchase or lease state land if an error or omission by a state or federal agency over which the applicant had no control caused inequitable detriment to the applicant or prevented the applicant from obtaining title to the land. However, the applicant must apply for the preference right within three years after the error or omission, the state's acquisition of the land, or any court decision or settlement nullifying the disposal of state land. Id. AS 38.05.035(b)(5) authorizes the director to dispose of land to a person "who presently uses and who used and made improvements to that land before January 3, 1959, or to the heirs or devisees of that person" if the director determines that it is in the best interest of the state and will avoid an injustice to the person or to his heirs or devisees. Finally, the decision to grant a preference right rests in the discretion of the Department. Longwith v. State, 848 P.2d 257 (Alaska 1992).

In applying for a preference right, Mr. Tillion asserted that BLM delayed review of Bachman's small-tract

⁸ After its decision denying Mr. Tillion's application for a preference right in 1989, the Division proposed to grant the Tillions a limited amount of time to remove the cabin. However, given our discussion below regarding the absence of Department authority to dispose of state park land, that proposal was probably invalid as a matter of law.

application in 1959 and 1960 and that this alleged delay constituted an error or omission within the content of AS 38.05.035(2) and (3). According to Mr. Tillion, had BLM more quickly approved Bachman's small-tract application, the lease or sale could have been completed before the state's selection of the land. In addition, Mr. Tillion asserted that BLM should not have preferred the state's selection over Bachman's previously-filed application. Finally, Mr. Tillion argued that because other small-tract applications in the area had been approved by BLM earlier in 1959, it was unfair for BLM to deny Bachman's application.

The acting director determined that for purposes of AS 38.05.035 (2) and (3) BLM did not commit any error or omission and that Mr. Tillion had not filed a preference right application within the period of time required under the statute. The acting director found that to the extent there was any delay by BLM, it was caused by Bachman's failure to include required information in the initial application. The acting director also concluded that BLM had not erred in preferring the state's selections over previously-filed small-tract applications such as Bachman's because the decision to grant a small-tract lease or sale was within the discretionary authority of the Secretary of Interior. He also found that the other small-tract applications that had been approved by BLM in the area were filed before May 1959 and adjudicated prior to the state's selection. With respect to Mr. Tillion's claim that he qualified for a preference right under AS 38.05.035(b)(5), the acting director concluded that no improvements to the land had been made by the Tillions before January 3, 1959, and that, therefore, Mr. Tillion did not satisfy the statutory criteria. Lastly, the acting director determined that it would not be in the best interest of the state to grant a preference right because of the location of the land within Kachemak Bay State Park. As previously noted, this decision was upheld in subsequent decisions by two Department commissioners.

We see nothing in the acting director's and commissioners' decisions that is contrary to law or beyond the scope of their authority. We, therefore, conclude that the acting director and the commissioners properly denied Mr. Tillion's application for a preference right under AS 38.05.035. Furthermore, the time for appeal of those decisions expired long ago. See Alaska R. App. P. 602(a)(2) (appeal may be brought within thirty days of the date of the final administrative decision).

3. The Department does not have authority to dispose of the parcel and cabin

While we believe the Department correctly determined that Mr. Tillion does not qualify for a preference right under AS 38.05.035, the Department could not have granted the preference right even if Mr. Tillion had satisfied the criteria set out in the statute because the statute is inapplicable to land that has been reserved by the legislature from the state public domain.

On several occasions, this office has addressed the question of whether land withdrawn from the state public domain and reserved for use as a state park may be disposed into private ownership. For example, in 1980 our office advised the Division of Parks that mineral leases may not be issued for lands in state parks. 1980 Inf. Op. Att'y Gen. 3-5 (July 10; A66-307-80). In that opinion we reasoned that because article VIII, section 8, of the Alaska Constitution limits the issuance of mineral leases to lands in the state public domain, and state park lands are reserved from the public domain, the Division did not have authority to issue mineral leases for state land designated as state parks. Id.; accord, 1981 Inf. Op. Att'y Gen. 2-3 (Feb. 5; A66-249-81). See also 1982 Inf. Op. Att'y Gen. 2 (Jan. 22; A66-231-82) (nonmineral leases are not authorized in state parks because parks are withdrawn from the state public domain). More recently, we advised the Department that, in general, the laws concerning the disposal of lands codified in Title 38 of the Alaska Statutes do not apply to state lands the legislature has reserved from the public domain and designated as state parks. 1985 Inf. Op. Att'y Gen. 8-10 (Feb. 21; 166-136-85). In that opinion we reasoned that because the legislature has consistently referenced article VIII, section 7 of the Alaska Constitution⁹ in designating state lands as state parks¹⁰, it intended to exempt

⁹ Article VIII, section 7, of the Alaska Constitution provides:

Section 7. Special Purpose Sites: The legislature may provide for the acquisition of sites, objects, and areas of natural beauty or of historic, cultural, recreational, or scientific value. It may reserve them from the public domain and provide for their administration and preservation for the use, enjoyment, and welfare of the people.

¹⁰ See, e.g., AS 41.21.120 (Chugach State Park); AS 41.21.150

park lands from the disposal provisions of Title 38. Id. at 7-10.

We believe the previous advice to you on the absence of statutory authority for the Department to dispose of lands within state parks is correct. In designating state lands as part of Kachemak Bay State Park, the legislature referenced article VIII, section 7 of the Alaska Constitution and indicated its intent to reserve them for public use.¹¹ See AS 41.21.130-41.21.131. We conclude, therefore, that even if Mr. Tillion otherwise qualified to purchase the land and cabin under the preference right provisions of AS 38.05.035, the statute would not apply because the land and cabin have been reserved from the public domain. In sum, the Department simply does not have statutory authority to convey the parcel or cabin to the Tillions.

4. Options for the Division

If the Tillions refuse to vacate the cabin and parcel after appropriate notice, the Department may bring either an action for forcible entry and detainer ("FED") or ejectment. AS 09.45.070 authorizes FED actions. The statute provides a summary procedure in court for the recovery of property by a person entitled to possession.¹² The essential elements of a FED action are set forth in a previous opinion issued by our office. 1980 Inf. Op. Att'y Gen. 2 (July 24; J-66-430-80). A copy of that opinion is attached.

An action for ejectment under AS 09.45.630¹³ may be the

(Denali State Park); AS 41.21.160 (Wood-Tikchik State Park); AS 41.21.170 (Shuyak Island State Park).

¹¹ We do not, however, suggest that the legislature may not partially reserve land from the public domain and permit disposal of lands under Title 38. See, e.g., AS 41.21.617 (commissioner may issue leases in Chilkat Bald Eagle Preserve).

¹² Where title to the property is legitimately in dispute, the summary FED procedures may not be available. See Modrok v. Marshall, 523 P.2d 172, 174 (Alaska 1974). However the court may, in a FED action, reject unmeritorious defensive claims of title and proceed with the FED action. Id. at 174-175.

¹³ AS 09.45.630 provides:

proper approach where a more detailed inquiry into claims of title are made by a trespassing party. See Modrok v. Marshall, 523 P.2d 172, 174 (Alaska 1974). AS 09.45.630 codifies the common-law right to bring suit to recover possession of property and damages for withholding it. In general terms, an action for ejectment may be brought to establish title and the right to possession and to recover damages and remove the trespasser. Id.; Modrok, 523 P.2d at 174.

AS 41.21.132 commands the Commissioner of the Department to "designate by regulation incompatible uses within the boundaries of Kachemak Bay State Park." Existing regulations adopted by the Department provide that "[n]o person may construct or maintain a dock, cabin, home, building or other structure in a state park, unless authorized by the director under 11 AAC 18.010." 11 AAC 12.140. The director has apparently never issued permits to the Tillions to construct, maintain or use the cabin and land at issue in this matter. The Tillions' maintenance and use of the cabin is, therefore, unlawful and subject to criminal prosecution under AS 41.21.950.¹⁴ The Department may request that the district attorney bring criminal charges against them.¹⁵

Actions for recovery of real property. A person who has a legal estate in real property and has a present right to the possession of the property may bring an action to recover the possession of the property with damages for withholding it; however recovery of possession from a tenant shall be made under AS 09.45.060 -- AS 09.45.160.

¹⁴ AS 41.21.950 provides: "A person who violates a provision of this chapter or a regulation adopted under this chapter is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than \$1,000, or by imprisonment for not more than six months, or by both."

¹⁵ However, to the extent the Division finds that it is in the public interest and consistent with applicable regulations and the purposes for which the Kachemak Bay State Park was created, it may issue to the Tillions a permit for occasional use of the cabin and parcel. Any permit issued must also be revocable at will by the Division. See 1988 Inf. Op. Att'y Gen. 3-5 (Sept. 13; 663-89-0056).

Conclusion

In summary, we believe Mr. Tillion does not have a meritorious claim of title to the land and cabin. It is also our opinion that the Department correctly determined that Mr. Tillion does not qualify for a preference right under AS 38.05.035 and that, in any event, the Department does not have authority to convey the land to Mr. Tillion because it has been reserved from the state public domain. The Department may bring an FED or ejectment action in state court against the Tillions to recover possession of the property. Finally, the Department may request that the district attorney bring criminal charges against the Tillions under AS 41.21.950.

Please do not hesitate to contact this office if we can be of additional assistance.

RCN/mw